

Obstacles to Women's and Girls' Access to Justice for Gender-based Violence in Morocco



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This project is funded by ifa (Institut für Auslandsbeziehungen) with resources provided by the German Federal Foreign Office.



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I. EXECUTIVE SUMMARY

In this report, the International Commission of Jurists (ICJ) examines Morocco's obligations to ensure the right of access to justice for victims of sexual and gender-based Violence (SGBV).¹ It endeavours to explore the various obstacles that hinder a woman's ability to seek justice in Morocco and therefrom provide analyses and draw comprehensive recommendations with the primary objective of improving the access to justice for women and girls who are victims of SGBV. These recommendations target both the executive and judicial levels.

The report delineates key concepts with regard to access to justice and SGBV in addition to explaining why SGBV remains a serious concern in Morocco. It identifies the provisions within the Moroccan legal framework that are pertinent to SGBV, and examines the difficulties and deficiencies that lie therein in light of international human rights law and standards.

The report also addresses the multiplicity of challenges associated with the investigation and prosecution of SGBV in Morocco. Despite efforts made to overcome these difficulties, the judiciary continues to grapple with the effective investigation and prosecution of gender-based crimes, including the discriminatory attitudes women often encounter as they seek justice, reparation and remedy for their suffering.

Access to justice

The right to effective remedy;² to claim any such remedy before an independent and impartial judicial authority;³ and to equality before the law⁴ are enshrined in international human rights law. Combined, these rights crystallize to form what is known as *access to justice*, a basic component of the rule of law and good governance. Access to justice is fundamental to the protection and enforcement of all human rights and their correlative legal protections,⁵ enjoining on States an obligation to ensure that no human being is deprived of his or her right to seek or claim justice. The international human rights regime demands the actual preservation of its rights. Therefore, access to justice is simply the means to that end, a vehicle through which rights can be realized.

Where States fail to comply with their obligations to respect, protect and fulfil human rights, impediments and restrictions to the realization of the right of access to justice will arise and affect both men and women.⁶ Women, however, will often encounter impediments beyond those commonly associated with access to justice failings. This holds particularly true in the case of SGBV. The Committee on the Elimination of Discrimination against Women⁷ has observed that discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms, and gender-based violence can hamper a woman's ability to access justice on an equal basis with men.⁸

Furthermore, the ICJ has previously noted that access to justice for women does not necessarily lie

¹ Hereinafter referred to as "SGBV".

² International Covenant on Civil and Political Rights, art. 2.

³ International Covenant on Civil and Political Rights, art. 2.

⁴ International Covenant on Civil and Political Rights, arts. 2, 3, 14 and 26; United Nations Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, A/HRC/17/30 (2011), para.37.

⁵ See for example, Committee on the Elimination of Discrimination against Women, *General Recommendation on Women's Access to Justice*, CEDAW/C/GC/33 (2015), para.1.

⁶ International Commission of Jurists, "Obstacles to Access to Justice for Women in Tunisia in Light of International Law and Standards", (Geneva: International Commission of Jurists, 2016), pp. 1-7, available at <https://www.icj.org/wp-content/uploads/2016/06/Tunisia-Memo-WA2J-Advocacy-Analysis-brief-2016-ENG.pdf>.

⁷ The committee responsible for monitoring the implementation of obligations set forth in the Convention on the Elimination of All Forms of Discrimination against Women. Hereinafter referred to as "the CEDAW Committee".

⁸ See for example, Committee on the Elimination of Discrimination against Women, *General Recommendation on Women's Access to Justice*, CEDAW/C/GC/33 (2015), para.7.

solely or exclusively in a criminal justice response to the perpetrator.⁹ Rather, women may espouse a multidimensional idea of justice for the harm they have experienced and aspire to seek safety through effective protection orders; physical and mental recovery through good quality and accessible health services; and/or the opportunity to seek a divorce and a new life free from the violence of a spouse.¹⁰ Such forms of justice must be available in order for a victim of SGBV to embark on the often daunting process of seeking justice through the criminal justice system.¹¹

Sexual and gender-based violence

SGBV is a global phenomenon of epidemic proportions. The World Health Organization has noted that it “puts women’s health at risk, limits their participation in society and causes great human suffering.”¹² Indeed, the negative impacts of SGBV on the physical, sexual or psychological health, development or identity of the person are well documented.¹³ The CEDAW Committee defines gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately”.¹⁴ In further elaborations, the CEDAW Committee noted that gender-based violence “takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty.”¹⁵

The view that SGBV “impairs or nullifies the enjoyment by women of [their] human rights and fundamental freedoms”¹⁶ has gained considerable currency and its illegality has emerged as a principle of customary international law.¹⁷ There is now consistent recognition among several legal authorities, including United Nations treaty monitoring bodies, such as the Human Rights Committee and the Committee against Torture; independent experts, such as the Special Rapporteur on violence against women and the Special Rapporteur on torture, that SGBV contravenes the legal prohibition against torture or other cruel, inhuman or degrading treatment and against discrimination. Access to justice for SGBV therefore involves an intersection between three fundamental principles of human rights law: the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to discrimination on the basis of gender; and the right to seek remedy and reparation for a violation of one’s human rights. The forms of gender-based violence

⁹ International Commission of Jurists, Practitioner’s Guide No. 12, “Women’s Access to Justice for Gender-Based Violence”, (Geneva: International Commission of Jurists, 2016), p.3, available at: <https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-accesss-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>.

¹⁰ International Commission of Jurists, Practitioner’s Guide No. 12, “Women’s Access to Justice for Gender-Based Violence”, (Geneva: International Commission of Jurists, 2016), p.3.

¹¹ International Commission of Jurists, Practitioner’s Guide No. 12, “Women’s Access to Justice for Gender-Based Violence”, (Geneva: International Commission of Jurists, 2016), p.3.

¹² World Health Organization, “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence”, (Geneva: World Health Organization, 2013) p.35.

¹³ See generally, World Health Organization, “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence” (Geneva, World Health Organization, 2013); International Commission of Jurists, Practitioner’s Guide No. 12.

¹⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para. 6.

¹⁵ Committee on the Elimination of Discrimination against Women, *General recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35 (2017), para. 14.

¹⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992). The Committee stated, “these rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.”

¹⁷ See generally, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 35: Gender-based violence against women*, UN Doc C/GC/35 (2017).

recognized as engaging international law will be expanded upon in the forthcoming chapter.

Moroccan framework

For women in Morocco who choose to exercise their right to judicial remedy for SGBV, the pursuance of justice can prove a tumultuous endeavour. A combination of discriminatory laws, procedures and practices; a judiciary that may harbour biased assumptions; negative gender stereotypes; cultural norms rooted in patriarchy; and poor economic opportunities for women, continue to frustrate the access to justice of those affected by SGBV. It is important to note that SGBV is not necessarily limited to manifestations of sexual violence. Indeed, its scope leaps beyond the confines of sexual acts to include sexual harassment; physical assault; economic violence; the denial of a woman's reproductive rights; and other discriminatory practices. It is necessary to discuss some of these practices, albeit briefly, for they form the backdrop against which abuse thrives in Morocco.

In Morocco, forced or child marriage remains a prevalent practice. The United Nations Population Fund estimates that some 11.47% of women are married under 18 years of age.¹⁸ According to a study conducted by the Moroccan Ministry of Justice, in 2013 there were 35,152 reported cases of early marriage, 99% of which affected girls.¹⁹ While the Family Code establishes the age of 18 as the minimum age for marriage for both men and women,²⁰ it also stipulates that the family affairs judge, in exercise of his or her discretion, can authorize the marriage of a boy or girl below the age of 18 in certain circumstances.²¹

The institution of polygamy was also retained by the Moroccan legislature. In Morocco, a husband may enter into a second marriage if he acquires the necessary judicial authorization. Polygamous marriages contravene a woman's right to equality with men, and the adverse emotional and economic effects they can have on women have been noted by the CEDAW Committee.²² Furthermore, marital rape, that is the act of a husband having non-consensual sex with his wife, is not in and of itself classified as a crime of rape in Morocco.

Despite the substantive reforms embodied in the Family Code,²³ the preservation of such egregious and archaic practices perpetuates discrimination against women and gender stereotypes in Morocco. Moreover, such practices diverge with the international legal perspective, and particularly several principles of international human rights law, which will be elaborated on in further detail in Chapter II.

A number of initiatives have been undertaken to address SGBV in Morocco, most noteworthy of which is the adoption of law 103/03 on combatting violence against women, a widespread phenomenon in the country. The law had been the subject of much contention, drawing criticism from across the political spectrum. Arguably, the length of time it took for the law to be enacted, coupled with the

¹⁸ Ministry of Justice, "Statistical Report" (2013); See also, United Nations Population Fund, "Morocco: Scorecard on gender-based violence", available at: <http://arabstates.unfpa.org/sites/default/files/pub-pdf/UNFPA%20-%20Morocco%20WEB.pdf>.

¹⁹ Ministry of Justice, "Analytical study on the application of the Code of Personal Status" (2004-2013), available at: <http://www.justice.gov.ma/lg-1/documents/doccat-1.aspx>

²⁰ Family Code, art. 19, available at: <http://adala.justice.gov.ma/production/legislation/ar/Nouveautes/%D9%85%D8%AF%D9%88%D9%86%D8%A9%20%D8%A7%D9%84%D8%A3%D8%B3%D8%B1%D8%A9.pdf>. An unofficial translation of the Personal Status Code is available at: <http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/>.

²¹ Family Code, art. 20.

²² Committee on the Elimination of Discrimination against Women, *General Recommendation No.21: Equality in marriage and family relations*, UN Doc A/49/38 (1994), para. 14. See also, UN Committee on the Elimination of Discrimination Against Women & UN Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC18 (2014). ,.

²³ Reformed in 2004.

markedly low number of parliamentarians who attended the voting session, is reflective of how sensitive the issue of women's rights is in Morocco. The law contains a non-exhaustive list of conceptual definitions of violence against women and offers preventative measures, including the imposition of tougher penalties on SGBV offenders.

II. DE JURE OBSTACLES EXPERIENCED BY WOMEN SEEKING JUSTICE FOR SEXUAL AND GENDER-BASED VIOLENCE IN MOROCCO

1. International human rights law and standards on sexual and gender-based violence and access to justice for sexual and gender-based violence

When a State ratifies or accedes to human rights treaties, it undertakes an obligation to protect, respect and fulfil the human rights contained therein. The international human rights treaties to which Morocco is a party require the adoption of legislative, judicial, administrative and other appropriate measures to respect, protect and fulfil the human rights of all.²⁴

Respect

The obligation to respect requires all State officials, including government personnel and those who act under its instruction, direction or control, not to commit human rights violations. Furthermore, States are duty bound to ensure the application of the principle of equal treatment in law and in practice and refrain from any unlawful interference with the enjoyment of human rights. The CEDAW Committee has found that the obligation to respect requires States Parties to:

Refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.²⁵

Protect

The additional obligation to protect requires States to safeguard human rights and ensure that private individuals do not interfere with or violate human rights. This obligation is codified in several international legal instruments, which adhere to the view that it is incumbent on States to ensure that all appropriate measures are taken to protect individuals from the impairment or nullification of their human rights by third parties.²⁶ The CEDAW Committee has noted that effective protection necessitates that States take steps to eliminate customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.²⁷ Therefore, the State is liable for an act of SGBV perpetrated by a private individual where, for example, it has failed to determine that women were at risk, or has knowingly or unknowingly, obstructed the effective investigation and prosecution of the violation in question.²⁸

²⁴ 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 (2004), para.7.

²⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para. 9.

²⁶ 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 (2004), para 8.

²⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para. 9.

²⁸ International Commission of Jurists, *Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence"*, (Geneva: International Commission of Jurists, 2016) p.64; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para.9; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010) para. 13. See also, 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 (2004), para 8.

Fulfil

Finally, the obligation to fulfil human rights means that States must take affirmative action to ensure their realization. In order for rights to be fulfilled, the State must ensure that a legal framework that gives effect to human rights obligations is in place, and that it takes positive and effective steps to ensure their appropriate enforcement.²⁹

Morocco has progressively acceded to several human rights treaties, including: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);³⁰ the International Covenant on Civil and Political Rights (ICCPR);³¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR);³² the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);³³ the Convention for the Protection of All Persons from Enforced Disappearance (CED);³⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);³⁵ the Convention on the Rights of the Child (CRC);³⁶ the Convention on the Rights of Persons with Disabilities (ICRPD);³⁷ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).³⁸ Any failure on the part of Morocco to desist from acts or omissions that run contrary to provisions articulated within treaties to which it is a party, constitutes a violation of human rights.

Morocco has failed to ratify the First Optional Protocol to the International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Furthermore, Morocco has not yet ratified the Rome Statute of the International Criminal Court (ICC).

Forms of sexual and gender-based violence that are recognized under international law

SGBV is multidimensional, incorporating an assortment of acts, practices and manifestations that may constitute human rights violations. The types of SGBV identified below are based on common forms of SGBV in Morocco. For each form of SGBV identified, the table below shows its characterization under applicable domestic law and under international human rights law and standards as relevant.

²⁹ Human Rights Committee, *General Comment No. 3: Implementation at the national level*, HRI/GEN/1/Rev.1 (1981); 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 (2004), para.7; Committee Against Torture, *General Comment No.2: Implementation of Article 2 by States Parties*, CAT/C/GC/2 (2008); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010); Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (2003).

³⁰ Ratification date: 18 December 1970.

³¹ Ratification date: 03 May 1979.

³² Ratification date: 03 May 1979.

³³ Ratification date: 21 June 1993. Morocco has also ratified the Optional Protocol of the Convention against Torture (CAT-OP), 24 November 2014.

³⁴ Ratification date: 14 May 2013.

³⁵ Ratification date: 21 June 1993.

³⁶ Ratification date: 21 June 1993. Morocco has also ratified the Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC), 22 May 2002 and the Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC), 02 October 2001.

³⁷ Ratification date: 08 April 2009.

³⁸ Ratification date: 21 June 1993.

Definitions	Characterisation under domestic law	Characterisation under international law and standards
<p>Murder/ femicide³⁹</p>	<ul style="list-style-type: none"> ● Penal Code, art. 393: Premeditated murder shall be punished by the death penalty. ● Penal Code, art. 403: Harm causing death carries a sentence from 10 up to 20 years' imprisonment. If committed against the spouse, the sentence shall be raised from 20 to 30 years' imprisonment [Article 404]. <p>If the harm is committed with premeditation or with the use of a weapon, the sentence shall be life imprisonment.</p>	<p>Violation of the right to life; arbitrary or unlawful deprivation of life</p> <ul style="list-style-type: none"> ● United Nations Human Rights Committee, General Comment No. 36: Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (2018), para. 61: <p>61. Any deprivation of life based on discrimination in law or fact is <i>ipso facto</i> arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.</p> ● United Nations Committee on the Elimination of Discrimination against Women General recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19, UN Doc C/GC/35 (2017), para. 14. <p>14. Gender-based violence...takes multiple forms, including acts or omissions intended or likely to cause or result in death.</p>
<p>Violence against women</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 1: Any material or moral act or omission thereof based on gender discrimination that results in physical, psychological, sexual, or economic harm to women. 	<ul style="list-style-type: none"> ● United Nations General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, art.2: <p>2. Violence against women shall be understood to encompass, but not be limited to, the following:</p> <p>(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence</p>

³⁹ See, World Health Organization, *Information Sheet on Understanding and Addressing Violence Against Women: Femicide*, WHO/RHR/12.38 (2012), available at: http://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf;jsessionid=DDB903C407DC7FC74081A9D46260678D?sequence=1 where "femicide is generally understood to involve intentional murder of women because they are women, but broader definitions include any killings of women and girls.....Femicide is usually perpetrated by men, but sometimes female family members may be involved. Femicide differs from male homicide in specific ways. For example, most cases of femicide are committed by partners or ex-partners, and involve ongoing abuse in the home, threats or intimidation, sexual violence or situations where women have less power or fewer resources than their partner."

<p>Physical violence</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 1: Any act or omission thereof that affects or may affect the physical safety and integrity of women, regardless of the aggressor, aggressor's means or place of perpetration. 	<p>related to exploitation;</p> <p>(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;</p> <p>(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.</p> <ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, UN Doc A/47/38 (1992), paras. 6 & 7: <p>6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.</p> <p>7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:</p>
<p>Psychological violence</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 1: Any verbal assault, coercion, threat, negligence or deprivation, with the intent (i) to affect the dignity, liberty or serenity of a woman; or (ii) to threaten or intimidate her. 	<p>(a) The right to life;</p> <p>(b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;</p> <p>(c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;</p> <p>(d) The right to liberty and security of person;</p> <p>(e) The right to equal protection under the</p>

<p>Sexual violence</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 1: Any statement, act or exploitation that may affect the inviolability of the woman's body, whether such statement, act or exploitation is for sexual or business purposes, and regardless of the means thereto. 	<p>law;</p> <p>(f) The right to equality in the family;</p> <p>(g) The right to the highest standard attainable of physical and mental health;</p> <p>(h) The right to just and favourable conditions of work.</p> <ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 35: Gender-based violence against Women, updating general recommendation No.19, UN Doc C/GC/35 (2017), paras. 14 & 16: <p>14. Gender-based violence.....takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty...</p> <p>16. Gender-based violence against women, may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices, among others. In some cases, some forms of gender-based violence against women may also constitute international crimes.</p> ● African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, art. 4: <p>1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.</p> <p>2. States Parties shall take appropriate and effective measures to:</p> <p>(a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;</p> <p>(b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention,</p>
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		<p>punishment and eradication of all forms of violence against women;</p> <p>(c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;</p> <p>(d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;</p> <p>(e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;</p> <p>(f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women...</p>
<p>Economic violence</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 1: Any act or omission of an economic or financial nature that harms, or is likely to prejudice, the social or economic rights of women. 	<ul style="list-style-type: none"> ● United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13, art. 13: 13. States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of financial credit... ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, UN Doc A/47/38 (1992), para. 23: 23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence,

		<p>which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.</p>
<p>Sexual harassment</p>	<ul style="list-style-type: none"> ● Law 103-13, art. 5 (related to Article 503 of the Penal Code): Any intensified harassment of others by acts, statements or signs of a sexual nature or for sexual purposes; or sending written or telephonic or electronic messages or recordings or images of a sexual nature or for sexual purposes, in public or other spaces. 	<ul style="list-style-type: none"> ● United Nations General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, art. 2: <p>2. Violence against women shall be understood to encompass, but not be limited to, the following:</p> <p>(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.</p> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, UN Doc A/47/38 (1992): <p>18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.</p> ● Council of Europe, Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention), 11 May 2011, CETS No. 210, art. 40: <p>40. Parties shall take the necessary legislative or other measures to ensure that</p>

		<p>any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.</p>
<p>Forced and early marriage</p>	<ul style="list-style-type: none"> ● Family Code, art. 20: A family affairs judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage, by a reasoned decision explaining the interest and reasons that justify the marriage, after having heard the parents of the minor or his/her legal tutor, with the assistance of medical expertise or after having conducted a social enquiry. 	<ul style="list-style-type: none"> ● United Nations General Assembly, Convention on the Elimination of All Forms of Violence against Women, 18 December 1979, A/RES/34/180, art. 16: <ol style="list-style-type: none"> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: <ol style="list-style-type: none"> (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. ● United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol.1577, art. 19: <ol style="list-style-type: none"> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child,

		<p>as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.</p> <ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, Concluding Observations: Third and Fourth Periodic Report of Morocco CE-DAW/C/MAR/CO/4 (2008), paras. 34 & 35: <p>34. While acknowledging that the Family Code, which came into force in February 2004, has established the minimum age of marriage for women and men at 18 years, the Committee remains concerned at the possibility that authorisation may be granted by a judge to allow for marriage before that age, without any mandatory legal conditions having been fulfilled. It is also concerned at the high rate of approval of those authorisations and that the vast majority relate to girls, some as young as 13 years.</p> <p>35. The Committee calls upon the State Party to ensure the strict implementation of the provisions on the minimum age of marriage of the Family Code. It also recommends that the State party amend the Family Code in order only to authorise marriage of children under exceptional strict mandatory legal conditions.</p> ● African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, art. 6: <p>States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:</p> <ul style="list-style-type: none"> (a) no marriage shall take place without the free and full consent of both parties; (b) the minimum age of marriage for women shall be 18 years; (c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including
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		in polygamous marital relationships are promoted and protected...
Stalking	<p>Stalking is not explicitly penalized in the Moroccan criminal system. Provisions on sexual harassment in Law 103-13 only include acts of a sexual nature (See above provisions on sexual harassment).</p> <p>This does not include acts that constitute stalking, unless they are of a sexual, or even violent, nature.</p>	<ul style="list-style-type: none"> ● Council of Europe, Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention), 11 May 2011, CETS No. 210, art. 34: <p>34. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.</p>
Access to sexual and reproductive healthcare services and sexual and reproductive rights	<ul style="list-style-type: none"> ● Penal Code, art. 453: <p>Abortion shall not be punished if it is necessary to protect the mother's health, as long as it is administered publicly by a medical doctor or surgeon with the permission of the husband.</p> <p>If the husband's approval is not provided for any reason, abortion must be approved in writing by the President of the Medical Syndicate.</p> 	<ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 35: Gender-based violence against Women, updating general recommendation No.19, UN Doc C/GC/35 (2017), para. 18: <p>18. Violations of women's sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.⁴⁰</p> ● United Nations Human Rights Committee, CCPR General Comment No.28: Article 3 (The Equality of Rights between Men and Women), CCPR/C/21/Rev.1/Add.10 (2000), para. 11: <p>11. To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party</p>

⁴⁰ See, Report of the Special Rapporteur on Torture, UN Doc. A/HRC/31/57, 5 January 2016; Committee on the Elimination of Discrimination against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.18; Human Rights Committee, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), paras. 7.4.

		<p>gives access to safe abortion to women who have become pregnant as a result of rape...</p> <ul style="list-style-type: none"> ● United Nations Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2 (2008), para. 22: <p>22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasises that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes...</p> ● African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, art. 14: <p>2. States Parties shall take all appropriate measures to:</p> <p>(c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother and the foetus.</p>
<p>Marital rape</p>	<p>Consistent with several cases in Morocco, the courts have always treated marital rape as mere "violence" against the spouse pursuant to Article 404 of the Penal Code and not rape, pursuant to Article 486 of the Penal Code. The only case that the ICJ has been able to identify that led to the conviction of a husband for raping his wife was when the penetration was anal. The Court held that that consent of the wife</p>	<ul style="list-style-type: none"> ● United Nations General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, art. 2: <p>2. Violence against women shall be understood to encompass, but not be limited to, the following:</p> <p>(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and</p>

	<p>is required where the penetration is not vaginal.</p>	<p>other traditional practices harmful to women, non-spousal violence and violence related to exploitation.</p> <ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 35: Gender-based violence against Women, updating general recommendation No.19, UN Doc C/GC/35 (2017), para. 33: <p>33. Ensure that sexual assault, including rape is characterised as a crime against women's right to personal security and their physical, sexual and psychological integrity. Ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances. Any time limitations, where they exist, should prioritise the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/authorities.</p>
<p>Honour assault/killings</p>	<p>Penal Code, art. 418: Sentences shall be reduced in cases of killing or injury or physical assault if they are committed by a spouse who caught the other spouse with their partner in flagrante delicto committing adultery.</p> <p>Penal Code, art. 420: Sentences shall be reduced in cases of injury or assault where there was no intention to kill, even if it lead to death, if committed by the head of the family against individuals he caught in his house in a state of illegal sexual contact.</p>	<ul style="list-style-type: none"> ● United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, UN Doc A/47/38 (1992), para. 24: <p>24. ... the Committee on the Elimination of Discrimination against Women recommends that:</p> <p>(r) Measures that are necessary to overcome family violence should include:</p> <p>(i) Criminal penalties where necessary and civil remedies in cases of domestic violence;</p> <p>(ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member.</p> ● Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, art. 42: <p>42. Unacceptable justifications for crimes, including crimes committed in the name of</p>

		<p>so-called "honour"</p> <p>(1) Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.</p> <p>(2) Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.</p>
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2. Moroccan legal framework

Access to justice for SGBV cannot be considered without taking into account other forms of inequality, which are sanctioned by certain provisions of the Moroccan legal framework. Thus, it is necessary to pinpoint and appraise all those aspects that negatively impact the everyday lives of women in Morocco. As articulated above, the obligation to fulfil entails legislating, institutionalizing and monitoring. The primary focus of this section is to assess the relevant legislative provisions in light of this obligation.

Constitutional provisions

The preamble of the Moroccan Constitution calls upon the State to ensure equality and respect of human rights and international law. Furthermore, it prohibits all forms of discrimination on the grounds of sex, colour, religion, or any personal status, classifying all international treaties ratified by Morocco as superior to domestic law.

Article 19 states that men and women enjoy equal civil, political, economic, social, cultural, and environmental rights and freedoms, enshrined both in the Constitution and in international conventions and pacts duly ratified by Morocco.⁴¹ It further stipulates that the State works for the realization of parity between men and women and accordingly, an authority for parity and the struggle against all forms of discrimination is created.⁴² Articles 20-22 grant everyone the right to life, the right to personal, physical, and psychological safety, and the right not to be subjected to torture or inhuman or degrading treatment that infringes human dignity.⁴³

Additionally, Articles 117-128 protect the right of access to justice and to litigation, where judges are responsible for protecting the rights and liberties of all persons and their judicial safety.⁴⁴ Litigation is

⁴¹ Moroccan Constitution, art. 19.

⁴² Moroccan Constitution, art. 19.

⁴³ Moroccan Constitution, art. 20-22.

⁴⁴ Moroccan Constitution, arts. 117-118.

cost free for those with no financial means.⁴⁵

Penal code provisions

In a recent Memorandum concerning the effective investigation and prosecution of SGBV against women and girls in Morocco, the ICJ thoroughly examined⁴⁶ the provisions within the Penal Code that pertain to several forms of SGBV. The provisions, reproduced below, illustrate that in Morocco, SGBV-related offences are classified into felonies and misdemeanours. The determination of this classification is contingent on the severity of the offence.⁴⁷

Criminal Offence	Penal Code Article	Penalty⁴⁸	Classification of the offence	Increased penalty if committed against the spouse Article 404⁴⁹	Classification after application of Article 404
Premeditated homicide	393	Death penalty ⁵⁰	Felony	Not applicable	Not applicable
Intentional assault, without causing harm or causing incapacitation not exceeding 20 days	(1) 400	From one month to one year of imprisonment, and fine from 200 up to 500 Dirhams ⁵¹ , or one of either penalty	Misdemeanour	From two months to two years' imprisonment, and fine from 400 up to 1000 Dirhams, or one of either penalty	Misdemeanour
Intentional assault (as above) with premeditation or use of a weapon	(2) 400	From six months to two years' imprisonment, and fine from 200 up to 1000 Dirhams	Misdemeanour	From one year to four years' imprisonment, and fine from 400 up to 2000 Dirhams, or one of either penalty	Misdemeanour

⁴⁵ Moroccan Constitution, art. 121.

⁴⁶ International Commission of Jurists, "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017) pp. 6-7, available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

⁴⁷ Penal Code, arts. 16 and 111.

⁴⁸ Penal Code, art. 146 provides that if the Court finds that the sentence provided for in the Penal Code is too harsh when measured against the relative seriousness of the offence or the defendant's criminal record, it may apply mitigating circumstances. Mitigating circumstances are applied at the discretion of the judge. Decisions must be justified, specific and personalized to the situation of the convicted person.

⁴⁹ Aggravating circumstances when assault (provided for in arts. 400-403) is committed against an ascendant (i.e. living ancestors), guardian or wife.

⁵⁰ Sentences, including the death penalty, may be reduced at the discretion of the judge.

⁵¹ 100 Moroccan Dirhams is the equivalent of 9 Euros. The Minimum salary in the public and private sectors are set at 4000 Moroccan Dirhams as of November 2017.

Causing harm resulting in incapacitation exceeding 20 days	401	From one year to three years' imprisonment, and fine from 200 up to 1000 Dirhams	Misdemeanour	From two to six years' imprisonment, and fine from 400 up to 2000 Dirhams	Felony
Causing harm (as above) with pre-meditation or use of a weapon	(2) 401	From two to five years' imprisonment and fine from 250 up to 2000 Dirhams	Misdemeanour	From four to ten years' imprisonment, and fine from 500 up to 4000 Dirhams	Felony
Harm causing permanent disability	402	From five to ten years' imprisonment	Felony	From ten to 20 years' imprisonment	Felony
Harm causing permanent disability with pre-meditation or use of a weapon	(2) 402	From ten to 20 years' imprisonment	Felony	From 20 to 30 years' imprisonment	Felony
Harm causing death	403	From ten to 20 years' imprisonment	Felony	From 20 to 30 years' imprisonment	Felony
Harm causing death with pre-meditation or use of a weapon	(2) 403	Life sentence	Felony	Life sentence	Felony
Kidnapping or detaining	436	From five to ten years' imprisonment	Felony	Not applicable	Not applicable

"Sexual abuse" ⁵² of a minor ⁵³ or an individual with a physical or intellectual disability without the use of violence	484	From two to five years' imprisonment	Misdemeanour	From five to ten years' imprisonment	Felony
"Sexual abuse" of any person with the use of violence	485	From five to ten years' imprisonment	Felony	From ten to 20 years' imprisonment	Felony
"Sexual abuse" of a minor or an individual with a physical or intellectual disability	(2) 485	From ten to 20 years' imprisonment	Felony	From 20 to 30 years' imprisonment	Felony
Rape ⁵⁴	486	From five to ten years' imprisonment	Felony	From ten to 20 years' imprisonment	Felony
Rape committed against a minor or an individual with a physical or intellectual disability	(2) 486	From ten to 20 years' imprisonment	Felony	From 20 to 30 years' imprisonment	Felony

New Law (103-13) on combatting violence against women

Definitions

The forms of violence against women defined in Chapter One of Law 103-13 include:

- *Violence against women*: Any material or moral act or omission thereof based on gender discrimination that results in physical, psychological, sexual, or economic harm to women.
- *Physical violence*: Any act or omission thereof that affects or may affect the physical safety and integrity of women, regardless of the aggressor, aggressor's means or place of perpetration.

⁵² Literal translation from the Arabic version of the Moroccan Penal Code, describing the "violation of chastity" of another person, including all sexual acts other than penile-vaginal penetration.

⁵³ This includes any person under the age of 18, as defined by art. 19 of the Family Code.

⁵⁴ Art. 486 of the Penal Code defines rape as sexual intercourse i.e. penile-vaginal penetration carried out by a man against a woman without her consent. Thus, other types of rape are not characterized as such, e.g. anal rape is not characterized as rape under the Moroccan Penal Code. It does, however, qualify as "sexual abuse" carrying a similar sentence to that of rape.

- *Sexual violence*: Any statement, act or exploitation that may affect the inviolability of the woman's body, whether such statement, act or exploitation is for sexual or business purposes, and regardless of the means thereto.
- *Psychological violence*: Any verbal assault, coercion, threat, negligence or deprivation, with the intent (i) to affect the dignity, liberty or serenity of a woman; or (ii) to threaten or intimidate her.
- *Economic violence*: Any act or omission of an economic or financial nature that harms, or is likely to prejudice, the social or economic rights of women.

While these definitions are undoubtedly important, and largely resemble the definition contained in the United Nations Declaration on the Elimination of Violence against Women,⁵⁵ they fail to satisfactorily reflect the precise provisions in Article 2 of the same Declaration, which states that violence against women includes, for example:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.⁵⁶

Law 103-13 also neglects to define "discrimination" in a manner that is consistent with Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

It also neglects to criminalize acts that are not criminalized in the current Penal Code, such as the practice of forced marriage; the misappropriation of property and marriage property in bad faith; the expulsion of one spouse from the marital home or prevention of the spouse's return to the marital home; and the verbal assault of women because of their gender.

One of the latest developments in Law 103-13 is its amendment to the requirements relating to the criminalization of sexual harassment. It defines sexual harassment as:

Any intensified harassment of others by acts, statements or signs of a sexual nature or for sexual purposes; or sending written, telephonic, or electronic messages or recordings or images of a sexual nature or for sexual purposes, in public or other spaces.⁵⁷

Thus, sexual harassment has been criminalized more comprehensively. The definition is no longer confined to its classic form of "harassment by a supervisor in the work place," which is constrained by the existence of a subordinate relationship or authority between the victim and the offender within the work place. The new, improved definition now encompasses public and other places.

Despite the remarkable progress that has been made in widening the scope of the crime of sexual harassment and in diversifying its definition, concerns remain. The new law seems to require recurring incidents of harassment in order for it to be punished, which is reflected in the use of the term "intensified" [أمعن]. In practice, this will exclude isolated episodes of harassment. As it stands, the definition does not cover all the essential elements of sexual harassment.

⁵⁵ United Nations General Assembly, *Declaration on the Elimination of Violence against Women*: 20 December 1993, A/RES/48/104, art. 1.

⁵⁶ United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, art. 2.

⁵⁷ Law 103-03, art. 5.

The African Commission on Human and Peoples' Rights has explored the various dimensions of sexual harassment and has established:

Firstly, when looking at the verbal assaults used against the victims, such as "slut" and "whore", it is the opinion of the African Commission that these words are not usually used against persons of the male gender and are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional, religious, and even social norms.

Secondly, the physical assaults described above are gender-specific in the sense that the victims were subjected to acts of sexual harassment and physical violence that can only be directed to women. For instance, breast fondling and touching or attempting to touch "private and sensitive parts". There is no doubt that the victims were targeted in this manner due to their gender.⁵⁸

Furthermore, stalking is not recognized as a form of SGBV under the new law. The ICJ has previously highlighted the importance of treating stalking separately, as it might not necessarily include acts of a sexual nature.

Stalking

Stalking is a particular type of behaviour that amounts to harassment. While it might encompass a conduct that, in isolation appears innocent, when committed as a course of conduct, it affects the victim's freedom and leaves the victim in a state of fear or distress.

Acts constituting stalking may include, "sending offensive emails, text letters or cards; making offensive, threatening or silent telephone calls; making offensive comments about the victim on the internet; sharing intimate photographs or video footage without permission; loitering/waiting by the victim's home, school or workplace; following the victim around; and interfering with or damaging the victim's property."⁵⁹

The ICJ has reviewed 75 judgments and orders handed down in cases of SGBV offences. One of the key findings of this analysis is that stalking emerged as one of the most common forms of harassment committed against women and girls in Morocco. Despite its prevalence and gravity in terms of its impact on women, and the fact that it commonly precedes the commission of SGBV offences, stalking is not criminalized under the Moroccan Penal Code.

There are several ways in which this omission could be remedied, including by ensuring that victims of stalking benefit from adequate protection measures.⁶⁰ Stalking should be taken seriously during the investigation and trial phases. Studies illustrate that there is a direct link between cases of femicide⁶¹ and stalking, especially where the perpetrator is the victim's partner

⁵⁸ *Egyptian Initiative for Personal Rights and Interights v. Egypt*, African Commission on Human and Peoples' Rights, Communication 323/06 (12 October 2013), paras. 143-144.

⁵⁹ European Agency for Fundamental Rights Report, "Violence against women: an EU-wide survey. Main results" (Luxembourg: Publications Office of the European Union, 2014), p. 93. See also, Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016), pp. 191-192, available at: <https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-accesss-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>.

⁶⁰ See generally, International Commission of Jurists, "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017), available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

⁶¹ See, World Health Organization, *Information Sheet on Understanding and Addressing Violence Against Women: Femicide*, WHO/RHR/12.38 (2012), available at: http://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf;jsessionid=DDB903C407DC7FC74081A9D46260678D?sequence=1.

or ex-partner.⁶² Even in cases that may initially appear to be an isolated incident e.g. a physical assault, investigators should endeavour to identify whether there were any acts building up and related to the incident in question. This will assist in the risk assessment process and the identification and qualification of certain factors as aggravating circumstances, and in more effective charging decisions.

Sentences

Chapter Two of Law 103-13 offers little in the way of reform of sentencing guidelines as contained in the Penal Code. It does not reinforce penalties for acts that were criminalized under the current Penal Code, including deliberately refraining from providing assistance to a person in danger, assisting with preparations for or facilitating suicide, and threatening.

Family code provisions

The Family Code underwent extensive reform in 2004. Despite the many developments introduced therein,⁶³ it sanctioned and perpetuated the endorsement of a series of customary practices that are antithetical to gender equality, thereby condoning them. The CEDAW Committee and the Committee on the Rights of the Child⁶⁴ have concluded that practices such as forced or early marriage and polygamy, still practised in Morocco, “are grounded on discrimination on the basis of sex, gender, age and other grounds as well as multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.”⁶⁵

3. Forms of sexual and gender-based violence committed in Morocco recognized as engaging international law

Moroccan framework on rape

Article 486 of the Penal Code defines rape as “sexual intercourse carried out by a man against a woman without her consent, specifically penile-vaginal penetration.”⁶⁶ Accordingly, other forms of rape are not characterized as such. For example, non-consensual intercourse (i.e., anal rape) is not criminalized as rape under the Moroccan Penal Code. Rather, it is characterized as “sexual abuse”, albeit the sentencing guidelines applicable to it are the same as those that apply to the crime of rape.⁶⁷

While significant progress has been made to amend the Penal Code in relation to rape, most notably the amendment of Article 475, which allowed a rapist to escape prosecution if he married his under-age victim, the framework governing rape remains problematic in two respects. First, in Morocco rape is categorized and accordingly treated as a crime against morality as opposed to a crime against the individual. Second, a distinction is made in the law between victims of rape who are “virgins”, and

⁶² United Nations, Criminal Justice Handbook Series, “Handbook on Effective Prosecution Responses to Violence Against Women and Girls”, (Vienna: United Nations Office on Drugs and Crime, 2014), pp. 53-54.

⁶³ The final text of the Family Code or *Moudawana* secured several important rights for women, including the rights to self-guardianship, divorce and child custody. Furthermore, it made sexual harassment punishable by law and placed restrictions on the practice of polygamy.

⁶⁴ Hereinafter referred to as “the CRC Committee”.

⁶⁵ UN Committee on the Elimination of Discrimination Against Women & UN Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC18 (2014), para. 14.

⁶⁶ Penal Code, art. 486.

⁶⁷ Art. 486 stipulates that the crime of rape carries a sentence of up to 10 years’ imprisonment.

those who are “non-virgins”.⁶⁸ Rape is in fact punished more leniently if the victim “does not lose her virginity” as a consequence of the rape. Indeed, “the loss of virginity” is an aggravating circumstance for sentencing, as stipulated in Article 488 of the Penal Code.

Rape in light of international human rights law and standards

The prohibition of sexual violence, including rape, is absolute and finds its roots in three tenets of international law: international human rights law, international criminal law and international humanitarian law. These three tenets of law reinforce and positively influence each other in this field.

Insofar as international human rights law is concerned, few treaties, both regional and universal, contain explicit or specific prohibitions of rape.⁶⁹ Among the few, the Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa (Maputo Protocol) explicitly prohibits non-consensual sex, stipulating that:

Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment or treatment shall be prohibited. States Parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of sexual violence against women, including unwanted or forced sex whether the violence takes place in private or public.⁷⁰

Similar definitions are replicated in the Convention on the Rights of the Child⁷¹ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.⁷² Furthermore, the CEDAW Committee has identified gender-based violence, including rape and sexual violence, as a form of discrimination infringing on fundamental rights and freedoms.⁷³

The absolute and non-derogable prohibition of torture or other cruel, inhuman or degrading treatment or punishment,⁷⁴ which is a well-established rule of customary international law, provides a strong basis for the prohibition of all forms of sexual violence, including rape, at all times.⁷⁵ The notion of

⁶⁸ Penal Code, art. 488.

⁶⁹ See, for instance, United Nations General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, 04 November 1950, ETS 5; Organization of American States, *American Convention on Human Rights (ACHR)*, 22 November 1969; Organization of African Unity, *African Charter on Human and Peoples’ Rights (ACHPR)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

⁷⁰ African Union, *Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)*, of 11 July 2003, arts. 4(1) and (2) (a).

⁷¹ See, for example, arts. 19(1) and 34.

⁷² *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 09 June 1994, art. 2 reads, “Violence against women shall be understood to include physical, sexual and psychological violence: (a) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; (b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and (c) that is perpetrated or condoned by the State or its agents regardless of where it occurs.”

⁷³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para. 7 specifies these rights and freedoms as including, “the right to life; the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to equal protection according to humanitarian norms in time of international or internal armed conflict; the right to liberty and security of person; the right to equal protection under the law; the right to equality in the family; the right to the highest standard attainable of physical and mental health; the right to just and favourable conditions of work.”

⁷⁴ See, United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p.85, art. 1.

⁷⁵ See, United Nations Human Rights Council, *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15

rape as a form of torture has been upheld at the international level by various human rights bodies and criminal tribunals,⁷⁶ notably the International Criminal Tribunal for Rwanda⁷⁷ and the International Criminal Tribunal for the Former Yugoslavia.⁷⁸

The recognition of the seriousness of rape as a crime under international law has developed through the prosecution and subsequent jurisprudence of the ICTR and ICTY. The ICTR first defined rape in the *Akayesu* case⁷⁹ as “a physical invasion of a sexual nature, committed under circumstances which are coercive.”⁸⁰ More refined and precise definitions were articulated by the ICTY,⁸¹ identifying the various elements, which combined, amount to a criminal offence under international law.

The International Criminal Court’s *Elements of Crimes* offer a more robust definition of rape,⁸² one that is partly based on the relevant jurisprudence of the ICTR and ICTY, and is viewed as the most authoritative in international law to date. According to the Rome Statute, an act is considered rape if:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁸³

While international law clearly and adequately prohibits rape and other forms of sexual violence, some domestic frameworks continue to work from assumptions that can undermine women’s human rights and diminish their access to justice.⁸⁴ Two such assumptions, identified in the previous section, exist in the Moroccan legal framework. These assumptions are discriminatory and irreconcilable with international law for two reasons.

First, in Morocco the crime of rape is addressed through a prism of morality and public decency and is characterized as an intrusion on the victim’s honour and thus fails to reflect the seriousness of the offence. It assumes that rape is a crime against the family and society, as opposed to a violation of an individual’s bodily integrity.⁸⁵ This approach completely disregards one’s right to the enjoyment of

(1986), para. 119, for the view that sexual abuse, including rape, constitutes a method of physical torture.

⁷⁶ See, for example, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case IT-96-23 & IT-96-23/1-A (12 June 2002), para. 150, where the Appeals Chamber held, “Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.” Similarly see, *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, ICTY Case IT-96-21-T (16 November 1998), para.496. For the view that rape amounts to torture, see also, *Fernando and Raquel Mejia v. Peru* Case No. 10.970, Report No. 5/96, Annual Report 1995, OEA/Ser. L/V/II.91 Doc. 7 rev. (1996), p. 185; and ECtHR, *Aydin v Turkey*, Application No. 57/1996/676/866, Judgment (25 September 1997), paras. 83-86.

⁷⁷ Hereinafter ICTR.

⁷⁸ Hereinafter ICTY.

⁷⁹ *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4, Trial Judgment (2 September 1998).

⁸⁰ *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4, Trial Judgment (2 September 1998), para. 597.

⁸¹ See, *Prosecutor v Anto Furundžija*, ICTY Case No. IT-95-17-1, Trial Judgment (10 December 1998), para. 185; and *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case IT-96-23 & IT-96-23/1-A (12 June 2002), para. 438.

⁸² The International Criminal Court derived this definition from the *Akayesu*, *Furundžija* and *Kunarac* judgments.

⁸³ International Criminal Court, *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, art. 8(2)(b)(xxii)-1.

⁸⁴ International Commission of Jurists, Practitioner’s Guide No. 12, “Women’s Access to Justice for Gender-Based Violence”, (Geneva: International Commission of Jurists, 2016), pp.196-197.

⁸⁵ United Nations Division for the Advancement of Women in the Department of Economic and Social Affairs, “Handbook for Legislation on Violence against Women”, (New York: Department of Economic and Social Affairs, 2010), p. 26.

physical and psychological integrity, and by extension, the right to sexual autonomy, a fundamental human rights value protected by the criminalization of sexual violence under international law. Human rights law calls for the right to sexual autonomy, free consent, free of force, coercion, discrimination and violence, as expressed by the Beijing Declaration and Platform for Action:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.⁸⁶

Moreover, this approach implies that women victims of rape are only worthy of the law's protection where the victim is perceived as having conformed with shared social norms, such as living a chaste lifestyle, save within the socially accepted boundaries of heterosexual marriage.⁸⁷ Therefore, women who engage in sexual intercourse outside this conventional context, particularly sex workers, may be considered effectively to be in a state of constant agreement to sexual contact.⁸⁸ It is incumbent on the State to both establish and implement a legal framework that guarantees equality between individuals in freely agreeing to sexual conduct.⁸⁹ The ICJ has previously argued, "true consent can only be established by an expressly manifested affirmation by both parties, especially women."⁹⁰

Second, a legal framework that determines the length of rape sentences on the basis of whether or not the victim was a "virgin" at the time the crime was committed implies that rape committed against women who are "non-virgins" is a "lesser" crime than that which is committed against "virgins" and confers preferential status on the latter. The legal framework should refrain from making such distinctions and instead administer sentences that are commensurate with the gravity of the offence of rape.

Recommendations

The ICJ calls on the Moroccan authorities to amend Article 486 of the Penal Code with a view to ensuring its full compliance with international law and standards, including by providing that:

- **Acts of rape are adequately defined and fully criminalized through a gender-neutral definition;**
- **An act is considered rape if:**
 - 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.**
 - 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person inca-**

⁸⁶ United Nations, *Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Add.1 (1995), para.96.

⁸⁷ Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016), p.196.

⁸⁸ Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016), p.196.

⁸⁹ Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016), p.198.

⁹⁰ Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016), p.198.

pable of giving genuine consent.⁹¹

- **Rape is not specific to a particular gender;**
- **Rape sentences are commensurate with the gravity of the offence committed and take due account of the impact of the crime on the victim;**
- **Rape is not addressed through a lens of morality and public decency or that rape is not categorised as a crime against the family and society, but rather as a violation of one's bodily integrity;**
- **Legislation that gives recognition to one's right to the enjoyment of both physical and psychological integrity is adopted;**
- **Legislation that recognizes one's right to sexual autonomy, that is the right to have control over and decide freely and responsibly on matters related to one's sexuality, including sexual and reproductive health, free of force, coercion, discrimination and violence, is adopted;**
- **Legislation that recognizes equal relationships between men and women in matters pertaining to sexual relations, requiring the free, full and informed consent of both parties, is adopted;**
- **Consent should be understood as an express positive affirmation by both parties, especially women, before sexual interaction can occur.**

Moroccan framework on marital rape

Marital rape is not specifically provided for in the Moroccan Penal Code. It is not even considered as a crime per se, and thus its inclusion in national statistics is non-existent. Moreover, in accordance with Moroccan jurisprudence, it is not customary to characterize marital rape as rape pursuant to the Penal Code. The illustrative cases below will demonstrate how the Courts treat marital rape as mere "violence" against the spouse under Article 404 of the Penal Code, as opposed to rape specifically, under Article 486 of the Penal Code. The ICJ has been able to identify one case, discussed below, that led to the conviction of a husband for raping his wife when the penetration was anal.⁹²

Al-Jadida Court of Appeal – Criminal Division No. 2013/2644/36, 06 June 2013

The complainant filed a complaint against her husband. They had been married for 11 years and have three children. In the last four years leading up to the complaint, he began to mistreat her, physically assaulting her using a stick and leather belts. She tolerated the beatings in order to protect the unity of her family.

She alleged that on 26 December 2012, after her husband physically assaulted her in front of their children, he penetrated her anally and orally without her consent, which led her to leave the family home and stay with her grandmother.

The Court heard testimony from the complainant's daughter, a minor who said that her father had frequently assaulted her mother using a stick in the presence of both her and her sister. She said that her father penetrated her mother anally and that she heard her mother scream and her father remark, "I will give it to you from behind [and] keep sucking it."

The prosecution also furnished the Court with a medical certificate, which stated that the complainant had unusual cracks in her anus, additional proof that she was subject to anal penetration.

The defendant denied all charges.

The Court held, "in light of the marital relationship, if the wife is asked to make herself available to her husband, the husband must in turn protect his life companion from indecent acts that violate her inviolable physical integrity. Pursuant to decency, the husband should not subject

⁹¹ Definition is copied from, International Criminal Court, *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, art. 8(2)(b)(xxii)-1.

⁹² Al-Jadida Court of Appeal, Criminal Division No. 2013/2644/36 (06 June 2013).

his spouse to indecent acts such as penetrating her mouth or anus without her consent, for the marital relationship requires that the spouse is protected.”

The Court charged the defendant with sexual abuse pursuant to Article 485 of the Penal Code, and intentional assault pursuant to Article 400 of the Penal Code.

Mitigating circumstances led the Court to sentence the defendant to two years' imprisonment and a fine in the amount of 15 000 Moroccan Dirhams.

Applicable sentences:

- *Penal Code, art. 485: sexual abuse or attempt to sexually abuse a person*
- *Penalty: from five to ten years' imprisonment*
- *Penal Code, art. 400: physical assault not causing incapacitation that exceeds a period of 20 days*
- *Penalty: from one month to one year's imprisonment and a fine from 200 to 500 Dirhams, or one of either penalty*

There are several serious concerns that arise from this judgment. First, the Court fails to recognize the violations as rape under Article 486, and instead considers it as “general” sexual abuse under Article 485. While both crimes carry the same sentence, recognizing rape as rape is important in the way of remedy for, and the empowerment of, women. Second, the Court charged the defendant with physical assault under Article 400, and not under Article 404. The latter doubles the sentence when the crime is committed against the spouse. While both articles provide for a sentence lower than that of Article 485, the distinction bears a moral significance, as failing to explicitly make the distinction reinforces the need for the adoption of special procedural measures that ensure SGBV complaints are treated independently from other criminal offences.

Third, while the judgment addresses the notion of physical integrity in marriage, it does so exclusively with respect to requiring consent for anal and oral penetration, defined as “indecent acts”. Regrettably, the Court has not addressed the issue of consent for vaginal penetration in the context of marriage. This sustains the notion that a man may penetrate his wife vaginally without first obtaining her consent.

Despite the fact that the Penal Code provides for aggravated sentences where assault is committed against the spouse, wives do not benefit from this aggravation in cases of sexual assault. Marriage is not included in the scope of Article 487, which doubles the sentences for sexual assault if committed against a person who falls under the authority of the offender including, for example, a child.

Furthermore, the Court failed to consider the context of marriage in its assessment of sexual assault. This, coupled with the unjustified mitigating circumstances, led to sentencing a perpetrator of rape for a period of two years' imprisonment, as opposed to a sentence ranging from five to ten years had Article 485 formed the basis for the decision.

The Court was presented with a prime opportunity to set an important precedent that would have the effect of protecting women's physical and mental integrity in their own homes, and one that could have had a deterrent effect with respect to other cases of marital rape. Instead, it issued an exceedingly lenient sentence, indirectly reinforcing the notion of impunity for SGBV in Morocco. The judgment highlights the importance of ensuring that legislation recognizes rape in a manner that is not limited to mere vaginal penetration. Moreover, any legal reform must limit the biased exercise of judicial discretion in such situations.

Marrakech Court of Appeal - First Instance Court of Kal'at Al-Sraghna Misdemeanours file: 09/358, 09 September 2009

The complainant filed a complaint against her husband alleging that he tortured, hit and injured her. She provided the Court with a medical certificate, which documented her incapacitation for a period of 25 days.

The complainant stated that on the night of their wedding they returned home, where he broke her hymen in a violent manner. He continued to give her hallucinogens, which caused her to lose consciousness and he subsequently proceeded to brutally sodomise her.

The defendant was charged with the misdemeanour of violence against the spouse pursuant to Article 404 of the Penal Code. However, the Court acquitted the defendant owing to insufficient evidence.

Applicable sentences:

- *Penal Code, art. 400(1): physical assault not causing incapacitation that exceeds a period of 20 days*
- *Penalty: from one month to one year's imprisonment and a fine from 200 to 500 Dirhams, or one of either penalty*
- *Penal Code, art. 404: physical assault against the spouse*
- *Penalty: increased penalty for physical assault because it is committed against the spouse, from two months to two years' imprisonment and a fine from 400 to 1000 Dirhams, or one of either penalty*

Regardless of the Court's decision, it is worth noting that neither the prosecution, nor the Court, charged the defendant with rape pursuant to Article 486 of the Penal Code.

Marital rape in light of international human rights law and standards

As underscored by the CEDAW Committee, "within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."⁹³ Securing access to justice and remedies for these women, and specifically those who have experienced marital rape may be difficult, even impossible, in jurisdictions like Morocco, where the law does not recognize marital rape, or where marital status is accepted as a defence to rape. This is premised on the traditional notion that it is impossible for a man to rape his wife because wives are expected to live in a state of continuous consent to sexual activity within their spousal relationships.

The European Court of Human Rights has considered the notion of marital immunity from criminal prosecution in cases of marital rape and deemed it inconsistent with human rights. In the case of *S.W. v the United Kingdom*,⁹⁴ it held:

The abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.⁹⁵

Combatting the erroneous belief that consent is implicit within the marriage unit must include raising the awareness of women and men on the notion of consent in both marital and extra-marital contexts.⁹⁶ Moroccan women must be informed of their human rights and of the availability of remedy through access to justice mechanisms.⁹⁷

⁹³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para. 23.

⁹⁴ *S.W. v the United Kingdom*, Application No. 20166/92 (22 November 1995).

⁹⁵ *S.W. v the United Kingdom*, Application No. 20166/92 (22 November 1995), para. 44.

⁹⁶ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women's Access to Justice*, CEDAW/C/GC/33 (2015), paras. 3-33.

⁹⁷ African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 35; Committee on the Elimination of Discrimination against Women, *General Recommendation*

Recommendations

The ICJ calls on the Moroccan authorities to criminalize marital rape with a view to ensuring its full compliance with international law and standards, including by providing that:

- Due diligence is exercised to prevent, investigate and prosecute all forms of rape;
- Legal traditions and attitudes that may hold that a wife gives constant and on-going consent to sexual contact with her husband are eradicated;
- Legal traditions and attitudes that deem a husband is immune against prosecution for the rape of his wife are abandoned;
- The Penal Code expressly establishes marital rape as a separate offence, that is any act that amounts to rape that occurs within a spousal relationship;
- Acts of rape that occur within spousal relationships should not fall within the meaning of Article 404 of the Penal Code, which recognises mere violence against the spouse;
- Rape sentences are commensurate with the gravity of the offence committed;
- Article 490 of the Penal Code, which criminalizes extramarital sexual relations, is repealed;
- Legislation that recognizes equal relationships between men and women in matters pertaining to sexual relations, requiring the free, full and informed consent of both parties, is adopted;
- Consent should be understood as an express positive affirmation by both parties, especially women, before sexual interaction can occur.

Extramarital relationships

According to Article 490 of the Moroccan Penal Code, it is a criminal offence to engage in consensual sex out of wedlock. This Article reinforces archaic gender stereotypes, stigma and discrimination against women. Its enduring currency is evidenced by the fact that it was overlooked in the text of the law on combatting violence against women, discussed above. The problems presented by Article 490 of the Penal Code are fourfold.

First, criminalizing all consensual extramarital sexual relations has the effect of rendering women who engage in such relations consensually criminal. It is based on the notion that women need protection from predatory men, and that women must be virtuous and only engage in sexual relations with their lawfully wedded husbands. Such a notion, in turn, denies women their right to self-determination and sexual autonomy, as explored above.

Second, the criminalization of consensual extramarital sex has a disproportionately negative impact on women, as it is often women who are charged or liable to be charged with consensual extramarital sex. This holds particularly true for victims of SGBV who are trying to escape abusive domestic relationships because the criminalization of consensual extramarital sex places them at greater risk than men of false accusations, or even counter-accusations of extramarital sex.

Third, and linked with the second point above, criminalizing consensual extramarital sex can discourage and deter women from seeking justice in cases of physical or sexual abuse of which they may be victims at the hands of individuals with whom they are not married, whether the women themselves are married to someone else or not. In any event, a woman who chooses not to enter into a commitment of marriage should, under no circumstances, be susceptible to unpunished abuse. A woman's behaviour and actions should not grant the aggressor impunity for violating her right to both physical and psychological integrity.

Fourth, the existence of such legislation is particularly invidious to women who fall pregnant out of wedlock as their pregnancy may be used as corroborating evidence to support a particular set of facts, whether the sexual conduct that led to the pregnancy was consensual or otherwise. This can have particularly devastating effects, *a fortiori*, in circumstances where the pregnancy is the by-product of an incident of rape.

Moroccan framework on forced and early marriage

Forced and early Marriage⁹⁸

Most child marriages may be considered forced marriages. Early marriage, or child marriage, has come to be recognized as purported marriage involving children under 18 years, although there are exceptions. The majority of child marriages involve girls, although sometimes their spouses may also be under the age of 18 years.⁹⁹ Forced and early marriage affects boys and girls, but girls tend to be targeted more frequently than boys for exploitation.¹⁰⁰

As mentioned above, the Family Code consolidates the practice of certain domestic customs that amount to discrimination or violence against women. A prime example of this is court-permitted early marriage, pursuant to Article 20 of the Family Code. Article 20 stipulates that a family affairs judge may authorize the marriage of a girl or boy below the legal age of requirement,¹⁰¹ if his/her decision is 'well-substantiated'. A well-substantiated decision requires the judge to hear from the parents of the minor and a medical expert, and to conduct a social enquiry into the parties involved.

Before 2014, Morocco's Penal Code problematically provided impunity for perpetrators who had raped minors. Clause 2 of Article 475 of the Penal Code exempted a perpetrator from prosecution for the rape of a minor if he subsequently proceeded to marry his victim. While this clause was repealed, the ICJ has analysed several judgments, included below, which combined, indicate that impunity is still granted to such perpetrators through the suspension of the penalty by way of mitigating circumstances.

A number of court judgments have condoned illegal marriages, such as men marrying women or girls by simply reciting a Qur'anic verse with their respective legal guardians, and other forms of violence against girls.¹⁰²

Forced or early marriage in cases of rape

Qunaitra Court of Appeal - Case No. 13/26120/280, 24 July 2013

At the time of the offence, the complainant was a minor.¹⁰³ She filed a complaint, which stated that the defendant "seduced" her into beginning a relationship with him. After speaking over the phone for three months, and upon the defendant's request, the complainant journeyed to Tangiers to join him without informing her mother. Upon her arrival, they spent the night in a house in Mertil. Later that evening, the defendant removed the complainant's clothes and indicated that he wanted to engage in sexual intercourse with her, and when she withheld consent, he proceeded to hit her repeatedly. Despite the defendant's overt actions, including screams and calls for help, "she submitted to his will", which resulted in the "perforation of her hymen".

In order to ease the complainant's concerns about the nature of their relationship, the defendant promised to marry her and accordingly asked her to remain in the house. The complainant confirmed that she continued to reside with the defendant in his home for a period of four months, during which time they engaged in sexual intercourse on a regular basis.

⁹⁸ This definition has been copied from, International Commission of Jurists, Practitioner's Guide No. 12, "Women's Access to Justice for Gender-Based Violence", (Geneva: International Commission of Jurists, 2016) p.205.

⁹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW) & UN Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No.18 of the Committee on the Rights of the Child: Harmful Practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC18 (2014), para. 20.

¹⁰⁰ Marsha Freeman, Christine Chinkin and Beate Rudolf, "The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary", (Oxford: Oxford University Press, 2012), p. 438.

¹⁰¹ Family Code, art. 19.

¹⁰² This is also referred to as *Zawaj al-Fatiha*.

¹⁰³ Art. 19 of the Family Code sets the age of marriage in Morocco at 18. However, according to Art. 20 of the Family Code, a family court judge may grant approval for the marriage of minors in certain circumstances.

During the preliminary investigation, the defendant admitted that he was in a relationship with the complainant and maintained that it was consensual. He also admitted that he persuaded the complainant to meet him by promising to marry her, and by sending her money. The defendant also confirmed that he was the first person with whom she had ever had sexual intercourse.

The Court found the defendant guilty of "seducing a minor", that is someone under the age of 18, and of "sexual abuse causing perforation of the hymen", pursuant to Articles 475, 484 and 488 of the Penal Code.

It further held, "the sentence provided for by the law is too harsh considering the [relative] seriousness of the acts that were committed". The Court also held that the defendant could benefit from mitigating circumstances because of his social situation, clean criminal record, commitment to the complainant by way of marriage and the subsequent withdrawal of the complaint by the complainant and her legal guardian.

The Court sentenced the defendant to a suspended penalty of one year's imprisonment.

Applicable sentences:

- *Penal Code, art. 475: "seducing a minor" without the use of violence*
- *Penalty: one to five years' imprisonment and a fine from 200 to 500 Dirhams*
- *Penal Code, art. 484: sexual abuse of a minor without the use of violence Penalty: two to five years' imprisonment*
- *Penal Code, art. 488: sexual abuse causing perforation of the hymen*
- *Penalty: five to ten years' imprisonment*

Rabat Court of Appeal - Case No. 1343/2011/22, 28 January 2015

The defendant was involved in an extra-marital relationship with the complainant, who was a minor at the time. The complainant stated that they engaged in sexual activity for a period of time "without causing perforation of the hymen". Eventually, they had sexual intercourse, which "resulted in the perforation of her hymen". The defendant confirmed the complainant's testimony, adding that they are now legally married.

The Court decided that the defendant could benefit from certain mitigating circumstances because of his social situation. The fact that he had no criminal record, coupled with his marriage to the complainant, led the Court to suspend his sentence of two years' imprisonment.

Applicable sentences:

- *Penal Code, art. 485: sexual abuse or attempt to sexually abuse a minor Penalty: from ten to 20 years' imprisonment*
- *Penal Code, art. 488: sexual abuse causing perforation of the hymen Penalty: from 20 to 30 years' imprisonment*
- *Penal Code, art. 471: seducing a minor*
- *Penalty: from five to ten years' imprisonment*

Forced or early marriage in light of international human rights law and standards

The forced or early marriage of girls, permitted by Article 20 of the Family Code, albeit in limited circumstances, incontrovertibly undermines a number of rights guaranteed by the Convention on the Rights of the Child. The United Nations Children's Fund has specified them as:¹⁰⁴

- The right to education (Article 28, Convention on the Rights of the Child);
- The right to be protected from all forms of physical or mental violence, injury or abuse, including

¹⁰⁴ United Nations Children's Fund, "Child Marriage and the Law: Legislative Reform Initiative Paper Series", (New York: Division of Policy and Planning, 2008), p. 7.

- sexual abuse (Article 19, CRC) and from all forms of sexual exploitation (Article 34, CRC);
- The right to the enjoyment of the highest attainable standard of health (Article 24, CRC);
 - The right to educational and vocational information and guidance (Article 28, CRC);
 - The right to seek, receive and impart information and ideas (Article 13, CRC);
 - The right to rest and leisure, and to participate freely in cultural life (Article 31, CRC);
 - The right to not be separated from their parents against their will (Article 9, CRC);
 - The right to protection against all forms of exploitation affecting any aspect of the child's welfare (Article 36, CRC).

Moreover, early marriage exposes minors to threats of unpunished sexual abuse and increases the risk of maternal mortality in the event of pregnancy at an early age, as well as premature birth. Several reports have documented cases of girls who were forced into early marriage and consequently committed suicide.¹⁰⁵

A joint General Recommendation and Comment on harmful practices from the CRC and CEDAW Committees states:

A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent. As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.¹⁰⁶

Both the CRC and CEDAW Committees have expressed their concern regarding the on-going practice of early marriage in Morocco. In its Concluding Observations and Recommendations following its review of Morocco's compliance with the CEDAW Convention, the CEDAW Committee stated:

While acknowledging that the Family Code, which came into force in February 2004, has established the minimum age of marriage for women and men at 18 years, the Committee remains concerned at the possibility that authorisation may be granted by a judge to allow for marriage before that age, without any mandatory legal conditions having been fulfilled. It is also concerned at the high rate of approval of those authorisations and that the vast majority relate to girls, some as young as 13 years.¹⁰⁷

Accordingly, the Committee called on Morocco to ensure the stringent implementation of the provisions on the minimum age of marriage provided for in Article 19 of the Family Code in addition to recommending the amendment of the Family Code to authorize the marriage of minors only under exceptional and strict mandatory legal conditions.¹⁰⁸ Therefore, judges share a responsibility in ensuring the child's protection from all forms of physical and sexual coercion and refraining from enabling early marriage.

¹⁰⁵ Human Rights Watch, Morocco: Girl's Death Highlights Flawed Laws, Reform Domestic Violence, Rape Provisions, 23 March 2012, available at: <https://www.hrw.org/news/2012/03/23/morocco-girls-death-highlights-flawed-laws>.

¹⁰⁶ UN Committee on the Elimination of Discrimination Against Women & UN Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC18 (2014), para.20.

¹⁰⁷ UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Morocco*, CEDAW/C/MAR/CO/4, (2008), para. 34.

¹⁰⁸ UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Morocco*, CEDAW/C/MAR/CO/4 (2008), para. 35.

Recommendations

The ICJ calls on the Moroccan authorities to authorize early marriage under exceptional and strict mandatory legal conditions, with a view to ensuring the full compliance with international law and standards by ensuring that:

- **The provision on the minimum age of marriage, under Article 19 of the Family Code, is stringently observed;**
- **Even when a child below the minimum age of requirement is deemed mature and capable to enter into marriage, the child be at least 16 years of age;**
- **Such authorizations are made by a judge and are based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition;**
- **Immunity and impunity, including the suspension of penalties by way of mitigating circumstances, are never granted to perpetrators in cases of forced or early marriage after rape;**
- **Women and men enjoy equal rights and are regarded as equal partners in marriage by enacting legislation that guarantees that no marriage takes place without the free, full and informed consent of both parties;**
- **A provision criminally sanctioning adults responsible for child marriage is introduced in the Penal Code.**

4. Financial obstacles and legal aid

Moroccan framework

The Moroccan Constitution provides for a general right of equality before the law.¹⁰⁹ It also provides that:

The public authorities shall enact and implement policies designed for individuals and categories of specific needs. To this effect, they shall ensure: to respond and provide for the vulnerability of certain categories of women and of mothers of children, and of elderly persons....¹¹⁰

The Constitution recognizes “the vulnerability” of certain categories of individuals in Moroccan society. The direct reference to “women” and “mothers” denotes an acknowledgment of the disadvantaged status of women in Morocco; in addition, the Constitution places an express obligation on public authorities to provide certain categories of women with enhanced protection.

The persistent marginalization of women in Morocco is well documented. Indeed, a significant number of women in Morocco are entirely financially dependent on their spouses, who are at times the perpetrators of abuse against them or their children. One World Bank report noted:

Women’s access [to justice] is constrained as compared to men by relatively less control of economic assets needed to navigate justice sector services, and restrictive social norms that discourage them from filing cases and complaints.¹¹¹

The ineffectiveness of public sector services related to women’s access to justice further increases women’s marginalization.¹¹² The World Bank report referred to a survey conducted by the *Haut Com-*

¹⁰⁹ Moroccan Constitution, arts. 6 and 19.

¹¹⁰ Moroccan Constitution, art. 34.

¹¹¹ World Bank, “Morocco: Mind the Gap: Empowering Women for a More Open, Inclusive and Prosperous Society”, (Washington DC: World Bank, 2015), p. 74.

¹¹² World Bank, “Morocco: Mind the Gap: Empowering Women for a More Open, Inclusive and Prosperous Society”, (Washington DC: World Bank, 2015), p. 74.

missariat au Plan in 2009, which found, “one-half of women entitled to alimony were not receiving it regularly, with about one-quarter not receiving any payments at all.”¹¹³ Women’s marginalization has resulted in numerous violations of their right of access to justice. These violations are diverse and tend to occur in the domain of family law, particularly in matters of divorce and inheritance. Despite the many amendments made to the Family Code, Morocco continues to grapple with gender inequality and the economic dependence of women on men.¹¹⁴

In order to effectively address these violations and related failings by the justice system and other public sector services, an effective legal aid system is necessary. Still, the Constitution only guarantees the right of legal assistance to detained persons,¹¹⁵ and while Article 32 of the Law on the Legal Profession¹¹⁶ stipulates that certified attorneys must represent the lawful interests of people in court proceedings, no effective legal aid system has been provided so that free assistance is made available to women victims of SGBV. With the exception of the Law on Combatting Human Trafficking, which prescribes that victims of human trafficking are exempt from legal costs and provides them with automatic legal assistance,¹¹⁷ neither the Constitution nor Law 103-13 on violence against women addresses the specific issue of legal assistance in non-criminal or non-detention contexts. Victims of SGBV are therefore not protected by any specific legal text that ensures the provision of free legal assistance to victims who are otherwise unable to afford access to the court system. For an SGBV survivor who embarks on the process of seeking justice and reparation, there are a number of expenses, including court fees, legal costs, medical care and DNA tests, which may prove burdensome.

Furthermore, self-representation is permitted in cases that have the potential to negatively impact on women’s right to effective and meaningful access to justice, including cases of alimony before the Court of First Instance and the Court of Appeal and cases where the Court of First Instance is competent at first and last resort.

In other proceedings where parties are not exempt from the legal representation condition delineated above, women victims of SGBV face significant financial and procedural burdens that negatively affect their right to an effective remedy. In cases of divorce, for example, women are not required to establish proof that domestic violence has occurred in order to file for divorce. However, if a woman initiates divorce proceedings, she is automatically disqualified from obtaining *mut’ah* [متعة].¹¹⁸ This framework is indisputably discriminatory, emboldening men to pressurize their spouse into initiating divorce proceedings, sometimes by means of domestic violence, in order to evade paying the requisite compensation and alimony to which the spouse should be entitled.

It is therefore important to ensure that the right of victims of SGBV to free and effective legal advice, assistance and representation is fully respected, so that free assistance is available to victims unable

¹¹³ World Bank, “Morocco: Mind the Gap: Empowering Women for a More Open, Inclusive and Prosperous Society”, (Washington DC: World Bank, 2015), pp. 74., which refers to “Enquête nationale sur la prevalence de la violence à l’égard des femmes (ENPVEF), *Haut Commissariat au Plan*, 2009.

¹¹⁴ See, Human Rights Watch, “Morocco: Tepid Response on Domestic Violence”, 15 February 2016; Human Rights Watch, “Letter from Human Rights Watch to the Government of Morocco on Domestic Violence Law Reforms”, 15 February 2016; Human Rights Watch, “World Report on Morocco and Western Sahara”, 11 November 2015; Euromed Rights “Morocco: Report on Violence against Women”, 25 November 2015; Amnesty International, “Bias in Penal Code puts women and girls in danger in Morocco”, 01 March 2013.

¹¹⁵ Moroccan Constitution, art. 23.

¹¹⁶ Dahir Sharif No. 1.08.101 issued on 20 Shawal 1429 (20 October 2008) on the implementation of Law No. 28.08 on the amendment of the Law regulating the Legal Profession.

¹¹⁷ Dahir No. 1.16.127 (2016), implementing Law No. 24.14 pertaining to Combatting Human Trafficking, Official Gazette No. 6501 on 19 September 2016, p. 6644.

¹¹⁸ Court of Cassation, Judgment No. 433 (21 September 2009). *Mut’ah* [متعة] refers to compensation owed by a husband to his ex-wife for any inconvenience he has caused her. Article 84 of the Family Code stipulates that in cases of divorce “the amount due to the wife includes: the delayed dowry if appropriate, maintenance for the *iddat* (legal waiting period) and the *mut’ah* (compensation), which is assessed based on the length of the marriage, the financial means of the husband, the reasons for the divorce, and the degree to which the husband has abused this right...”

to pay through an effective legal aid system, and that the assigned lawyers are of experience and competence required by the nature, gravity and consequences of the matters being dealt with.

Qunaitra Court of First Instance - Case No. 1721/1618/2012, 29 October 2013

The complainant, a mother of four, filed for divorce because her husband mistreated her - a behaviour that was often incited by his family. He also failed to cover necessary expenses.

The Court dismissed the case on the grounds that that the complainant had failed to hire a lawyer, pursuant to Article 32 of the Law on Legal Profession. It was held that the complainant was liable for all expenses incurred as a result of the divorce application.

Souq Al-Arbaa Court of First Instance - Case No. 13-484, 25 November 2013

A divorced woman, who had sole custody of her daughter, petitioned the Court for an increase in spousal maintenance in order to cover accommodation costs and other expenses. This would mean raising the current alimony payment from an overall of 900 MAD (80 Euros) to 7300 MAD (650 Euros).

The Court rejected the complainant's application, finding that she had failed to comply with relevant procedures, which, in this case entailed notifying her ex-husband of the request for an increase in financial maintenance before petitioning the Court.

Financial obstacles and legal aid in light of international human rights law and standards

Article 14 of the International Covenant on Civil and Political Rights provides, "all persons shall be equal before the courts and tribunals". The Human Rights Committee has further elaborated, "the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."¹¹⁹

Legal assistance should not be limited to detained persons, but should extend to any persons who do not have sufficient means to pay for it and who seek justice before a court of law.¹²⁰ The Human Rights Committee had held that, "in some cases [...], the State is obliged to provide legal assistance in accordance with Article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in Article 2, paragraph 3 of the Covenant."¹²¹ Additionally, "the imposition of fees on the parties to proceedings that would *de facto* prevent their access to justice might give rise to issues under Article 14, paragraph 1."¹²²

Recommendations

The ICJ calls on the Moroccan authorities to reform the legal framework and policies related to women's access to justice with a view to ensuring their full compliance with international human rights law and standards, including by providing that:

- **Policies that aim to eradicate the persistent marginalization of women in Morocco and ensure their full empowerment, including at the economic level, are enacted and implemented;**
- **Legal provisions that guarantee women their financial rights irrespective of who initi-**

¹¹⁹ Human Rights Committee, *General Comment No. 32 on Article 14: Rights to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 10.

¹²⁰ Human Rights Committee, *General Comment No. 32 on Article 14: Rights to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 10.

¹²¹ Human Rights Committee, *General Comment No. 32 on Article 14: Rights to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 10.

¹²² Human Rights Committee, *General Comment No. 32 on Article 14: Rights to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 11.

ates divorce proceedings are adopted and enforced;

- **The effectiveness of judicial and other public sector services related to women's access to justice is enhanced, including by ensuring that spousal support and child support are enforceable; that related amounts are adequate and commensurate with increases in cost of living, and that related procedures are accessible and not unduly restrictive;**
- **The right of victims of SGBV to effective legal advice, assistance and representation is fully respected;**
- **To this end, free assistance is available to victims unable to pay through an effective legal aid system, and the assigned lawyers are of experience and competence required by the nature, gravity and consequences of the matters dealt with;**
- **Awareness raising campaigns and capacity building programmes for all actors of the justice system, including judges, are developed and implemented, with a view to ensuring that procedural and administrative requirements do not result in denying or impeding women's full and equal access to justice.**

III. *DE FACTO* OBSTACLES EXPERIENCED BY WOMEN SEEKING JUSTICE FOR SEXUAL AND GENDER-BASED VIOLENCE IN MOROCCO

Preventing and combatting SGBV offences effectively relies not only on legislative reform, but also on available and effective implementation mechanisms. The CEDAW Committee has found that, in accordance with its obligation to fulfil human rights, the State must:

Take a wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures in line with article 4, paragraph 1, of the Convention and general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures. This entails obligations of means or conduct and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.¹²³

The State is therefore duty bound to create an enabling environment for access to justice, including by ensuring that responses to SGBV are adequate and effective, both in law and in practice.

Substantive equality

The CEDAW Committee has explained the meaning and scope of substantive equality in the following terms:

In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

Equality of results is the logical corollary of *de facto* or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.¹²⁴

¹²³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para. 9.

¹²⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, on art.4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, HRI/GEN/1/Rev.7 p.282 (2004), paras. 8-10.

1. The investigation and prosecution of sexual and gender-based violence

Moroccan framework

With a view to identifying the *de facto* obstacles that impede women's access to justice for SGBV, the ICJ conducted several interviews with justice sector actors and victims of SGBV across Morocco and reviewed numerous case files and courts' decisions.

Documentation

Some of the *de facto* obstacles that impede women's access to justice manifest at the very beginning of the criminal process, which is the filing of a criminal complaint. Five victims of SGBV conveyed that in their experience, police officers were reluctant to process their complaints, referring them instead to other police stations or to the Office of the Public Prosecutor.¹²⁵ Other victims, and case files, indicate that complaints are rarely processed within a reasonable time. Indeed, the process for filing complaints in Morocco is deficient in several respects. The box below delineates the process for filing complaints in Morocco in accordance with criminal procedure.

- The Office of the Public Prosecutor requires the alleged victim to draft the complaint. In many instances, this requirement involves using the services of a public notary, which unnecessarily intrudes upon a complainant's privacy and, moreover, is not free of charge.
- Procedure dictates that the Office of the Public Prosecutor must refer the complaint to the judicial police via mail or other administrative means before the investigation can be initiated. A prolonged period of time usually elapses between the receipt of the complaint by the judicial police and the initiation of the investigation, during which time complainants must make an oral statement and acquire a medical report to corroborate their testimony.
- Thereafter, the accused is subpoenaed and questioned by the judicial police.
- The results of the interrogation are then transmitted to the Office of Public Prosecutions, who re-examine the case files. In many instances, the cases are closed due to lack of or insufficient evidence.
- When a prosecution is pursued, the case file is conveyed to a criminal court where the trial of the accused will take place. There is a long waiting period from the time of the first hearing to the end of trial, and typically a judgment is not passed before several hearings are held.

Other victims reported that police officers or royal guards¹²⁶ refused to inspect the crime scene. When subpoenas were issued, perpetrators failed to comply with them. Additionally, some victims claimed that police officers or members of the royal guard failed to apprehend the perpetrator and, instead, asked them to track the perpetrator and inform them of his location. These practices place an additional burden on victims/survivors, jeopardize the delicate process of evidence gathering, and create impediments to the ultimate objective of securing a remedy and reparation for victims/survivors.

Additional interviews indicate that some access to justice failings are linked to geographical jurisdictional limitations. Such limitations pose are capable of seriously compromising the effective processing of SGBV complaints, particularly in cases of felonies, which fall under the jurisdiction of the Courts of Appeal, and which are inaccessible to victims of SGBV living in remote, rural areas.

Investigation

Article 99 et seq. of the Code of Criminal Procedure give investigating judges wide discretion to issue

¹²⁵ Interviews conducted by the ICJ with five victims of SGBV in the offices of the Moroccan Association on Combatting Violence against Women in Casablanca, 22 December 2017.

¹²⁶ Royal guards fall under the authority of the Royal Moroccan Army. For a more in-depth understanding of the various justice sector actors involved at different stages of the criminal investigation, prosecution and trial phases of SGBV offences see, International Commission of Jurists, "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017), p. 4, available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

search and arrest warrants in order to establish the truth, even in jurisdictions other than that of the investigating judge. The Code of Criminal Procedure further stipulates that investigations must be conducted by investigating judges in cases of felonies punishable by the death sentence, a life sentence or a sentence of 30 years' imprisonment; cases of felonies committed by minors; and cases of certain misdemeanours specified by law. Where felonies and misdemeanours are perpetrated by a minor, and misdemeanours are punishable by a sentence of five years' imprisonment or more, the prosecutor may refer the case to an investigating judge.¹²⁷ In all other situations, prosecutors shall either close the case or conduct an investigation and thereafter refer the case to the trial judge.

The large degree of discretion afforded to justice sector actors in Morocco during the course of an investigation has led to situations where many justice sectors actors did not employ all the means at their disposal to establish the truth, resulting in a lack of evidence, and ultimately the acquittal of SGBV perpetrators. The Moroccan authorities have endeavoured to address these failings as they relate to SGBV cases through various procedural reforms of the Code of Criminal Procedure. These reforms, however, are limited.

Chapter 3 of Law 103-13 on combatting violence against women adopted procedural provisions in order to rectify these procedural failings. For example, Article 6 of Law 103-13 amended Article 302 of the Code of Criminal Procedure to enable courts to facilitate private and confidential hearings for women and minors who have experienced physical or sexual assault, if they so wish. However, the recent procedural reform through Law 103-13 was a missed opportunity to enable victims to provide a victim impact statement before the court without having to confront the defendant or protect SGBV victims as they enter and exit the courtroom.

Lack of capacity

The reluctance of many justice sector actors to effectively investigate some SGBV offences is also rooted in their lack of adequate training and logistical support. Throughout their training, in both universities and training institutes, justice sector actors receive no specific training on the proper documentation, investigation, prosecution and overall management of SGBV cases. This reinforces the urgency to set up a specialized criminal justice mechanisms or units that are exclusively dedicated to cases of SGBV, incorporating a special police force that is trained to process victims' complaints.

The investigation and prosecution of sexual and gender-based violence in light of international human rights law and standards

While Law 103-13 strengthens the legal framework on SGBV by criminalizing forms of SGBV that were not previously criminalized under the Penal Code, and by tightening the sentencing guidelines relating to SGBV, it overlooks the practicability of these developments. It provides little in the way of guidance on how to effectively document and investigate SGBV crimes. The adoption of Law 103-13 was a prime opportunity to address the absence of guidance on evidence gathering, and specifically the gathering of medico-legal evidence, such as DNA testing, intrinsic to SGBV cases, whether entailing a felony or a misdemeanour.

The African Commission has adopted robust guidelines on how to investigate sexual violence and prosecute those responsible. Section 40.4 of this document prescribes best practices in relation to evidence gathering and can serve as a practical guide to justice sector actors in Morocco.

40. 4. Evidence-gathering

a. General principles

- i. States must ensure that forensic and legal services apply international standards in gathering, using, preserving and archiving evidence related to acts of sexual violence.
- ii. States must guarantee that the victims of sexual violence are properly informed of the protocols used in forensic examinations and all other procedures for gathering evidence

¹²⁷ Code of Criminal Procedure, arts. 83-86.

- that involve them.
- iii. States must take the necessary measures to prioritize protecting the physical and psychological integrity of victims and/or witnesses in procedures to gather and archive evidence related to acts of sexual violence.
 - iv. States must take the necessary measures to ensure that professionals involved in gathering evidence limit the number of examinations and interviews performed, and ensure that they are conducted in a reassuring and confidential environment in order to minimize the re-victimization of victims.
 - v. States must ensure that these professionals receive specific training on gathering, using, preserving and archiving evidence related to acts of sexual violence, including for procedures involving children.
 - vi. Taking into account the lack of medical personnel in certain areas (especially rural areas) or during times of conflict and crisis, States must take the necessary measures to extend training in evidence-gathering and enable certain types of medical personnel, such as nurses and midwives, to gather evidence. These personnel should be specially trained (according to the recommendations 14 and 15 set forth in these Guidelines).
 - vii. As far as possible, States must guarantee that forensic services are provided at no cost.

b. Procedures for the collection and preservation of forensic evidence

- i. States must implement a mechanism enabling the rigorous collection and preservation of forensic evidence related to acts of sexual violence (DNA sampling, samples of blood, hair, saliva, sperm, etc.), to ensure that the evidence is admissible throughout the criminal proceedings.
- ii. States must guarantee that the professionals involved in investigation and prosecution are provided with equipment for the collection, analysis, preservation and storage of evidence that is sufficient, effective, safe and of high quality. Specific equipment must also be provided in cases involving sexual violence against children. This equipment must enable the collection and preservation of evidence such that the evidence is admissible throughout the criminal proceedings, even if the victim decides to lodge complaints several weeks or months after the crime takes place.
- iii. The evidence must be digitally stored under conditions that guarantee the security of victims, witnesses and those responsible for gathering the evidence, as much as possible.

In isolation, the criminalization of SGBV acts coupled with the review of some sentencing considerations are insufficient. These measures must be guided by effective guidelines and instructions on the effective and expeditious documentation, investigation, prosecution and adjudication of SGBV.

In a previous memorandum,¹²⁸ the ICJ sought to palliate the absence of such specific guidelines for justice sector actors tasked with investigating and prosecuting offences of SGBV against women in Morocco, by setting out a list of comprehensive guiding principles for justice sector actors as they attempt to navigate the existing SGBV framework and provide an effective remedy to victims/survivors.

Special measures

In addition to legal reform and the effective implementation of the law at the judicial, administrative and education levels,¹²⁹ it is also incumbent on the State to deliver a protection framework and sup-

¹²⁸ See generally, International Commission of Jurists, "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017), available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

¹²⁹ Human Rights Committee, *General Comment No.31 on the nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. (2004), paras 7 and 8. See also, Human Rights Committee, *General Comment No. 3 on implementation at the national level*, HRI/GEN/1/Rev.1, 1981; Committee Against Torture, *General Comment No.2 on the implementation of article 2 by States Parties*, CAT/C/GC/2 (2008); CEDAW, *General Recommendation 28 on the core obligations of States Parties under article 2 of CEDAW*, U.N. Doc. CEDAW/C/GC/28 (2010) Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation of Convention on the Rights of the*

port services tailored to the needs of SGBV victims/survivors, as well as gender-sensitive training and awareness activities to all the justice sector actors involved in SGBV cases.¹³⁰ In this regard, temporary, special measures can play an important role in accelerating the correction of past and current forms of discrimination against women.¹³¹ This includes protecting women from discrimination by private actors and taking steps towards the elimination of customary practices detrimental to women and that perpetuate the notion of women's inferiority or men's superiority in society.¹³² Providing a gender-competent service to women, which entails establishing diversity within the judiciary and police, could ensure the effective investigation and prosecution of SGBV, as well as the enforcement of relevant protection orders.

Recommendations

The ICJ reiterates its call on the Moroccan authorities, including the Government, the Parliament, the *Conseil Supérieur du Pouvoir Judiciaire*, and the Office of the Public Prosecutor, to ensure that:

- **Clear, detailed Guidelines on investigating SGBV crimes are developed, enforced and fully complied with by police officers;**
- **These Guidelines provide for clear procedures and protocols on the initial receipt and evaluation of information on a reported SGBV offence; the procedure for preliminary investigation; and the documentation, collection, and proper preservation of evidence;**
- **Professional health services are available and affordable for all victims/survivors of SGBV, including through increasing the number of hospitals and doctors offering forensic-testing services;**
- **A national protocol for SGBV medical forensic examinations is developed consistent with international standards, and fully complied with by doctors and other healthcare professionals;**
- **Until such a national protocol is adopted and enforced, healthcare professionals strictly adhere to, and comply with the Istanbul Protocol–Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and the WHO Guidelines for Medico-legal Care for Victims of Sexual Violence;**
- **Specialized SGBV prosecution units and chambers are established within the Tribunals of First Instance and Courts of Appeal;**
- **Guidelines on the effective prosecution of SGBV offences are developed and complied with by prosecutors;**
- **Effective and ongoing training programmes are provided for judges and other justice sector actors on relevant international law and standards on the effective adjudication of SGBV;**
- **Effective training and awareness programmes are provided to counter judicial stereotyping, victim blaming and other harmful practices that impede the effective investigation, prosecution and adjudication of SGBV offences in Morocco.**

2. Discriminatory attitudes and stereotyping

Moroccan framework

Women in Morocco are particularly vulnerable to SGBV because of on-going discrimination against

Child, CRC/GC/2003/5 (2003).

¹³⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para. 24(b).

¹³¹ CEDAW General Recommendation No. 25, "Temporary special measures", adopted by the CEDAW Committee during its thirtieth session (2004), paragraph 15.

¹³² Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), para. 9.

them. Entrenched inequality in legislation – perpetuated by customs, harmful practices and religious norms – underpins discriminatory, patriarchal attitudes and gender-based stereotypes. The ICJ's research¹³³ has revealed that these attitudes surface during the investigation, prosecution and adjudication stages of SGBV cases, including through biases that abound about the victim's background and behaviour, whether real or, more often than not, attributed to the victim because she is a woman. These attitudes have and continue to undermine women's effective access to justice for offences of SGBV in Morocco.

According to interviews conducted by the ICJ, five victims of SGBV¹³⁴ conveyed that police officers refused to register their complaints where their complaint involved the perpetration of abuse by a male relative. While the Moroccan legislative framework, namely Article 30 of the Code of Criminal Procedure,¹³⁵ recognizes that it is incumbent on the State to hold justice sector actors accountable for misconduct or for refusing to process a complaint, misconduct relating to discrimination is rarely, if ever, investigated. Such discriminatory attitudes are indeed embedded in practice.

One victim told the ICJ that:

She was subjected to regular beatings by her husband, who often punched her in the face and abdomen when he was drunk. On one occasion, he forcibly removed her clothes in the presence of his friend and insisted she had sex with him. When she reported the incident to local police officers, she was told, "We cannot do anything about it. Go back to your husband. He is the father of your child." In a subsequent episode of violence, her husband choked her and burned her arm with a cigarette. When she complained to the police a second time, they told her to file a complaint with a prosecutor. In this case, the complainant's right to access to justice, and by extension her right to effective remedy for the domestic and sexual violence to which she was subjected was violated because the police's refusal to process the complaint was based on predetermined prejudices and stereotyped roles for men and women.

Judicial stereotyping, which refers to the practice of judges perpetuating harmful stereotypes, is also another common and pernicious barrier to justice for victims of SGBV in Morocco. Preconceived notions rooted in patriarchy can impair judges' ability to form fair decisions that are based on the set of facts, enquiry and evidence put before them, therefore compromising the impartiality and integrity of the justice system as a whole. Thus, judicial stereotyping can affect women's right to a fair trial,¹³⁶ particularly in cases of SGBV. The CEDAW Committee had stressed that:

Stereotyping affects women's right 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 or a victim of gender-based violence, in general.¹³⁷

Gender stereotyping and bias are prevalent in the decisions of Moroccan courts, including those of the Court of Cassation, the highest court of the Moroccan judicial order.

Court of Cassation - Decision No. 331 / Sharia File No. 276/2/1/2015, 23 June 2015.
The applicant, who was married with three daughters, submitted a request before the Court of

¹³³ See generally, "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017), available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

¹³⁴ Interviews conducted by the ICJ with five victims of SGBV in the offices of the Moroccan Association on Combatting violence against women in Casablanca on 22 December 2017.

¹³⁵ Stipulates that prosecutors must report cases of misconduct by judicial police to the Court of Appeal.

¹³⁶ Guaranteed by Article 14 of the International Convention on Civil and Political Rights.

¹³⁷ Committee on the Elimination of Discrimination against Women, *Karen Tayag Vertido v The Philippines*, Communication No. 18/2008, CEDAW/C/46/D/18/2008 (2010), para. 8.4.

First Instance in Casablanca that has jurisdiction over social matters. Arguing that he had no male heir, the applicant sought the Court's authorization to enter into a polygamous marriage, maintaining that his first wife had given him her consent. The Court of First Instance rejected the applicant's request. The applicant decided to appeal the Court's decision. However, the Court of First Instance's decision was upheld.

He subsequently challenged the decision before the Court of Cassation. The appellant claimed that his request to marry a second wife fulfilled all legal requirements as he had obtained his wife's permission, who was unable to conceive because of her age. He argued that polygamy is a legal right set out in both the Sharia and the Moroccan Family Code. According to Article 40 of the Family Code, polygamy can only be forbidden in cases where there is concern that the husband is unable to treat his wives in a just and equitable manner, or where the first wife does not approve of his marrying another woman. The appellant argued that the first instance decision should be overturned since his wife has consented to his marrying a second woman, and that he has sufficient resources to support two families.

The Court of Cassation ruled in favour of the appellant, finding that the Court of First Instance's justification for denying the polygamous marriage was erroneous. The Court of Cassation held that "polygamy is a right" that can only be limited in "exceptional circumstances" and that the appellant's desire to have a male child after his first wife "bore him only female children" constituted an exceptional circumstance as provided for by the law.

The ICJ has analyzed a number of other court decisions that were based on patriarchal notions and judges' biased beliefs about women's supposed roles in society, rather than on the facts, evidence and the fair implementation of the law.

Court of Appeal in Tangier - File No. 315-08, 19 June 2008

The applicant, who was married, sought the Court's approval to marry his co-worker with whom he was "in love". He argued that the attachment that he had formed with his co-worker could lure him to engage in marital infidelity. In its ruling, the Court of First Instance decided that the applicant had failed to fulfil the preconditions and "exceptional" standard for the authorization of polygamous marriages, set out in Articles 41 and 42 of the Family Code. It held that "emotional attachment or love" does not constitute an "objective" justification for the approval of polygamy.

The Court of Appeal, however, overturned the Court of First Instance judgement, and held that the appellant's fear of engaging in adultery was well founded. Furthermore, it found that the appellant had met the relevant preconditions in the Family Code, as he had both obtained the necessary consent of his first wife, and successfully proved that he was able to provide for two family units in an equal manner.

Court of First Instance in Bouarfa – File No. 14-12, 19 July 2012

The applicant, married to two women, sought the Court's authorization to enter into a third marriage so that the third wife could help the first and second wives with "housework" and "farming". He claimed that his current wives, who were overwhelmed with their duties, and unable to "bear the burdens of marriage alone", had directed him to marry again. He explained that his first wife resided in the city and was responsible for raising his children. His second wife lived in the countryside and assisted him in farming livestock. He claimed that she required further assistance to carry out her farming duties. Both wives formally gave their consent before the Court.

The Court found that applicant's reason to seek authorization for polygamy, which was his two wives' "inability to bear the burdens of marriage alone", was an "objective justification" to authorize his third polygamous marriage. Moreover, the applicant had satisfied the preconditions of the Family Code. Accordingly, the Court granted his application.

Court of First Instance in Nador - File No. 291-05, 12 June 2005

The applicant submitted a request for a polygamous marriage on the basis that his current wife could no longer "conduct the affairs of married life" because of her "age and health". His wife, who acknowledged she suffered from a health condition, gave her consent to the Court. It was held that the applicant's reasons to enter into a second marriage constituted "an objective justification" for polygamy and therefore his application was approved.

Court of First Instance in Larache – File No. 56-04, 27 December 2004

In its ruling, the Court held, "where an applicant has proved that his income is sufficient to support two families, and where his reason to enter into another marriage relates to his wife's inability to bear the burdens of household duties, there is an objective justification for polygamy.

Discriminatory attitudes and stereotyping in light of international human rights law and standards

The right to equality before the law and the prohibition of discrimination are guaranteed under international human rights law and standards. The International Covenant on Civil and Political Rights incorporates a number of articles, which reinforce the principles of equality and non-discrimination.¹³⁸ For example, Article 26 stipulates:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Article 14 of the International Covenant on Civil and Political Rights states, "all persons shall be equal before the courts and tribunals [...]."¹³⁹ States Parties must respect, protect and fulfil the guarantees contained within Article 14 regardless of their legal traditions and their domestic law.¹⁴⁰

Article 5 (a) of the Convention on the Elimination on All Forms of Discrimination against Women explicitly calls for the eradication of gender stereotyping, emphasizing States Parties responsibility to:

Take all appropriate measures to modify the social and structural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women [...].¹⁴¹

In its General Recommendation on women's access to justice, the CEDAW Committee has elaborated on the consequences judicial stereotyping and bias have on women's full enjoyment of their human rights. The Committee found that:

Stereotyping and gender bias...impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to these stereotypes.

¹³⁸ International Covenant on Civil and Political Rights, arts. 2, 3, 23 and 26.

¹³⁹ International Covenant on Civil and Political Rights, art. 14.

¹⁴⁰ Human Rights Committee, *General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 4.

¹⁴¹ United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13, art. 5.

Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses. [...] In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the re-victimization of complainants.¹⁴²

The CEDAW Committee has further emphasized that judges and adjudicators are not the only actors in the justice system who engage in the practice of gender stereotyping.¹⁴³ Rather, the Committee has found that the practice extends to justice sector actors at different levels of intervention, including prosecutors and police officers, who often allow stereotypes to determine the course of investigations and trials, particularly in cases of gender-based violence, "with stereotypes undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator."¹⁴⁴

The CEDAW Committee has therefore urged States Parties to ensure that all criminal proceedings that involve offences of a sexual nature are conducted in an "impartial and fair manner...free from prejudices or stereotypical notions regarding the victim's gender, age and disability."¹⁴⁵ The CEDAW Committee also urged States Parties to arrange adequate and regular training on the [CEDAW] Convention and its general recommendations, particularly recommendations 18 and 19, to the judiciary and legal professionals in order to "ensure that stereotypes and gender bias do not affect court proceedings and decision-making."¹⁴⁶

Recommendations

In order to redress the detrimental impact that gender stereotyping can have on women's rights, it is crucial that Moroccan authorities ensure that all legal and quasi-judicial procedures are free from gender stereotypes and prejudice. In this regard, the CEDAW Committee has made a number of recommendations, duplicated below, that should serve as a paradigm to guide the process of eradicating gender stereotyping in Morocco.

The CEDAW Committee has made the following recommendations to address gender stereotypes in legal systems relating to violence against women:

- (a) Take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system;**
- (b) Include other professionals, in particular health professionals and social workers, who can play an important role in cases of violence against women and in family matters, in these awareness-raising and capacity building programmes;**
- (c) Ensure that capacity-building programmes address in particular:**
 - i. The issue of the credibility and weight given to women's voices, arguments and testimonies, as parties and witnesses;**
 - ii. The inflexible standards often developed by judges and prosecutors on what they consider as appropriate behaviour for women;**
- (d) Consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for**

¹⁴² Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women's Access to Justice*, CEDAW/C/GC/33 (2015), para. 26.

¹⁴³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women's Access to Justice*, CEDAW/C/GC/33 (2015), para. 27.

¹⁴⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women's Access to Justice*, CEDAW/C/GC/33 (2015), para. 27.

¹⁴⁵ Committee on the Elimination of Discrimination against Women, *R.P.B. v The Philippines*, Communication No. 34/2011, CEDAW/C/57/D/34/2011 (2014), para. 9(b) (iii).

¹⁴⁶ Committee on the Elimination of Discrimination against Women, *R.P.B. v The Philippines*, Communication No. 34/2011, CEDAW/C/57/D/34/2011 (2014), para. 9(b) (iv).

- women victims and survivors of violence;**
- (e) Raise awareness on the negative impact of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases; and**
 - (f) Provide capacity building to judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments related to human rights, including the CEDAW Convention and the jurisprudence of the CEDAW Committee, and on the application of legislation prohibiting discrimination against women.¹⁴⁷**

3. Protection measures and support services for victims

Moroccan framework

The Code of Criminal Procedure empowers prosecutors and investigating judges to employ protection measures with a view to ensuring the safety of victims and witnesses of crimes and their family members. The protection measures at the disposal of victims and witnesses, articulated in Article 82-7, include a telephone hotline number to call the judicial police or another relevant security department, which they can call at any time to ask for protection; and physical protection for him/her and his/her family members from force. These protection measures are sufficiently general to enable prosecutors and investigating judges to actively devise a personal safety plan suitable for the victim, one that is centred on the individual circumstances of the case.

Additionally, Articles 161 and 162 of the Code of Criminal Procedure specify various measures that can be enforced against the accused, which include residential and travel restrictions; summonses; suspension of driving licence/permit; rehabilitation; medical treatment; conditional bail; confiscation of weapons; and no-contact orders. The latter, imposed by the courts, seek to guarantee the complainant/victim's safety against retaliation. Residential and travel restrictions, summonses and conditional bail on the other hand, aim to ensure the accused's appearance at trial and reduce the risk of absconding.

While this framework provides for some adequate measures, its enforceability, especially in cases of SGBV, remains problematic. Indeed, the enforcement of the available protection measures is not compulsory and is entirely reliant on the discretion of investigating judges and prosecutors. After reviewing 75 judgments relating to SGBV cases, the ICJ has observed that, particularly in cases of domestic violence, justice sector actors rarely resort to employing non-custodial measures or provisional detention directed at the accused that would protect the victims/survivors against retaliation to some extent, irrespective of the severity of harm suffered and the potential risk of retaliation involved.

Law 103-13 on combatting violence against women attempted to build on the existing protection measures, by incorporating protection measures related to SGBV case management. Article 82-5-1 establishes protection measures from the beginning of judicial proceedings for SGBV cases. Article 88-3 enables prosecutors to issue no-contact orders against the accused, prohibiting them from being in physical and verbal contact with the complainant or from approaching the complainant's location.

While these measures constitute a positive development in the process of combatting SGBV in Morocco, they should be supplemented by necessary funding, awareness-raising campaigns and capacity-building programmes to ensure the effective implementation of the protection measures articulated by law.

Specialized Women's Unit

¹⁴⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33: Women's Access to Justice*, CEDAW/C/GC/33 (2015), para. 29.

These specialized units exist within the 86 jurisdictions of the First Instance and Appeal Courts in Morocco. Each one is composed of a representative from the prosecutor-general, an investigating judge, a trial judge, a juvenile court judge, a registrar and a social worker. These units are the first point of access to the judiciary for the victims and/or complainants of SGBV offences.

Article 10 of Law 103-13 stipulates that these units provide services, such as “receiving, listening, supporting and advising” victims of SGBV. The mandate of these units, however, is ill-defined and neglects to recognize services that are fundamental to the protection, care and support of SGBV victims/survivors. There is no express provision in the law relating to healthcare, physical and psychological rehabilitation and reintegration into society. Moreover, Article 10 makes no explicit reference to legal or financial assistance for SGBV victims/survivors.

Abortion

Law 103-13 fails to ensure safe and legal access to abortion for SGBV victims/survivors. In fact, according to the Penal Code, abortion is a criminal offence punishable by imprisonment and fines,¹⁴⁸ except in the cases of married women “when it is a necessary measure to safeguard the health of the mother.”¹⁴⁹ Furthermore, the procedure for terminating pregnancies is both lengthy and complex, as obtaining the consent of the spouse is compulsory, as well as the examining physician providing notice to the chief physician of the prefecture.¹⁵⁰ The same provisions apply in cases where pregnancy results from rape and incest, which, among others, are gross violations of women’s right to mental and physical health and integrity.

Protection measures and support services in light of international human rights law and standards

The harm inflicted by SGBV and its ensuing impact on women’s health and their participation in society is distinct. SGBV case management demands an integrated, multidisciplinary and gender-sensitive approach, recognizing the distinctive needs of SGBV victims/survivors, against the backdrop of access to justice.

Protection for victims, both throughout the investigation and prosecution stages, and in the aftermath of judicial proceedings, is key to achieving effective access to justice for SGBV victims/survivors. Failure by the State to protect victims/survivors from intimidation and retribution would undoubtedly result in their distrust of the justice system. It is incumbent on States to ensure that domestic law conforms to at least the same level of protection for victims as imposed by international obligations.¹⁵¹

In relation to protection orders, international standards provide for States to take legislative and procedural measures to enable justice sector actors to promptly grant and enforce protection orders for victims in situations of immediate danger, imposing different restraints on the individual subjected to the order.¹⁵² These measures must ensure “the protection of the victims of sexual violence, and their children in emergency situations of imminent harm, and when the source of the violence is an inti-

¹⁴⁸ Penal Code, art. 454. The penalty for abortion is up to two years’ imprisonment and a fine of up to 500 MAD.

¹⁴⁹ Penal Code, art. 453.

¹⁵⁰ Penal Code, art. 453.

¹⁵¹ United Nations General Assembly, *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*, A/RES/60/147 (2006), principle I. 2(d).

¹⁵² African Commission on Human and Peoples’ Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 27.1.; United Nations General Assembly, *Resolution on strengthening crime prevention and criminal justice response to violence against women*, A/RES/65/228 (2011), para. 16(h)-(i); Committee on the Elimination of Discrimination against Women, *General Recommendation on Women’s Access to Justice*, CEDAW/C/GC/33 (2015), para.51; Council of Europe, Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention), 11 May 2011, CETS No. 210, art. 53.

mate partner [or] ex-spouse.”¹⁵³ Moreover, these protection orders must be provided free of charge.¹⁵⁴ The ICJ has published guiding principles, specific to the context of Morocco that may assist justice sector actors in ensuring the personal safety of SGBV victims/survivors.¹⁵⁵

As alluded to above, the effective protection for SGBV victims/survivors entails more than the availability and enforcement of protection orders. Rather, securing protection entails empowering victims through a variety of services, the most important of which is healthcare and access to sexual and reproductive rights as the consequences of SGBV on human health are severe and can be long lasting.¹⁵⁶ They can include fatal outcomes; acute and chronic physical injuries and disabilities; serious mental health problems and behavioural deviations increasing the risk of subsequent victimization; and gynaecological disorders, unwanted pregnancies, obstetric complications and HIV/AIDS.¹⁵⁷ The Convention on Economic, Social and Cultural Rights guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁵⁸ Both the Committee on the Economic, Social and Cultural Rights¹⁵⁹ and the CEDAW Committee maintain that sexual and reproductive health is an integral part of the right to health.¹⁶⁰ In accordance with their obligations under international law, State Parties must ensure the availability, accessibility, acceptability and quality standard set down by the CESCR Committee.¹⁶¹

States must employ measures to mitigate and/or remedy the consequences of SGBV, regardless of whether not the victim/survivor has lodged a formal complaint. These measures can be divided four-fold. First, the State must make emergency contraception available to victims/survivors no more than five days after the episode of violence has occurred,¹⁶² so that pregnancy can be avoided. Second, the State must guarantee effective access to safe and legal abortion. The State must adopt the appropriate laws and regulations to ensure the *de jure* and *de facto* exercise of the right to obtain an abortion in cases of SGBV and ensure that women who have had abortions are not criminally prosecuted.¹⁶³ Moreover, the State must facilitate the procedure and empower women to make a decision to have an abortion without first having to seek the approval of their spouse.¹⁶⁴

¹⁵³ African Commission on Human and Peoples’ Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 27.1.

¹⁵⁴ African Commission on Human and Peoples’ Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 27.2.

¹⁵⁵ International Commission of Jurists, “Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls”, (Geneva: International Commission of Jurists, 2017), p. 4, available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

¹⁵⁶ World Bank Group, “Gender-based Violence, Health and the role of the Health Sector”, (2000), p.3.

¹⁵⁷ World Bank Group, “Gender-based Violence, Health and the role of the Health Sector”, (2000), p.3.

¹⁵⁸ International Convention on Economic, Social and Cultural Rights, art. 12.

¹⁵⁹ The committee responsible for monitoring the implementation of obligations set forth in the Convention on Economic, Social and Cultural Rights. Hereinafter referred to as “the CESCR Committee”.

¹⁶⁰ See generally, Committee on Economic, Social and Cultural Rights, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22 (2016); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 35: Gender-based violence against women*, UN Doc C/GC/35 (2017).

¹⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No.14 on the right to the highest attainable standard of health (article 12)*, E/C.12/2000/4 (2000), para.12.

¹⁶² African Commission on Human and Peoples’ Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 29.

¹⁶³ See generally, Committee on Economic, Social and Cultural Rights, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22 (2016); Committee on the Rights of the Child, *General comment No. 20 on the implementation of the rights of the child during adolescence*, CRC/C/GC/20 (2016), par. 60; Committee on the Rights of the Child, *General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, CRC/C/GC/15 (2013), art. 24; African Union, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, art. 12(2) (c).

¹⁶⁴ African Commission on Human and Peoples’ Rights, *Guidelines on Combating Sexual Violence and its Consequences*

Third, States must ensure that SGBV victims/survivors who undergo abortions receive necessary post-abortion care. Effective access to safe and legal abortion and post-abortion care, as well as being provided with emergency contraception, are part and parcel of the right to an effective remedy and reparation to which women and girls victims of sexual violence are entitled, if they so wish.¹⁶⁵ Finally, in order to prevent the transmission of sexually transmitted diseases, especially HIV, States must ensure that victims of rape have free access to prophylaxis within 72 hours of the incident.¹⁶⁶

Social support services are also essential in cases of SGBV. SGBV victims/survivors must be empowered by the State through adequate and effective social support in order to ensure their rehabilitation and full and equal participation in society. The African Commission has elaborated on the important role social support plays in SGBV contexts, urging States to:

Provide social support to victims to aid them in achieving autonomy, especially by facilitating access to (new) housing; care services for their children (access to daily supervision, education and healthcare), especially children born from rape; access to financial assistance; and helping them return to work or obtain work as needed. States must work together with civil society organisations, private sector stakeholders and technical partners who support the victims of sexual violence by offering appropriate support services and helping them to regain control of their lives, especially by assisting them to gain new skills and access new opportunities, for example through income-generating activities.¹⁶⁷

Recommendations

The ICJ calls on the Moroccan authorities to amend Law 103-13 with a view to ensuring its full compliance with international human rights law and standards, including by providing that:

- **Legislative and procedural measures are adopted to enable justice sector actors to promptly grant and enforce protection orders, free of charge, for SGBV victims, including those in situations of immediate danger;**
- **Urgent measures are adopted to remedy the consequences of SGBV, regardless of whether not the victim/survivor has lodged a formal complaint;**
- **Emergency contraception is available to SGBV victims/survivors no more than five days after the episode of violence has occurred;**
- **Access to safe and legal abortion is facilitated, including by empowering women to make a decision to have an abortion without first having to seek the approval of their spouse, by introducing new regulations to ensure the *de jure* and *de facto* exercise of the right to obtain an abortion in cases of SGBV, and by ensuring that women who have had abortions are not criminally prosecuted;**
- **SGBV victims/survivors who undergo abortions receive necessary post-abortion care;**
- **Victims of rape have free access to prophylaxis within 72 hours of the incident;**
- **Social support to SGBV victims is provided to aid them in achieving autonomy, especially by facilitating their access to care services;**
- **The mandate of specialised women's units is developed so as to include legal and financial assistance to SGBV victims/survivors.**

in Africa (2017), principle. 30.2.

¹⁶⁵ "Morocco: Ensuring the Effective Investigation and Prosecution of Sexual and Gender-Based Violence against Women and Girls", (Geneva: International Commission of Jurists, 2017) p. 16, available at: <https://www.icj.org/wp-content/uploads/2017/12/MOR-Memo-on-SGBV-2017-ENG.pdf>.

¹⁶⁶ African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 33.1; African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003, art.1(d) and (e).

¹⁶⁷ African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017), principle. 34.

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