

## 10. COMBATING DISCRIMINATION BASED ON SEX AND GENDER

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### 1. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination against Women<sup>1</sup> (the Convention or CEDAW) was adopted by the United Nations General Assembly in 1979 to remedy the pervasive and structural nature of violations of the human rights of women. The Convention acknowledges that despite efforts to eliminate sex and gender discrimination, women continue to suffer from various forms of discrimination because they are *women*.<sup>2</sup> As a result, their rights require specific international protection. The Convention thus entrenches and expands the rights afforded to women in other international human rights instruments, such as the International Covenant on Civil and Political Rights<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> This chapter is intended as an introduction to the Convention and its Optional Protocol providing for enforcement mechanisms.<sup>5</sup>

The Convention is organized into six parts. Part I defines 'discrimination against women' and outlines States Parties' core Convention obligations. Part II protects women's rights to equality in political and public life, while Part III outlines women's rights to equality in economic and social matters, including in the areas of education, employment, and health. Women's rights to equality in legal and civil matters, as well as in marriage and family relations are guaranteed in Part IV. Part V addresses the establishment and operation of the Committee on the Elimination of Discrimination against Women (the Committee), a treaty body comprised of 23 independent women's rights experts, which monitors progress in the Convention's implementation. Part VI explains how governments sign, ratify or accede to the Convention and the consequent legal obligations of such steps. This Part also explains that States Parties are permitted to enter reservations that are not contrary to the Convention's object and purpose, and how States Parties might resolve their disputes about the application

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination against Women, concluded 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13.

<sup>2</sup> Preamble para. 6 of the Convention.

<sup>3</sup> International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

<sup>5</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, concluded 10 December 1999, entered into force 22 December 2000, 2131 UNTS 83. The Optional Protocol provides for two enforcement mechanisms, namely a communication procedure and an inquiry procedure.

of the Convention. Part VI reinforces Part I, by requiring States Parties to adopt all necessary measures at the national level to achieve the full realization of the Convention.

## 2. THE OBJECT AND PURPOSE OF THE CONVENTION

The Convention obligates States Parties to 'eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms'.<sup>6</sup> 'Discrimination against women' is defined as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>7</sup>

This definition must be considered in light of the Convention's overall object and purpose, which is discernible from its title, Preamble, and foundational Articles 1 to 5 and 24. Read together, they require States Parties to: eliminate direct and indirect discrimination against women in their laws, and ensure women are protected against discrimination in all spheres of life; improve women's de facto position within society; and, address prevailing gender relations and discriminatory gender stereotypes.<sup>8</sup> Put simply, States Parties must aim to improve women's position by eliminating all forms of discrimination against women, with a view to ensuring both formal (de jure) and substantive (de facto) equality.

The Convention moves beyond the concept of discrimination used in other human rights treaties; it requires States Parties to eliminate all forms of discrimination against women, 'emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women'.<sup>9</sup> In order to meet their treaty obligations, States Parties must therefore not only treat men and women identically where their interests are similar (*i.e.*, according to formal or de jure equality), but also acknowledge and accommodate biological as well as socially and culturally constructed differences. This means that, in certain circumstances, such as in pregnancy and childbirth, non-identical treatment of men and women will be necessary to address such differences.<sup>10</sup> States Parties' failure to accommodate differences between men and women — such as in cases where health-care services fail to accommodate fundamental biological differences in reproduction leading, *inter alia*, to high

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<sup>6</sup> Committee on the Elimination of Discrimination against Women, General Recommendation no. 25 (2004), Article 4, paragraph 1, of the Convention (temporary special measures), UN doc. HRI/GEN/1/Rev.8, pp. 337–345, para. 4.

<sup>7</sup> Article 1 of the Convention.

<sup>8</sup> General Recommendation no. 25, *supra* (note 6), para. 7.

<sup>9</sup> *Ibid.*, para. 5.

<sup>10</sup> *Ibid.*, para. 8.

rates of maternal mortality — will violate women's rights to equality and non-discrimination under the Convention.<sup>11</sup>

The Committee has stated that in order to improve women's position within society, it is essential that States Parties address the underlying causes of discrimination against women, and of their inequality. Measures must be 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'.<sup>12</sup> On the basis of this transformative view of equality, States Parties are required to undertake a social re-ordering of their political economy, and the cultural valuations ascribed to men and women. This requires States Parties to address the compounded forms of discrimination that women face, such as discrimination on grounds of race and ethnicity, age, sexual orientation, immigration status and disability.<sup>13</sup> That is, in order to remedy the underlying causes of discrimination against women, States Parties need to address the ways in which sex discrimination interacts with other forms of discrimination to deny certain subgroups of women their equality rights.

Additional measures, such as *temporary special measures*, may also be required to move beyond formal equality and to accelerate the realization of de facto or substantive equality.<sup>14</sup> Temporary special measures are 'time-limited positive measures intended to enhance opportunities for historically and systemically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life'.<sup>15</sup> They may include initiatives ranging from the introduction of training programmes targeted at women, to the implementation of quotas in education or employment, and the granting of short-term bank loans to enable women to start small businesses.

Building on Article 4(1) in its General Recommendation no. 25, the Committee has explained that such measures are not an exception to the norm of non-discrimination; in its view, they 'are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms'.<sup>16</sup> This means that although temporary special measures may result in non-identical treatment of men and women, such differential treatment may be required to improve women's de facto position, and shall not be considered a form of

<sup>11</sup> See Rebecca J. Cook et al., *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford: Clarendon Press; New York: Oxford University Press, 2003), p. 199.

<sup>12</sup> General Recommendation no. 25, *supra* (note 6), para. 10.

<sup>13</sup> See, e.g., the views of the Committee on the Elimination of Racial Discrimination (CERD) in the case of *Yilmaz-Dogan v. the Netherlands* (Communication no. 1/1984), UN doc. CERD/C/36/D/1/1984 (1988). See also CERD, General Recommendation no. 25 (2000), on gender-related dimensions of racial discrimination, UN doc. HRI/GEN/1/Rev.8, pp. 258–259; Adrien Katherine Wing, *Critical Race Feminism: A Reader* (New York: New York University Press, 2nd ed., 2003).

<sup>14</sup> See Article 4 of the Convention; General Recommendation no. 25, *supra* (note 6).

<sup>15</sup> Rebecca J. Cook, 'Obligations to Adopt Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination Against Women', in Ineke Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Antwerp: Intersentia, 2003), pp. 119–141, at p. 119.

<sup>16</sup> General Recommendation no. 25, *supra* (note 6), para. 18.

discrimination. This view is also taken by the United Nations Human Rights Committee<sup>17</sup> and the Committee on Economic, Social and Cultural Rights.<sup>18</sup>

### 3. STATE OBLIGATIONS TO PROTECT WOMEN'S RIGHTS

#### 3.1 *The Scope of State Obligations*

Article 2 of the Convention contains States Parties' general undertaking to eliminate discrimination against women.<sup>19</sup> It condemns all forms of discrimination against women, and provides that States Parties 'agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women' by undertaking constitutional, legislative, administrative and other measures. It also obligates States Parties to: refrain from discriminatory acts or practices; sanction discrimination against women; protect the human rights of women on an equal basis with those of men; and, for instance, modify or abolish existing laws, regulations, customs and practices that discriminate against women.

Article 3 further obligates States Parties to take measures in all fields 'to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'. This means that States Parties must make available to women institutions appropriate to their needs where those needs differ from those of men. It also means that women must have equality of access to institutions where their needs are the same as men's. Article 3 is reinforced by Article 24, which requires States Parties to 'adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized' in the Convention.<sup>20</sup> Taking account of States Parties' obligation to implement changes at the national level, where appropriate, this chapter shall refer to decisions of domestic courts.

It is an established principle of international human rights law that States Parties must do more than merely refrain from interfering with human rights; they must also adopt *positive* measures to ensure those rights are guaranteed in practice.<sup>21</sup> Article 2(e) of the Convention

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<sup>17</sup> Human Rights Committee, General Comment no. 18 (1989), non-discrimination, UN doc. HRI/GEN/1/Rev.8, pp. 185–188, para. 10.

<sup>18</sup> Committee on Economic, Social and Cultural Rights, General Comment no. 16 (2005), the equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3), UN doc. HRI/GEN/1/Rev.8, pp. 122–131, para. 15.

<sup>19</sup> See Andrew Byrnes et al., State Obligation and the Convention on the Elimination of All Forms of Discrimination against Women, IWRAW Asia Pacific Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation (May 2007), online IWRAW Asia Pacific <<http://www.iwraw-ap.org/aboutus/pdf/Background%20paper.pdf>> (last accessed 1 December 2008).

<sup>20</sup> See also Human Rights Committee, General Comment no. 31 (2004), the nature of the general legal obligation on States Parties to the Covenant, UN doc. HRI/GEN/1/Rev.8, pp. 233–238, para. 13.

<sup>21</sup> See, e.g., *X and Y v. the Netherlands*, judgment of 26 March 1985, Publications of the European Court of Human Rights, Ser. A, no. 91; *Airey v. Ireland*, judgment of 9 October 1979, Publications of the European Court of Human Rights, Ser. A, no. 32; *Maria Da Penha Maia Fernandes v. Brazil* (2000), Inter-American Commission on Human Rights, no. 12.051, Annual Report of the Inter-American Commission on Human

provides a clear example of a positive obligation imposed on States Parties; it requires the adoption of 'all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. Under this provision, a State Party can, in addition to being responsible for the acts or omissions of its own agents and officials, be held legally accountable for its failure to act with due diligence to prevent, investigate, punish, and remedy private acts of discrimination.<sup>22</sup> Whether the discriminatory acts of private individuals take place in the domestic or public sphere, states are legally responsible for failure to prevent, investigate, punish and remedy such acts. It is encouraging that there has been a trend in recent years towards removing discriminatory provisions in national laws. A future challenge is to ensure that States Parties adopt positive measures — including, where appropriate, temporary special measures — to implement those laws in practice.<sup>23</sup>

### 3.2 Reservations

States Parties may limit or qualify their legal obligations under the Convention through reservations.<sup>24</sup> Article 28(2) permits States Parties to enter reservations to specific Convention provisions, provided they are compatible with its object and purpose.<sup>25</sup> A significant number of States Parties have entered reservations to the Convention, making it amongst the most heavily reserved of international human rights treaties.<sup>26</sup> Many reservations, such as those relating to Articles 2 (state obligations), 5(a) (discriminatory gender stereotyping), 9 (nationality), or 16 (marriage and family life), or those which are justified on cultural, religious, or constitutional grounds, appear incompatible with the Convention. It has been argued, for instance, that reservations entered on the basis of Islamic law do not warrant special

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Rights, 2000, OEA/Ser.L/V/II.111/doc.20 rev. 704.

<sup>22</sup> Committee on the Elimination of Discrimination against Women, General Recommendation no. 19 (1992), violence against women, UN doc. HRI/GEN/1/Rev.8, pp. 302–307, paras. 8–9.

<sup>23</sup> One commentator has observed, for instance, that although laws setting minimum legal ages of marriage have been enacted in the Indian subcontinent and Sri Lanka as deterrents to child marriage, they have yet to be adequately enforced. Savitri Goonesekere, 'Universalizing Women's Human Rights', in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007), pp. 52–67, at p. 62. On child marriage, see Jaya Sagade, *Child Marriage in India: Social-Legal and Human Rights Dimensions* (New Delhi: Oxford University Press, 2005); UNICEF Innocenti Research Centre, 'Early Marriage: Child Spouses', *Innocenti Digest*, vol. 7 (2001).

<sup>24</sup> A reservation is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. Article 2(1)(d) of the Vienna Convention on the Law of Treaties, concluded 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

<sup>25</sup> See also Article 19(c) of the Vienna Convention on the Law of Treaties.

<sup>26</sup> For a list of reservations, see online: United Nations Treaty Collection <<http://untreaty.un.org/>> (last accessed 1 December 2008).

accommodation on account of their religious nature,<sup>27</sup> since all reservations limiting the scope of States Parties' obligations to eliminate all forms of discrimination against women lessen the protection afforded to women under the Convention, and also threaten the goal of substantive equality.<sup>28</sup>

The Committee has reiterated its concern about the number, scope and permissibility of reservations,<sup>29</sup> and has asked reserving States Parties in their periodic reports to: include information on their substantive reservations, explaining the specific article to which they refer, why they are necessary, and their precise effect in terms of national law and policy; and, explain plans to limit the effect of the respective reservation.<sup>30</sup>

Some States Parties have developed a practice of formulating objections to reservations they consider incompatible with the Convention's object and purpose. For instance, Sweden objected to Singapore's reservation to Articles 2 (state obligations) and 16 (marriage and family relations), which reserved the right not to apply these provisions in circumstances where they are incompatible with religious or personal laws, on the basis that they undermined its commitment to the Convention's object and purpose. In addition to registering a State Party's belief in the incompatibility of a reservation, objections reinforce the normative value of the right in question,<sup>31</sup> and, in some cases, occasion the withdrawal or modification of reservations.

The Committee has developed a practice of regularly questioning States Parties about their reservations during the periodic reporting process under Article 18 of the Convention. At its thirty-ninth session in 2007, for example, the Committee, whilst commending Singapore for withdrawing its reservation to Article 9 on nationality, expressed serious concern regarding its reservations to Articles 2 and 16, which it deemed incompatible with the Convention's object and purpose, as well as Article 11 (employment).<sup>32</sup> The effect of this process has been to require States Parties to reassess the need for and validity of their

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<sup>27</sup> Ann Elizabeth Mayer, 'Religious Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: What Do They Really Mean?', in Courtney W. Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (New York: St Martin's Press, 1999), pp. 105–116.

<sup>28</sup> Report of the Committee on the Elimination of Discrimination against Women, General Assembly Official Records (GAOR), Fifty-third session, Suppl. no. 38 (A/53/38/Rev.1) part II, pp. 47–50.

<sup>29</sup> General Recommendation no. 20 (1992), reservations to the Convention, UN doc. HRI/GEN/1/Rev.8, pp. 307–308, para. 2; General Recommendation no. 21 (1994), equality in marriage and family relations, UN doc. HRI/GEN/1/Rev.8, pp. 308–317, paras. 41–48.

<sup>30</sup> See Reporting Guidelines of the Committee on the Elimination of Discrimination against Women, UN doc. E/CN.6/2008/CRP.1 Annex I (2008), para. C.3; Human Rights Committee, General Comment no. 24 (1994), issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN doc. HRI/GEN/1/Rev.8, pp. 200–207, para. 19; Hanna Beate Schöpp-Schilling, 'Reservations to CEDAW: An Unresolved Issue or (No) New Developments?', in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff Publishers, 2004), pp. 3–39, at p. 21.

<sup>31</sup> See Rebecca J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', *Virginia Journal of International Law*, vol. 30 (1990) no. 3, pp. 643–716, at p. 658.

<sup>32</sup> Concluding Comments of the Committee on the Elimination of Discrimination against Women: Singapore, UN doc. CEDAW/C/SGP/CO/3 (2007), paras. 5 and 11.

reservations, especially those broad reservations that do not specify the national laws that are the subject of the reservation.

The entry into force of the Optional Protocol, which established an individual complaints procedure and an inquiry procedure, has provided the Committee with further opportunities to determine whether it will apply the Convention to a State Party, despite its reservations. In *Constance Ragan Salgado v. the United Kingdom*,<sup>33</sup> the author alleged, *inter alia*, a violation of Article 9(2) of the Convention, which provides for equality regarding the nationality of children. The United Kingdom argued that the communication should be declared inadmissible on the basis of its reservation to this provision. The Committee chose not to address that claim and held the communication inadmissible on other grounds. Had the Committee found the communication admissible,<sup>34</sup> it would have had to address the compatibility of the reservation.<sup>35</sup>

#### 4. THE MAIN FUNCTIONS OF THE COMMITTEE

In the 26 years since its inception, the Committee has played a vital role scrutinizing States Parties' compliance with the Convention, and also interpreting the nature and scope of the normative obligations contained therein. This section shall examine the nature and mandate of the Committee.

##### 4.1 *The Convention's Reporting and Interstate Complaint Procedures*

The reporting procedure in Article 18 of the Convention is one of the Committee's principal means of monitoring States Parties' compliance with the Convention. Under this procedure, States Parties are required to submit, for the Committee's consideration, periodic reports 'on the legislative, judicial, administrative or other measures' adopted to give effect to the Convention, as well as 'the progress made in this respect' (Article 18(1)). Reports 'may indicate factors and difficulties affecting the degree of fulfilment of obligations' (Article 18(2)). Every State Party is required to submit an initial report within one year of the relevant entry into force date of the Convention. Thereafter, reports must be submitted at least every four years, or whenever requested by the Committee.

The Committee considers the periodic reports of States Parties at each of its sessions. As part of this process, the Committee enters into a 'constructive dialogue' with the state

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<sup>33</sup> *Constance Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland* (Communication no. 11/2006), decision on inadmissibility 22 January 2007, UN doc. CEDAW/C/37/D/11/2006.

<sup>34</sup> *Ibid.*, paras. 8.4–8.7.

<sup>35</sup> The European Court of Human Rights and the Human Rights Committee have, in their jurisprudence, concluded that an impermissible reservation may be without legal effect. See, e.g., *Belilos v. Switzerland*, judgment of 29 April 1988, Publications of the European Court of Human Rights, Ser. A, no. 132; *Loizidou v. Turkey*, judgment of 23 March 1995, Publications of the European Court of Human Rights, Ser. A, no. 310; *Kennedy v. Trinidad and Tobago* (Communication no. 845/1998), decision on admissibility 2 November 1999, Report of the Human Rights Committee, vol. II, GAOR, Fifty-fifth session, Suppl. no. 40 (A/55/40), pp. 258–272, para. 6.7.

concerned, posing specific questions regarding the report's content. In 2006, for example, the Committee asked Mexico to provide information on the status of the situation concerning the abduction, rape, and murder of women in Ciudad Juárez.<sup>36</sup> Constructive dialogue helps to enrich the Committee's understanding of the steps undertaken and obstacles faced by States Parties in seeking to comply with the Convention. It also requires States Parties to evaluate whether they have taken steps necessary to ensure the elimination of all forms of discrimination against women. It is, in this sense, very much a process of consciousness-raising and learning.

Following consideration of a report, the Committee will issue concluding observations in which it identifies strengths and weaknesses in States Parties' compliance with the Convention, and also outlines recommendations for overcoming obstacles impeding the realization of substantive equality. These observations enable the Committee to elaborate the meaning of Convention rights. It has been explained that, '[a] key feature of this process is its capacity to create a cultural category such as violence against women, to mobilize support against it, and to articulate for a wide variety of countries how they might go about taking responsibility for reducing it'.<sup>37</sup>

Maternal mortality is an example of an area where the Committee's concluding observations have contributed to improved understanding of the extent of this problem, as well as the steps required by States Parties to address its preventable causes. A maternal death is defined as 'the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes', and they are usually measured by countries as a ratio: annual number of maternal deaths per 100,000 live births.<sup>38</sup>

Maternal mortality is a preventable tragedy that, every year, affects more than half a million women, or approximately 1,400 women each day.<sup>39</sup> Failure to address preventable causes of maternal mortality is a violation of international human rights law, implicating women's rights to life, liberty and security of the person, health, maternity protection, and non-discrimination. Building on its General Recommendation no. 24<sup>40</sup> on women and health, that explains that neglecting health care that only women need is a form of discrimination, the Committee has, through its concluding observations, consistently expressed concern regarding high rates of maternal mortality. In 2007, for example, the Committee noted its

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<sup>36</sup> Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN doc. CEDAW/C/2005/OP.8/MEXICO (27 January 2005) (hereinafter: Ciudad Juárez inquiry).

<sup>37</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), p. 81.

<sup>38</sup> Cook et al., *supra* (note 11), pp. 19–20.

<sup>39</sup> *Ibid.*, pp. 9–10, 23–24, 406–420. See also Lale Say et al., *Maternal Mortality in 2005: Estimates Developed by WHO, UNICEF, UNFPA and the World Bank* (Geneva: World Health Organization, 2007), online: WHO <[http://www.who.int/reproductive-health/publications/maternal\\_mortality\\_2005/](http://www.who.int/reproductive-health/publications/maternal_mortality_2005/)> (last accessed 1 December 2008).

<sup>40</sup> General Recommendation no. 24 (1999), Article 12 of the Convention (women and health), UN doc. HRI/GEN/1/Rev.8, pp. 329–336.



concern 'that the maternal and infant mortality rates in Sierra Leone are among the highest in the world'.<sup>41</sup>

The Committee has situated the problem of maternal mortality within the context of, amongst other things, inadequate access to comprehensive reproductive health services, including inadequate access to emergency obstetric care, safe and lawful abortion services, as well as high teenage pregnancy rates and poor nutrition.<sup>42</sup> It has urged States Parties, *inter alia*, to: identify the causes of this problem; improve access to reproductive health services and information, including contraceptive methods; review family planning policies, programmes and legislation; and, ensure access to qualified birth attendants.<sup>43</sup> In its concluding observations on Sierra Leone, the Committee recommended that the government:

step up its efforts to reduce the incidence of maternal and infant mortality rates. It suggest[ed] that the State party assess the actual causes of maternal mortality and set targets and benchmarks within a time frame for its reduction. It urge[d] the State party to make every effort to raise awareness of and increase women's access to health-care facilities and medical assistance by trained personnel, especially in rural areas and particularly in the area of post-natal care. The Committee further recommend[ed] that the State party implement programmes and policies aimed at providing effective access to contraceptives and family planning services.<sup>44</sup>

With respect to maternal mortality resulting from unsafe abortion, the Committee has specifically called on States Parties to review legislation criminalizing abortion.<sup>45</sup>

Concluding observations, such as those relating to maternal mortality, make explicit and help to clarify States Parties' Convention obligations. The reporting procedure is not, however, without its problems. Indeed, like other international human rights treaty bodies, the Committee has faced substantial challenges in the form of late or non-reporting by States Parties. Delays occasioned by limited meeting time and inadequate resources have also impacted the effectiveness of this procedure. The Committee has sought to alleviate the backlog of reports and also to ensure the timely consideration of new reports, by scheduling additional sessions as well as convening sessions in parallel chambers. Further recommendations for reform of the reporting process are under consideration as part of the broader discussion relating to reform of the United Nations treaty body system.<sup>46</sup>

The reporting procedure is supplemented by the interstate complaint procedure, which enables States Parties to refer disputes concerning the interpretation or application of the

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<sup>41</sup> See, e.g., Concluding Comments of the Committee on the Elimination of Discrimination against Women: Sierra Leone, UN doc. CEDAW/C/SLE/CO/5 (2007), para. 34.

<sup>42</sup> See Center for Reproductive Rights, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Bodies on Reproductive Rights* (New York: Center for Reproductive Rights; Toronto: University of Toronto International Reproductive and Sexual Health Law Programme, 2002), p. 107, online: Center for Reproductive Rights <<http://www.reproductiverights.org>> (last accessed 1 December 2008).

<sup>43</sup> *Ibid.*, p. 108.

<sup>44</sup> Concluding Comments on Sierra Leone, *supra* (note 41), para. 35.

<sup>45</sup> See Center for Reproductive Rights, *supra* (note 42), p. 108.

<sup>46</sup> See Hanna Beate Schöpp-Schilling, 'Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women', *Human Rights Law Review*, vol. 7 (2007) no. 1, pp. 201–224.

Convention to the International Court of Justice (ICJ).<sup>47</sup> Significantly, the interstate complaint procedure has never been utilized, perhaps reflecting the low priority of human rights issues on international agendas. Furthermore, a large number of States Parties have entered reservations to this procedure,<sup>48</sup> preventing States Parties from using it against a reserving state. It might be time for States Parties to use the interstate complaint mechanism to challenge some of the most offending substantive reservations of those States Parties that have not reserved the interstate complaint procedure, or to request an advisory opinion of the ICJ.

#### 4.2 General Recommendations

The Committee's mandate includes the formulation of general recommendations on specific articles of the Convention to guide States Parties in the discharge of their periodic reporting duties.<sup>49</sup> These recommendations elaborate the meaning of equality by explaining States Parties' obligations to eliminate different and compounded forms of discrimination against women. Key in this respect are General Recommendations nos. 19 (violence against women),<sup>50</sup> 21 (equality in marriage and family relations),<sup>51</sup> 23 (political and public life),<sup>52</sup> 24 (women and health),<sup>53</sup> and 25 (temporary special measures).<sup>54</sup> Together, they have facilitated the normative expansion and enriched understanding of the Convention. They have also raised awareness of women's particular vulnerabilities to human rights violations.

For example, in its General Recommendation no. 19, the Committee interpreted the definition of discrimination in Article 1 to include gender-based violence against women — meaning 'violence that is directed against a woman because she is a woman or that affects women disproportionately'<sup>55</sup> — an area which had not previously received attention by the Committee. States Parties are thus required to eliminate such violence, whether perpetrated by public or private actors.<sup>56</sup>

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<sup>47</sup> Article 29(1) of the Convention.

<sup>48</sup> Article 29(2) of the Convention.

<sup>49</sup> Article 21 of the Convention.

<sup>50</sup> General Recommendation no. 19, *supra* (note 22).

<sup>51</sup> General Recommendation no. 21, *supra* (note 29).

<sup>52</sup> General Recommendation no. 23 (1997), political and public life, UN doc. HRI/GEN/1/Rev.8, pp. 318–329.

<sup>53</sup> General Recommendation no. 24, *supra* (note 40).

<sup>54</sup> General Recommendation no. 25, *supra* (note 6).

<sup>55</sup> General Recommendation no. 19, *supra* (note 22), para. 6.

<sup>56</sup> *Ibid.*, paras. 8–9.

General Recommendation no. 19 has had a profound impact on international,<sup>57</sup> regional,<sup>58</sup> and comparative jurisprudence.<sup>59</sup> For example, in a series of communications relating to domestic violence, the Committee relied upon this general recommendation to underscore States Parties' obligation to eliminate domestic violence by non-state actors.<sup>60</sup> In *Goekce v. Austria*, for instance, the Committee relied upon General Recommendation no. 19 when emphasizing Austria's obligation to protect Ms. Goekce against domestic violence perpetrated by her husband.<sup>61</sup> It explained that General Recommendation no. 19 makes clear that the Convention affords women protection against gender-based violence, and that, as part of their Convention obligations, States Parties are required to address the 'linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence'.<sup>62</sup>

#### 4.3 *The Optional Protocol to the Convention*

The adoption of the Optional Protocol in 1999 signalled a major breakthrough in the international protection of women's rights, as well as a broadening of the Committee's mandate. Developed directly in response to calls to improve the international protection, promotion, and enforcement of women's rights,<sup>63</sup> the Optional Protocol introduced two new mechanisms — a communication procedure and an inquiry procedure — specifically designed to strengthen enforcement of the Convention's substantive provisions. Put simply, these mechanisms were introduced in an attempt to improve opportunities to monitor States Parties' compliance with the Convention, with a view to better ensuring the elimination of all forms of discrimination against women and the realization of substantive equality.

**4.3.1 *The Communication Procedure.*** The Optional Protocol's communication procedure allows individuals or groups of individuals or, alternatively, persons acting on their behalf (*e.g.*, legal

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<sup>57</sup> See, *e.g.*, *A.T. v. Hungary* (Communication no. 2/2003), views adopted 26 January 2005, Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixtieth session, Suppl. no. 38 (A/60/38), pp. 27–39.

<sup>58</sup> See, *e.g.*, European Court of Human Rights, *M.C. v. Bulgaria*, judgment of 4 December 2003, Reports of Judgments and Decisions 2003–XII.

<sup>59</sup> See, *e.g.*, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *Vishaka and Others v. State of Rajasthan and Others*, (1997) 6 SCC 241, AIR 1997 SC 3011; (1998) BHRC 261; [1997] 3 L.R.

<sup>60</sup> See, *e.g.*, *A.T. v. Hungary*, *supra* (note 57), para. 9.2; *Şabide Goekce v. Austria* (Communication no. 5/2005), views adopted 6 August 2007, Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixty-second session, Suppl. no. 38 (A/62/38), pp. 433–454, paras. 12.1.1, 12.1.6–12.3; *Fatma Yildirim v. Austria* (Communication no. 6/2005), Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixty-second session, Suppl. no. 38 (A/62/38), pp. 455–473, paras. 12.1.1, 12.2–12.3.

<sup>61</sup> *Goekce v. Austria*, *supra* (note 60), para. 12.1.1.

<sup>62</sup> *Ibid.*, para. 12.2.

<sup>63</sup> See, *e.g.*, Andrew Byrnes and Jane Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?', *Brooklyn Journal of International Law*, vol. 21 (1996) no. 3, pp. 679–797, at pp. 698–705.

counsel or NGOs), to submit communications (*i.e.*, complaints) to the Committee seeking redress for alleged violations by a State Party of Convention rights.<sup>64</sup> The purpose of this procedure is to provide women with a means of obtaining international redress for violations of their Convention rights.

Before proceeding to an examination of the merits of a communication, the Committee must determine whether it satisfies the Optional Protocol's admissibility criteria found in Article 4. Failure to comply with these criteria will render a communication inadmissible on procedural grounds, and prevent the Committee from assessing its substantive allegations. A communication shall be declared *prima facie* admissible provided that it is presented in writing, is not anonymous, and concerns allegations against a State Party to the Optional Protocol.<sup>65</sup> Assuming these preliminary criteria have been satisfied, the Committee shall then engage in a more detailed analysis of the communication's admissibility.

For a communication to be declared admissible, it must be shown that the author has exhausted all available domestic remedies. In circumstances where domestic remedies have been unreasonably prolonged or are unlikely to bring effective relief to the victim, the Committee may, however, examine the communication's merits provided that it meets the Optional Protocol's other admissibility criteria.<sup>66</sup> For example, in *A.T. v. Hungary*, a communication concerning allegations of domestic violence, the Committee concluded that although domestic proceedings were still pending, their eventual outcome was unlikely to bring the author effective relief *vis-à-vis* her life-threatening situation of domestic violence. It further observed that a three-year delay was unreasonable, 'particularly considering that the author ha[d] been at risk of irreparable harm and threats to her life during that period'.<sup>67</sup> Although Hungary did not raise any preliminary objections as to the communication's admissibility, the Committee's views make it clear that had it chosen to do so, failure to exhaust domestic remedies would not have operated to exclude consideration of that complaint. In contrast, in *Rahime Kayhan v. Turkey*, the Committee declared inadmissible a communication concerning a schoolteacher's right to wear a headscarf to work, on the ground that she had failed to exhaust domestic remedies, by not raising sex discrimination as an issue for determination in domestic proceedings.<sup>68</sup>

The Committee is required to declare a communication inadmissible where '[t]he same matter has been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement'.<sup>69</sup> To be declared inadmissible on this ground, the State Party concerned must demonstrate that the same author has previously submitted the same complaint; it is not sufficient to point to a similar communication

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<sup>64</sup> Article 2 of the Optional Protocol. For a current list of States Parties to the Optional Protocol, see online: United Nations Treaty Collection <<http://untreaty.un.org>> (last accessed 1 December 2008).

<sup>65</sup> Article 3 of the Optional Protocol.

<sup>66</sup> Article 4(1) of the Optional Protocol.

<sup>67</sup> *A.T. v. Hungary*, *supra* (note 57), para. 8.4.

<sup>68</sup> *Rahime Kayhan v. Turkey* (Communication no. 8/2005), decision on inadmissibility 27 January 2006, Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixty-first session, Suppl. no. 38 (A/61/38), pp. 69–78, para. 7.7.

<sup>69</sup> Article 4(2)(a) of the Optional Protocol.

concerning a different individual. This was confirmed in *Rabime Kayhan v. Turkey*, in which the Committee dismissed the objection made by the State Party that the same matter had already been submitted to the European Court of Human Rights.<sup>70</sup>

The Committee is, in addition, required to declare communications inadmissible where the facts that are the subject of the complaint occurred prior to the Optional Protocol's entry into force for the state concerned, unless those facts continued after that date.<sup>71</sup> This is because the Committee is only competent *ratione temporis* to consider those communications alleging violations of the Convention that occurred after the Optional Protocol entered into force. In *A.S. v. Hungary*, the Committee concluded that although the coerced sterilization of Ms. A.S. preceded the Optional Protocol's entry into force for Hungary, its effects were continuous. Key in this respect was the 'irreversible' nature of sterilization. The Committee explained: 'the success rate of surgery to reverse sterilization is low and depends on many factors, such as how the sterilization was carried out, how much damage was done to the fallopian tubes or other reproductive organs and the skills of the surgeon'.<sup>72</sup> In reaching its decision on this ground, the Committee also took into account the risks associated with reversal surgery, as well as the increased likelihood of ectopic pregnancy following sterilization.<sup>73</sup>

Similarly, in *A.T. v. Hungary*, the Committee observed that although most of the reported incidents of violence took place prior to the Optional Protocol's entry into force for Hungary, the facts demonstrated a clear continuum of regular domestic violence that had 'uninterruptedly characterized the period beginning in 1998 to the present'.<sup>74</sup>

Communications that are incompatible with the provisions of the Convention will also result in a finding of inadmissibility.<sup>75</sup> The question of a communication's compatibility with the Convention arose in *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain*,<sup>76</sup> a complaint concerning succession to a title of nobility. A slim majority of the Committee found the communication inadmissible because the facts of the communication predated the Optional Protocol's entry into force date for Spain. Several Committee members whilst agreeing with the majority's conclusion, in a concurring opinion, justified their decision on the ground of incompatibility with the Convention's substantive provisions.<sup>77</sup> In so doing, they reasoned

<sup>70</sup> *Rabime Kayhan v. Turkey*, *supra* (note 68), para. 7.3.

<sup>71</sup> Article 4(2)(e) of the Optional Protocol.

<sup>72</sup> *A.S. v. Hungary* (Communication no. 4/2004), views adopted 14 August 2006, Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixty-first session, Suppl. no. 38 (A/61/38), pp. 366–379, para. 10.4.

<sup>73</sup> *Ibid.*

<sup>74</sup> *A.T. v. Hungary*, *supra* (note 57), para. 8.5.

<sup>75</sup> Article 4(2)(b) of the Optional Protocol.

<sup>76</sup> *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain* (Communication no. 7/2005), decision on inadmissibility 9 August 2007, Report of the Committee on the Elimination of Discrimination against Women, GAOR, Sixty-second session, Suppl. no. 38 (A/62/38), pp. 474–486 (Mary Shanthi Dairiam dissenting).

<sup>77</sup> *Ibid.*, Individual opinion by Magalys Arocha Dominguez, Cees Flinterman, Pramila Patten, Silvia Pimentel, Fumiko Saiga, Glenda P. Simms, Anamah Tan, Zou Xiaojiao (concurring), p. 482.

‘that the title of nobility ... is of a purely symbolic and honorific nature, devoid of any legal or material effect’.<sup>78</sup> Therefore, it could not form the basis of a communication.

Although conceding that a title to nobility is not a fundamental human right,<sup>79</sup> one Committee member argued in dissent ‘that when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, *in principle*, of women’s right to equality’.<sup>80</sup> She explained:

The entire intent and spirit of the Convention is the elimination of all forms of discrimination against women and the achievement of equality for women. In pursuing this goal, the Convention recognizes, in article 5 (a), the negative effects of conduct based on culture, custom, tradition and the ascription of stereotypical roles that entrench the inferiority of women. The Convention sees this as an impediment to the pursuit of equality for women that has to be eradicated ... Because of its mandate, the Committee ... must be broad in its interpretation and recognition of the violations of women’s right to equality, going beyond the obvious consequences of discriminatory acts and recognizing the dangers of ideology and norms that underpin such acts. A textual reading of article 1 ... as seen in the concurring opinion ... does not take into account the intent and spirit of the Convention. I therefore conclude that the complaint *is* compatible with the provisions of the Convention.<sup>81</sup>

The Committee’s decision in *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain* raises important questions regarding the kinds of communications that will be deemed compatible with the Convention. It is essential, when determining the admissibility of communications, that the Committee considers complaints in light of the Convention’s overall object and purpose of eliminating *all* forms of discrimination against women.

The Committee is also obligated to declare inadmissible communications that are manifestly ill-founded, insufficiently substantiated,<sup>82</sup> or an abuse of the right to submit a communication.<sup>83</sup> A communication may be found manifestly ill-founded if, for example, it is based on an erroneous interpretation of the provisions of the Convention.<sup>84</sup> Communications that fail to provide sufficient factual information and legal argument to substantiate a *prima facie* case against a State Party are likely to be declared insufficiently substantiated. A

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<sup>78</sup> *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain*, *supra* (note 76), p. 482.

<sup>79</sup> *Ibid.*, Individual opinion by Mary Shanthi Dairiam (dissenting), pp. 483–486.

<sup>80</sup> *Ibid.*, p. 484 (emphasis added).

<sup>81</sup> *Ibid.*, p. 485 (emphasis added).

<sup>82</sup> Article 4(2)(c) of the Optional Protocol.

<sup>83</sup> Article 4(2)(d) of the Optional Protocol.

<sup>84</sup> Donna J. Sullivan, ‘Commentary on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’, in Inter-American Institute of Human Rights (ed.), *Optional Protocol: Convention on the Elimination of All Forms of Discrimination against Women* (San Jose, C.R.: Instituto Interamericano de Derechos Humanos, 2000), pp. 31–107, at p. 53.

communication may be deemed an abuse of the right to submit a complaint in circumstances where, for example, it is made with malicious intent.<sup>85</sup>

Should a communication be declared admissible, the Committee shall then examine its merits, determining whether or not the State Party has met its Convention obligations, that is, whether there has been a violation.<sup>86</sup> The Committee shall then issue its views (*i.e.*, findings), together with any recommendations.<sup>87</sup> Whilst not legally binding on States Parties, views, as authoritative interpretations of the Convention, are highly persuasive. Recommendations may aim to address the victim's individual situation, such as in cases where recommendations are made for reparations,<sup>88</sup> or aim to address the underlying causes of the violation, such as in cases proposing domestic law reform,<sup>89</sup> improved training on and public awareness of women's rights,<sup>90</sup> or the elimination of discriminatory gender stereotypes. The Committee may later follow-up on its recommendations by, for example, inviting the State Party to submit in its periodic report further information about any measures adopted in response to the Committee's views and recommendations.<sup>91</sup>

*4.3.2 The Inquiry Procedure.* The Optional Protocol's inquiry procedure, which is regulated in Articles 8 to 10, empowers the Committee to undertake inquiries where it receives *reliable* information indicating *grave* or *systematic* violations by a State Party of rights protected under the Convention. Anyone is entitled to submit information under this procedure for the Committee's consideration. Nevertheless, the decision to initiate an inquiry remains entirely within the Committee's discretion. Only those States Parties that have opted out of the inquiry procedure will be exempt.

Assuming the information received under the inquiry procedure is reliable and concerns alleged grave and/or systematic violations of the Convention by a State Party, the Committee may decide to initiate a confidential inquiry. If deemed warranted, and provided that the State Party agrees, an inquiry may include an on-site visit to the state.

At the conclusion of an inquiry, the Committee shall issues its findings to the state, together with any comments and recommendations. It may also elect to follow-up on its inquiry in order to determine what, if any, measures the state has taken in response to its recommendations. The follow-up mechanism has particular relevance for the inquiry procedure considering that it addresses questions which 'are broader than individual problems, and not likely to be solved by individual answers, legal or administrative'.<sup>92</sup> As one

<sup>85</sup> Sullivan, *supra* (note 84), p. 54.

<sup>86</sup> Article 7 of the Optional Protocol.

<sup>87</sup> Article 7(3) of the Optional Protocol.

<sup>88</sup> *A.T. v. Hungary*, *supra* (note 57), para. 9.6; *A.S. v. Hungary*, *supra* (note 72), para. 11.5.

<sup>89</sup> See, e.g., *A.S. v. Hungary*, *supra* (note 72), para. 11.5.

<sup>90</sup> *Ibid.*, para. 11.5; *Goekce v. Austria*, *supra* (note 60), para. 12.3; *Yildirim v. Austria*, *supra* (note 60), para. 12.3; *A.T. v. Hungary*, *supra* (note 57), para. 9.6.

<sup>91</sup> Article 7(5) of the Optional Protocol.

<sup>92</sup> Maria Regina Tavares da Silva and Yolanda Ferrer Gómez, 'The Juarez Murders and the Inquiry Procedure', in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007),

current and one former Committee member have explained: 'Solutions to grave or systematic violations of women's human rights dealt with by the inquiry procedure may be even of a deep structural and long-standing nature. As such, they may require time to be fully addressed and implemented, not only with respect to the on-going violations, but also with respect to their root causes and their social consequences'.<sup>93</sup>

Like the communication procedure, the inquiry procedure enables the Committee to consider and make determinations on individual violations of the Convention. The Committee could, for instance, decide to inquire into a maternal death occasioned by a state's failure to address the preventable causes of maternal mortality. Yet, what distinguishes the inquiry procedure from the communication procedure is the ability to examine patterns of offending conduct culminating in systematic violations. The significance of this is evidenced most clearly in the Committee's first inquiry under the Optional Protocol, that is, its inquiry into the abduction, rape, and murder of women in Ciudad Juárez, Mexico.<sup>94</sup>

The events culminating in this inquiry can be traced back to 1993, when the number of women abducted, raped, and murdered in Ciudad Juárez skyrocketed.<sup>95</sup> In 2003, the Committee initiated an inquiry into this situation of violence, finding Mexico in violation of the Convention, and in breach of the Declaration on the Elimination of Violence against Women (1967) and General Recommendation no. 19 of the Committee, for its failure to afford women effective protection from gender-based violence.<sup>96</sup> In so doing, it named abduction, rape, and murder as violations of 'women's basic human rights' and 'the most "radical" expressions of gender-based discrimination'.<sup>97</sup> It emphasized that these acts were 'not isolated, sporadic or episodic cases of violence' but rather, 'represent a structural situation and a social and cultural phenomenon deeply rooted in customs and mindsets'.<sup>98</sup> In its view, Mexico was witnessing 'systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority'.<sup>99</sup>

According to the Committee, a comprehensive programme of action was required to address this problem that included, but went beyond combating crime, conducting proper investigations, and punishing those responsible.<sup>100</sup> In its expert view, 'the root causes of gender violence in its structural dimensions and in all its forms ... must be combated, specific policies on gender equality adopted and a gender perspective integrated into all public policies'.<sup>101</sup> In other words, to meet its normative obligations, Mexico needed to implement 'structural changes in a society and in a culture which has permitted and tolerated such human

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pp. 299–309, at p. 304.

<sup>93</sup> *Ibid.*

<sup>94</sup> Ciudad Juárez inquiry, *supra* (note 36).

<sup>95</sup> *Ibid.*, paras. 36–37, 61, 73.

<sup>96</sup> *Ibid.*, paras. 50, 53, 259.

<sup>97</sup> *Ibid.*, para. 36.

<sup>98</sup> *Ibid.*, para. 159.

<sup>99</sup> *Ibid.*, para. 261.

<sup>100</sup> *Ibid.*, para. 161.

<sup>101</sup> *Ibid.*, para. 34.



rights violations'.<sup>102</sup> The Committee therefore called on Mexico, *inter alia*, to: comply with its normative obligations under the Convention;<sup>103</sup> end the culture of impunity surrounding violence against women;<sup>104</sup> implement a 'strategy aimed at transforming existing sociocultural patterns, especially with regard to eradicating the notion that gender violence is inevitable';<sup>105</sup> and, organize, implement and monitor 'ongoing campaigns to eradicate discrimination against women, promote equality between women and men and contribute to women's empowerment'.<sup>106</sup>

## 5. CHALLENGES AHEAD

As the thirtieth anniversary of the adoption of the Convention approaches in 2009, there is much to celebrate. The monitoring process under the Convention has resulted in significant normative development in guaranteeing women's human rights and fundamental freedoms.<sup>107</sup> As a result, understanding about what constitutes discrimination against women has grown, and with it an international consensus about the importance of its elimination. However, despite significant strides, intractable forms of discrimination persist, including discrimination that is exacerbated by stereotypical attitudes,<sup>108</sup> cultures<sup>109</sup> and religions,<sup>110</sup> or both.<sup>111</sup> The final section of this chapter shall review some of these challenges.

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<sup>102</sup> Ciudad Juárez inquiry, *supra* (note 36), para. 161.

<sup>103</sup> *Ibid.*, para. 264.

<sup>104</sup> *Ibid.*, paras. 271–286.

<sup>105</sup> *Ibid.*, para. 287.

<sup>106</sup> *Ibid.*, para. 288.

<sup>107</sup> See, e.g., *Unity Dow v. Attorney-General of Botswana*, 1994 (6) BCLR 1, [1991] LR Commonwealth [Const.] 574; *Vishaka and Others v. State of Rajasthan and Others*, *supra* (note 59); *Maria Da Penha Maia Fernandes v. Brazil*, *supra* (note 21).

<sup>108</sup> Michelle O'Sullivan, 'Stereotyping and Male Identification: "Keeping Women in their Place"', in Christina Murray (ed.), *Gender and the New South African Legal Order* (Kenwyn, South Africa: Juta, 1994), pp. 185–201.

<sup>109</sup> Uche Ewelukwe, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies', in Bert Lockwood (ed.), *Women's Rights* (Baltimore: John Hopkins University Press, 2006), pp. 152–213.

<sup>110</sup> Courtney W. Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (New York: St. Martin's Press, 1999).

<sup>111</sup> Indira Jaising (ed.), *Men's Laws, Women's Lives: Constitutional Perspectives on Religion, Common Law and Culture in South Asia* (New Delhi: Women Unlimited, 2005); Rebecca J. Cook and Lisa Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice Canada, 2006), online: Department of Justice <<http://www.justice.gc.ca/eng/dept-min/pub/poly/index.html>> (last accessed 1 December 2008); Lynn Welchman and Sara Hossain (eds.), *'Honour': Crimes, Paradigms, and Violence against Women* (London: Zed Books; Melbourne: Spinifex, 2005).

### 5.1 Eliminating Discriminatory Gender Stereotyping

Discriminatory gender stereotyping of men and women is one of the most significant challenges threatening the promise of substantive equality. Stereotypes generalize certain attributes to an entire class of persons (*e.g.*, women), and preclude assessment of individuals' particular needs, abilities, and circumstances.<sup>112</sup> A state's decision to deny benefits to or impose burdens on a woman in reliance on a gender stereotype amounts to discrimination when there is a failure to account for her particular situation in a way that diminishes her individual autonomy.<sup>113</sup> Discrimination also occurs where the generalization inherent to the stereotype implies that women are in some way inferior as human beings.<sup>114</sup>

The belief that motherhood is 'women's ultimate and ideal role' is one example of a stereotype that discriminates against women. Stereotyping women into motherhood not only ignores individual women's needs, abilities, and circumstances, but also limits their ability to make decisions about their lives that may conflict with their role as mothers or future mothers. As one former Committee member explains: 'The most globally pervasive of the harmful cultural practices ... is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunities to participate in public life, whether political or economic'.<sup>115</sup> Reliance on this stereotype discriminates against women in that it publicly diminishes women's worth as human beings by insinuating 'that women are by nature less capable of autonomous action than men. This results in a denial of women's status as moral agents and restricts their full participation in all areas of life'.<sup>116</sup>

It is not only stereotypes of women as mothers that threaten women's equal enjoyment of human rights and fundamental freedoms. Gender stereotypes influence all areas of life; their effects can be seen, *inter alia*, in limitations placed on women's reproductive choices,<sup>117</sup> sexual autonomy,<sup>118</sup> and workplace advancement.<sup>119</sup>

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<sup>112</sup> See Rebecca J. Cook and Susannah Howard, 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention', *Emory Law Journal*, vol. 56 (2007) no. 4, pp. 1039–1091, at p. 1043.

<sup>113</sup> See Sophia R. Moreau, 'The Wrongs of Unequal Treatment', *University of Toronto Law Journal*, vol. 54 (2004) no. 3, pp. 291–326, at pp. 298–299.

<sup>114</sup> See *ibid.*, p. 300.

<sup>115</sup> Frances Raday, 'Culture and Religion', in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007), pp. 68–85, at pp. 70–71. See also General Recommendation no. 21, *supra* (note 29), para. 21.

<sup>116</sup> Cook and Howard, *supra* (note 112), p. 1044.

<sup>117</sup> See, *e.g.*, *A.S. v. Hungary*, *supra* (note 72); *K.N.L.H. v. Peru* (Communication no. 1153/2003), views adopted 24 October 2005, Report of the Human Rights Committee, vol. II, GAOR, Sixty-first session, Suppl. no. 40 (A/61/40), pp. 191–199.

<sup>118</sup> See, *e.g.*, *Muojekevo & Ors v. Ejikeme & Ors*, [2000] (5) NWLR 402; (3) [1] CHRLD (Nigeria, Court of Appeal [Enugu]), summary available in Kibrom Isaac, *Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts* (New York: Center for Reproductive Rights; Toronto: International Reproductive and Sexual Health Law Programme, University of Toronto, 2005) online: Center for Reproductive Rights <[http://www.reproductiverights.org/pdf/bo\\_legalgrounds\\_2005.pdf](http://www.reproductiverights.org/pdf/bo_legalgrounds_2005.pdf)> (last accessed 1 December 2008);

States Parties are required by Article 5(a) of the Convention to eliminate prejudices and practices 'based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.<sup>120</sup> Article 2(f) further requires States Parties 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women', while the Convention's Preamble emphasizes the need for 'a change in the traditional role of men as well as the role of women in society and in the family'.<sup>121</sup> Moreover, in its General Recommendation no. 3,<sup>122</sup> the Committee, having illuminated widespread evidence of gender stereotypes in States Parties' periodic reports, called for the adoption of education and public information programmes to 'help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women'.

The Optional Protocol's adoption has enabled the Committee to address the phenomenon of stereotyping with renewed vigour.<sup>123</sup> In *A.T. v. Hungary*, for example, it noted how 'traditional attitudes by which women are regarded as subordinate to men contribute to violence against women'.<sup>124</sup> In this connection, it referred to its earlier concluding observations on periodic reports by Hungary, where it emphasized the 'persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family'.<sup>125</sup> Recalling also General Recommendation no. 19, the Committee, by implication, further highlighted how '[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse'.<sup>126</sup>

Yet, despite the Committee's endeavours so far, discriminatory gender stereotyping remains ubiquitous and far-reaching in its impact. It might be a helpful step for the Committee to develop a general recommendation on discriminatory gender stereotyping to assist States Parties in combating it. In addition, in its concluding observations on state

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*Raquel Martí de Mejía v. Peru*, Inter-American Commission on Human Rights no. 10.970, Annual Report of the Inter-American Commission on Human Rights, 1995, OEA/Ser.L/V/II.91/doc.7 rev. 157; *M.C. v. Bulgaria*, *supra* (note 58).

<sup>119</sup> See, e.g., Committee on Economic, Social and Cultural Rights, General Comment no. 16, *supra* (note 18), paras. 11 and 23.

<sup>120</sup> See Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Ministerie van Sociale Zaken en Werkgelegenheid, Den Haag/Reed Business Information, Doetinchem 2004), online: Emancipatieweb <[http://www.emancipatieweb.nl/uploads/1q/rm/1qrmG3gNd5rK0sTCYDuGiA/Towards\\_Different\\_Law\\_and\\_Public\\_Policy.pdf](http://www.emancipatieweb.nl/uploads/1q/rm/1qrmG3gNd5rK0sTCYDuGiA/Towards_Different_Law_and_Public_Policy.pdf)> (last accessed 1 December 2008).

<sup>121</sup> Preambular paragraph 14 of the Convention.

<sup>122</sup> General Recommendation no. 3 (1987), education and public information campaigns, UN doc. HRI/GEN/1/Rev.8, p. 290.

<sup>123</sup> See *A.T. v. Hungary*, *supra* (note 57); *Yildirim v. Austria*, *supra* (note 60); *Goeke v. Austria*, *supra* (note 60); *Ciudad Juárez inquiry*, *supra* (note 36); *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain*, *supra* (note 76).

<sup>124</sup> *A.T. v. Hungary*, *supra* (note 57), para. 9.4.

<sup>125</sup> *Ibid.*

<sup>126</sup> General Recommendation no. 19, *supra* (note 22), para. 11.

reports and its views under the two Optional Protocol procedures, the Committee might usefully name and define the different and compounded discriminatory gender stereotypes under consideration. It could also provide reasons why the operative gender stereotypes harm and discriminate against women and impede the realization of substantive equality.

## 5.2 Engaging Culture and Religion

The Convention has had a marked impact advancing women's rights, from its use in litigation before domestic courts,<sup>127</sup> incorporation into domestic law or policy,<sup>128</sup> to an advocacy tool for raising awareness of the importance of guaranteeing the human rights and fundamental freedoms of women.<sup>129</sup> However, the Convention has yet to be fully used to engage with discriminatory laws, policies and practices rooted in cultures and religions, in part due to the continuing legacy of tradition-based reservations. It has been explained that when States Parties complain about the impermissibility of such reservations, they have been silenced by charges of religious intolerance and cultural imperialism.<sup>130</sup> In contrast, when women's groups within reserving States Parties have opposed them by challenging the interpretations on which they are based, and stressing the internally contested and evolving nature of culture and religion,<sup>131</sup> they are harder to de-legitimize.

Women worldwide are increasingly challenging customary and religious laws, and are using their rights to construct their own cultural and religious identities. This momentum has helped to move beyond the dichotomous approaches of either repudiating static traditions of the past, or promoting women's rights for the future, to understanding how claims for women's equality might more effectively build on traditions.<sup>132</sup> It might be asked how this momentum to reinterpret traditions in ways that empower women's individual and collective identities can be extended. The answers to this question are a work in process, but some suggestions are discussed in the remainder of this section.

*Understanding the historical, social, political, cultural and religious context of offending laws, policies or practices in order to challenge 'widespread unreflective assumptions about what national "culture and*

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<sup>127</sup> See, e.g., *Unity Dow v. Attorney-General of Botswana*, *supra* (note 107); *State v. Filipe Bechu*, in Christine Forster et al. (eds.), *A Digest of Case Law on the Human Rights of Women (Asia Pacific)* (Chiangmai, Thailand: Asia Pacific Forum on Women Law and Development, 2003), pp. 54–55; *R. v. Ewanchuk*, *supra* (note 59); *Vishaka and Others v. State of Rajasthan and Others*, *supra* (note 59).

<sup>128</sup> See, e.g., Robyn Emerton et al. (eds.), *International Women's Rights Cases* (London: Cavendish, 2005); Vedna Jivan and Christine Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries* (Suva, Fiji: UNDP Pacific Centre and UNIFEM Pacific Regional Office, 2007).

<sup>129</sup> See, e.g., Shanthi Dairiam, 'From Global to Local: The Involvement of NGOS', in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007), pp. 313–325.

<sup>130</sup> Ann Elizabeth Mayer, 'A Benign Apartheid: How Gender Apartheid has been Rationalized', *UCLA Journal of International Law and Foreign Affairs*, vol. 5 (2001–2002) no. 2, pp. 237–338, at p. 271.

<sup>131</sup> Madhavi Sunder, 'Piercing the Veil', *Yale Law Journal*, vol. 112 (2003) no. 6, pp. 1399–1472, at pp. 1425–1427.

<sup>132</sup> Katherine T. Bartlett, 'Tradition, Change, and the Idea of Progress in Feminist Legal Thought', *Wisconsin Law Review*, (1995) no. 2, pp. 303–343, at pp. 305, 313–325.

"values" are'.<sup>133</sup> Contextual familiarity is important to ensuring accurate documentation of the human rights violation and its causes, which are essential to fashioning effective remedies.

*Questioning the laws, policies or practices offending constitutional or human rights principles, and not the culture or religion on which they are allegedly based.* It is important to understand what role customary or religious laws played originally, what benefits they served then and now, and what harms or benefits they caused to women and why. The South African Constitutional Court adopted this approach, where it held an African customary law of succession barring women and girls from inheritance because of their sex and race unconstitutional. The Court explained that the customary law has not been given the space to 'adapt and to keep pace with changing social conditions and values'.<sup>134</sup>

*Enabling internal and cross-cultural dialogue through the Convention's various procedures that fosters debate about how cultural and religious traditions can be reinterpreted in order to eliminate discrimination against women.* Some argue that human rights strategies too readily assign culture<sup>135</sup> and religion<sup>136</sup> to the role of the violator, thereby missing opportunities for women and men within cultures and religions to promote equality within those communities. It is important to identify when culture and religion have not kept pace with changing social conditions and values.<sup>137</sup>

It might be said that it is a tall order for the international human rights system to meet these above-mentioned challenges, but if *all forms* of discrimination are to be eliminated, they must be addressed.

### 5.3 *Evolving in a Globalizing World*

In the context of today's globalizing world wherein borders between international and domestic law are fast collapsing, the phenomenon of borrowing and lending jurisprudence across jurisdictions has become commonplace.<sup>138</sup> As a partial consequence of this trend, a transnational dialogue on the protection of women's rights is emerging between international, regional, and national adjudicative bodies. Owing to this process of cross-fertilization, understanding of the normative principles of eliminating all forms of discrimination against women and ensuring substantive equality continues to improve. Still, universal acceptance and understanding of these principles remains an unrealized goal.

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<sup>133</sup> Uma Narayan, *Dislocating Cultures: Identity, Traditions, and Third-World Feminism* (New York: Routledge, 1997), pp. 34, 43–80.

<sup>134</sup> *Bhe and Others v. The Magistrate, Khayelitsha and Others*, [2005] 1 B.C.L.R. 1 (S. Afr. Const. Ct.), para. 82.

<sup>135</sup> See Celestine Nyamu-Musembi, 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights', in Abdullahi A. An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa* (London: Zed Books, 2002), pp. 126–150.

<sup>136</sup> Sunder, *supra* (note 131), pp. 1433–1441.

<sup>137</sup> *Bhe and Others v. The Magistrate, Khayelitsha and Others*, *supra* (note 134).

<sup>138</sup> See, e.g., Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, vol. 20 (2000) no. 4, pp. 499–532.

As dialogue between these bodies deepens, the Committee's role in elaborating the specific obligations of States Parties under the Convention will be key. It is important therefore that the Committee carefully articulates the reasoning underlying its decisions. As one commentator has observed: 'The effects of its decisions are likely to be enhanced if the Committee's decisions incorporate full explanations of its reasoning with regard to both the facts and the law, since national courts and other officials will be more likely to take a thoroughly reasoned decision into account'.<sup>139</sup>

It is also important that the Committee takes advantage of its unique position as an international expert treaty body to raise awareness of national case law advancing the position of women. In this connection, one former Committee member has suggested that the Committee use its concluding observations 'to seek more information on ... national case law, and reflect further on the potential for both women victims of discrimination and their lawyers and judges to use the Convention and the Committee's general recommendations in the domestic Courts'.<sup>140</sup> The same Committee member further explained: 'Specific reference to case law in concluding comments can help to expand the scope for integrating CEDAW standards in domestic courts, as well as legislation and policy, and stimulate a "traveling jurisprudence" on women's rights that can fertilize domestic law in other jurisdictions of States Parties to the Convention'.<sup>141</sup> In addition to stimulating a traveling jurisprudence, the Committee can facilitate the migration of equality norms for women, and in so doing enhance understanding of the laws, policies and practices necessary for the elimination of *all forms* of discrimination against women.

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<sup>139</sup> Donna Sullivan, 'The Optional Protocol to CEDAW & its Applicability "On the Ground"', online: Association for Women's Rights in Development (AWID), <<http://www.awid.org/eng/Issues-and-Analysis/Library/The-Optional-Protocol-to-CEDAW-its-applicability-on-the-ground/%28language%29/eng-GB>> (last accessed 1 December 2008).

<sup>140</sup> Goonesekere, *supra* (note 23), p. 64.

<sup>141</sup> *Ibid.*