

# **Violence against Women as Sex Discrimination: Evaluating the Policy and Practice of the UN Human Rights Treaty Bodies**

## **Abstract**

*Violence against women is one of the greatest threats to women's equality and equal enjoyment of human rights. Yet, there is no single treaty provision explicitly prohibiting violence against women within any of the eight 'core' international human rights treaties, nor a binding international treaty specifically on the issue. In the work of the UN human rights treaty bodies, one of their approaches to recognising violence against women has been to subsume it within the guarantees to equality and non-discrimination on the basis of sex. This article examines the meanings given to these concepts and inquires into whether this approach to what is an obvious gender gap in the international human rights framework is effective.*

*'Violence against women is a political act: its message is "stay in your place or be afraid."'*<sup>1</sup>

## **A. INTRODUCTION**

On the concluding day of the Fourth World Conference on Women in Beijing in 1995, the Secretary-General of the United Nations declared that: 'The movement for gender equality the world over has been one of the defining developments of our time.'<sup>2</sup> He added that, despite progress made, 'much, much more remains to be done.'<sup>3</sup> On this path to equality, violence against women has featured as a clear obstacle to women's enjoyment of other human rights, in particular their rights to be treated in equality and with dignity.

Violence suffered by women is a global crisis that is a shared experience of women and girls<sup>4</sup> across historical periods, countries and cultures.<sup>5</sup> During their lives, women and girls may be subjected to a range of life-threatening violence, including 'honour' killings, acid violence, bride burning, domestic violence, or maternal death.<sup>6</sup> The conflicts in Rwanda and the former Yugoslavia in the 1990s brought renewed focus to

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<sup>1</sup> C. Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *HRQ* 486, 491.

<sup>2</sup> Statement of the UN Secretary-General, Boutros Boutros-Ghali, on the concluding day of the Fourth World Conference on Women, Beijing, 15 Sept. 1995, 'Introduction' to *Platform for Action and the Beijing Declaration*, UN Dept. of Public Information, 1996, 2.

<sup>3</sup> *Ibid.*

<sup>4</sup> Throughout this article, reference to women includes girls or girl-children. A child is defined as a 'human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.' (Art. 1, Convention on the Rights of the Child 1989).

<sup>5</sup> UN, *The World's Women 2005: Progress in Statistics*, Ch. 5: Violence against women, 69.

<sup>6</sup> UNICEF, *The State of the World's Children: Women and Children The Double Dividend of Gender Equality* (2007). See, also, Plan International, *Because I am a Girl: The State of the World's Girls 2007* [http://www.reliefweb.int/rw/lib.nsf/db900SID/TBRL-73ARJL/\\$FILE/plan-becauseiamagirl-may2007.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/TBRL-73ARJL/$FILE/plan-becauseiamagirl-may2007.pdf?OpenElement).

genocide as a heinous crime committed during armed conflict, with belated acknowledgement that women were exposed to particular forms of genocide, including through the use of rape and sexual violence.<sup>7</sup> Such forms of violence against women have continued into other conflicts.<sup>8</sup> Female genital mutilation remains a problem in many societies and has been declared a human rights violation by the World Health Organization.<sup>9</sup> According to the United Nations Population Fund, up to sixty million girls and women are missing from Asian populations due to sex-selective abortions and infanticide.<sup>10</sup> Amartya Sen has suggested that the figure is closer to over 100 million, caused in part by low literacy, education, and lack of economic opportunities for women.<sup>11</sup> Around 800,000 persons, mainly women and children, are estimated to be trafficked each year, largely for sexual exploitation and slavery.<sup>12</sup> According to the UN, violence is perpetrated against women and girls in all societies, in both conflict and in peacetime, and it 'cuts across lines of income, class and culture.'<sup>13</sup>

Despite extensive evidence and statements regarding the scale and serious effects of violence, the UN and its system of international law have been slow to recognise the issue officially as of concern. In particular, there is no single treaty provision explicitly prohibiting violence against women within any of the eight 'core' human rights treaties,<sup>14</sup> nor a binding international treaty specifically on the issue.<sup>15</sup> Because of this omission, the UN human rights treaty bodies or committees with responsibility for overseeing the implementation of treaty obligations by states parties, have sought

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<sup>7</sup> See, e.g., S.L. Russell-Brown, 'Rape as an Act of Genocide' (2003) 21 *Berkeley J. Int'l L.* 350, 355; R. Copelon, 'Gendered War Crimes: Reconceptualizing Rape in Time of War', in J. Peters & A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York, 1995) 197, 205-206.

<sup>8</sup> See, *Prosecutor v. Ahmad Muhammad Harun, Prosecutor v. Al Abd-Al-Rahman*, ICC-02/05-0/07, 27 Apr. 2007, in which the defendants are charged with rape as crimes against humanity and war crimes in relation to the conflict in Darfur, Sudan.

<sup>9</sup> WHO, World Health Organisation's Fact Sheet No. 241 (June 2000), available at: <http://www.who.int/mediacentre/factsheets/fs241/en/>. See, also, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, 'Cultural practices in the family that are violent towards women', UN Doc. E/CN.4/2002/83, 31 Jan. 2002, pp.9-10

<sup>10</sup> UN Population Fund, *State of the World's Population*, 2005.

<sup>11</sup> A. Sen, 'More than 100 million women are missing', *New York Review of Books*, 20 Dec. 1990, 61.

<sup>12</sup> Accurately determining the number of victims of trafficking is difficult. According to the US Department of State, between 600,000 – 800,000 individuals are trafficked annually. U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 6* (2005), available at <http://www.state.gov/documents/organization/47255.pdf>.

<sup>13</sup> *Ibid.*

<sup>14</sup> The 'core' human rights treaties are the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the International Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, the International Convention on the Rights of Migrant Workers and Members of their Families 1990, and the International Convention on the Rights of Persons with Disabilities 2006. Many of these treaties do however deal with particular forms of violence, which may be perpetrated against women or girls.

<sup>15</sup> There are two regional instruments that deal with violence against women: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (33 I.L.M. 1534 (1994); entered into force 5 Mar. 1995) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the African Union, Maputo, 11 July 2003; entered into force 25 Nov. 2005).

to incorporate violence against women as an issue of concern by applying gendered interpretations to existing provisions.<sup>16</sup> One way they have sought to achieve this is by characterising violence against women as a form of sex discrimination. For the purposes of this article, violence against women is understood to encompass, but is not limited to, any act or threat of physical, sexual, or psychological violence perpetrated against women.<sup>17</sup>

In this article, I explore how the concepts of equality and non-discrimination on the basis of sex have been interpreted and applied to various forms of violence against women by the UN human rights treaty bodies. How are sex discrimination and inequality understood under international law? What has this meant for the inclusion of women and their lives within these prohibitions? What progress has been made, if any, since the adoption of the UN Charter? In particular, I consider whether treating violence against women as sex discrimination has been effective in filling this obvious gender gap in international law. But, first, I provide a brief overview of the treaty bodies.

## B. THE UN HUMAN RIGHTS TREATY BODIES

International supervision of the implementation by states parties of most of their international human rights treaty obligations is carried out by independent committees, called treaty bodies. As at June 2008, the UN human rights treaty body system includes eight international treaty bodies that oversee the implementation of eight human rights treaties.<sup>18</sup> Of these, I am interested in the work of the Human Rights Committee (HRC), which monitors the International Covenant on Civil and Political Rights 1966 (ICCPR);<sup>19</sup> the Committee on Economic, Social and Cultural Rights (CERD) (the International Covenant on Economic, Social and Cultural Rights 1966 (ICERD));<sup>20</sup> the Committee on the Elimination of Racial Discrimination

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<sup>16</sup> See, e.g., A. Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19(2) *Leiden J. Int'l L.* 349.

<sup>17</sup> This definition is taken from Art. 2, Declaration on the Elimination of Violence against Women 1993, although it is wider than that definition (GA res. 48/104, 20 Dec. 1993; UN Doc. A/RES/48/104, 23 Feb. 1994). For background on the UN and violence against women, see J. Joachim, 'Shaping the Human Rights Agenda: The Case for Violence against Women', in M.K. Meyer and E. Prügl (eds.), *Gender Politics in Global Governance* (Rowman & Littlefield Publishers, Lanham, Boulder, 1999) 142 and S. Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

<sup>18</sup> These are the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of All Forms of Discrimination against Women, the Committee against Torture, the Committee on the Rights of the Child, the Committee on the Rights of Migrant Workers, and the Committee on the Rights of Persons with Disabilities. See, further, Office of the High Commissioner for Human Rights, 'The United Nations Human Rights Treaty System: An Introduction to the core human rights treaties and the treaty bodies', Fact Sheet No. 30, undated, available at: [www.unhchr.org](http://www.unhchr.org). There are a range of other human rights treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide (GA res. 260 A (III), 9 Dec. 1949, entered into force 12 Jan. 1951) and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 (opened for signature 21 Mar. 1950, entered into force 25 June 1951, 96 U.N.T.S. 273), however, these treaties do not establish monitoring mechanisms in the same way as those listed in the text.

<sup>19</sup> International Covenant on Civil and Political Rights, opened for signature 16 Dec. 1966, entered into force 23 Mar. 1976, S. EXEC. DOC. E, 95-2 (1978), 6 I.L.M. 368.

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 Dec. 1966, entered into force 3 Jan. 1976, 993 U.N.T.S. 3.

(CERD) (International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD));<sup>21</sup> and the Committee on the Elimination of Discrimination against Women (the Women's Committee) (the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)).<sup>22</sup> They are established pursuant to the treaty they monitor or by other UN resolution.<sup>23</sup> The committees are composed of independent experts of 'high moral character and recognized competence in the field of human rights',<sup>24</sup> who sit on a part-time basis.<sup>25</sup>

The functions of these treaty bodies are four-fold. First, the treaty bodies receive and examine reports submitted by states parties on a periodic basis.<sup>26</sup> Second, the treaty bodies have developed the practice of issuing authoritative statements or guidance to states parties on the meaning of substantive rights, the obligations of states parties, and other common issues (known as either General Comments or General Recommendations).<sup>27</sup> Third, two of these treaty bodies have jurisdiction to receive and consider inter-state communications relating to a dispute between two states parties,<sup>28</sup> although no such communications have ever been lodged. Fourth, the majority of the committees receive and consider petitions by individuals alleging violation of one or more of their human rights by a state party (known as 'individual communications').<sup>29</sup> In addition, the CERD and the Women's Committee have additional mechanisms to conduct fact-finding inquiries.<sup>30</sup> The views expressed by the treaty bodies in the carrying out of these functions make up what is loosely known as the 'jurisprudence' of the treaty bodies, which is the focus of this article.

### **C. FEMINIST CRITIQUES OF INTERNATIONAL HUMAN RIGHTS LAW AND THE EQUALITY GUARANTEES**

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<sup>21</sup> International Convention on the Elimination of All Forms of Racial Discrimination, GA res. 2106 (XX), 21 Dec. 1948, *entered into force* 4 Jan. 1951.

<sup>22</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* 18 Dec. 1979, *entered into force* 3 Sept. 1981, 1249 U.N.T.S. 13.

<sup>23</sup> HRC (Art. 8, ICCPR); CESCR (ECOSOC res. 1985/17, 28 May 1985); CERD (Part III, ICERD); Women's Committee (Part V, CEDAW).

<sup>24</sup> HRC (Art. 28, ICCPR); CESCR (para. (b), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women's Committee (Art. 17, CEDAW).

<sup>25</sup> HRC (normally 3 sessions per year of 3 weeks' duration, with Working Group on Communications meeting prior to that); CERD (2 sessions per year for 3 weeks and 1 week pre-session working group); CEDAW (2 sessions per year of 3 weeks); the Women's Committee (Art. 20, CEDAW originally envisaged 'not more than 2 weeks annually').

<sup>26</sup> HRC (Art. 40, ICCPR); CESCR (Art. 17, ICESCR); CERD (Art. 9, ICERD); Women's Committee (Art. 18, CEDAW).

<sup>27</sup> These are not explicitly provided for in the treaties themselves, but developed from practice drawing on vague language in some of the treaties relating to state party reporting: see, e.g., Art. 41, ICCPR: 'may transmit its reports, and such general comments as it may consider appropriate ...'

<sup>28</sup> HRC (Art. 41, ICCPR – on an optional basis – subject to declaration accepting the jurisdiction of the Committee); CERD (Art. 11, ICERD).

<sup>29</sup> HRC (Optional Protocol to the ICCPR, GA res. 2200 A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976); CERD (Art. 14, ICERD); Women's Committee (Optional Protocol to the CEDAW, GA res. A/54/4, 6 Oct. 1999; entered into force 22 Dec. 2000)

<sup>30</sup> The CERD has developed an *ad hoc* early warning or urgent procedure in order to prevent the escalation of situations into conflict or to prevent resumption of hostilities, based on a working paper (Committee on Elimination of Racial Discrimination, UN Doc. A/48/18, paras. 15-19 and Annex 3); the Optional Protocol to the CEDAW, GA res. 54/4, 6 Oct. 1999 (entered into force 22 Dec. 2000) has the capacity to undertake confidential inquiries when it receives reliable information of grave or systematic violations.

Animating feminist theories of the international legal system is the exclusion of women from mainstream human rights norms, processes, and institutions. In this article, I adopt Janet Halley's three-tiered definition of feminism. First, to qualify as a feminist argument, a distinction must be made between men/male/masculine (which she refers to as '*m*') and women/female/feminine (which she refers to as '*f*'). Second, feminism must posit some kind of subordination between *m* and *f*, in which *f* is the disadvantaged or subordinated element. Third, in opposing this subordination and in attempting to eradicate it, 'feminism carries a brief for *f*.'<sup>31</sup> I also agree with Nancy Levit and Robert Verchick's identification of two shared features of all feminist theories – the first is *an observation* - the world has been shaped by men, particularly white men, who for this reason possess larger shares of power and privilege; the second is *an aspiration* - all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and on how to achieve it.<sup>32</sup>

Broadly speaking, feminist scholars argue that international human rights law is conceived as a set of 'male' rights.<sup>33</sup> By 'male' rights, feminists mean that rights are 'defined by the criterion of what men fear will happen to them';<sup>34</sup> that the content of the rules of international law privilege men and fail to acknowledge, or otherwise marginalise or silence, women's interests;<sup>35</sup> and the very choice and categorisation of subject matter deemed appropriate for international regulation reflects male priorities.<sup>36</sup> In this way, the system of international law is said to be a 'thoroughly gendered system.'<sup>37</sup> The omission of an explicit prohibition on violence against women is an example in point. Moreover, feminist theory criticises international human rights law for adopting the 'male' sex as the standard against which all individuals are judged. Women become the deviation from this standard.<sup>38</sup> In short,

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<sup>31</sup> J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006), 17-18.

<sup>32</sup> N. Levit and R.R.M. Verchick, *Feminist Legal Theory: A Primer* (New York University Press, 2006), 15-16.

<sup>33</sup> See, e.g., R. Eisler, 'Human Rights: Toward an Integrated Theory for Action' (1987) 9 *HRQ* 287; C. Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *HRQ* 486; H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *Amer. J. Int'l L.* 613; R.J. Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 *HRQ* 230; H. Charlesworth and C. Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 *HRQ* 63; H. Charlesworth, 'Human Rights as Men's Rights', in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York, 1995), 103; G. Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *HRQ* 509, 514.

<sup>34</sup> H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *Amer. J. Int'l L.* 613, 628-30; H. Charlesworth and C. Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 *HRQ* 63; C. Bunch, 'Transforming Human Rights from a Feminist Perspective', in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York, 1995) 11, 13.

<sup>35</sup> H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *Amer. J. Int'l L.* 613, 614-615.

<sup>36</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), 18.

<sup>37</sup> *Ibid.*

<sup>38</sup> C.A. Littleton, 'Equality and Feminist Legal Theory' (1987) 48 *U. Pitt. L. Rev.* 1043, 1050-1052; N. Naffine, 'Sexing the Subject (of Law)', in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (Oxford University Press, Oxford, 1995) 18, 24-25; S.L. Bem, *The lenses of gender* (Yale University Press, New Haven, 1993), 2; C. Gould, 'The Woman Question: Philosophy of Liberation and the Liberation of Philosophy', in C. Gould and M.W. Wartofsky (eds.), *Women and Philosophy:*

women are an exception to the rule. Meanwhile, governments accept and promote this perspective as the rule of law.<sup>39</sup>

A sub-set of the above critique is the distinction drawn between the public and private spheres of everyday life for the purposes of international legal rules. As international law privileges the public sphere of life over the private, and thereby refuses to recognise the 'specificity of the female life in the private sphere,'<sup>40</sup> it ignores, marginalises, or silences women's concerns. This so-called public/private dichotomy is said to be the source of women's exclusion from international law, in particular because it is manifest in the theory of state responsibility for human rights abuses.<sup>41</sup> The boundaries between the 'public' and the 'private' and the allocation of men and women thereto, are 'deeply political and inherently constructed.'<sup>42</sup>

On a practical level, the effect of distinguishing between the public and the private has 'rendered invisible' or at least, less important, the many violations that women suffer in private.<sup>43</sup> Excluding violence against women from the human rights agenda arises from a failure to see the oppression of women as political.<sup>44</sup> In this way, it leaves the private or family realm, where the majority of women spend the bulk of their lives, unregulated, unprotected, and susceptible to abuse.<sup>45</sup> Many violent acts committed against women at the hands of men occur prior to or without direct state

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*Toward A Theory of Liberation* (Putnam, New York, 1976), 5-6; B.E. Hernández-Truyol, 'Women's Rights as Human Rights – Rules, Realities and the Role of Culture: A Formula for Reform' (1996) XXI *Brook. J. Int'l L.* 605, 651; K. Mahoney, 'Theoretical Perspectives on Women's Human Rights and Strategies for the Implementation' (1996) 12 *Brook. J. Int'l L.* 799; U.A. O'Hare, 'Realizing Human Rights for Women' (1999) 21 *HRQ* 364, 365-366; C.A. MacKinnon, 'Rape, Genocide, and Women's Human Rights' (1994) 17 *Harv. Women's L. J.* 5.

<sup>39</sup> B.E. Hernández-Truyol, 'Women's Rights as Human Rights – Rules, Realities and the Role of Culture: A Formula for Reform' (1996) XXI *Brook. J. Int'l L.* 605, 651.

<sup>40</sup> N. Naffine, 'Sexing the Subject (of Law)', in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) 18, 20 and 32.

<sup>41</sup> U.A. O'Hare, 'Realizing Human Rights for Women' (1999) 21 *HRQ* 364, 368. See, also, H. Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (1993) 1; K.M. Culliton, 'Finding a Mechanism to Enforce Women's Rights to State Protection from Domestic Violence in the Americas' (1993) 34 *Harv. Int'l L. J.* 507; A.P. Ewing, 'Establishing State Responsibility for Private Acts of Violence against Women under the American Convention on Human Rights' (1995) 26 *Colum. Hum. Rts. L. Rev.* 751; C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University Pennsylvania Press, Philadelphia, 1994) 85; C. Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) *Eur. J. In'tl L.* 387.

<sup>42</sup> V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Feminist Debates in Feminist Theory* (Hart Publishing, Oxford, 2007), 13.

<sup>43</sup> A. Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' (1997) 19 *HRQ* 283, 290; G. Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *HRQ* 509, 515-6; C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University Pennsylvania Press, Philadelphia, 1994) 85; C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harv. Hum. Rts. J.* 87, 87.

<sup>44</sup> C. Bunch, 'Transforming Human Rights from a Feminist Perspective', in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York, 1995) 11, 14.

<sup>45</sup> C. Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *HRQ* 486; H. Charlesworth, 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 *Wash. and Lee L. Rev.* 781.

involvement.<sup>46</sup> At the domestic level, for example, women have trouble convincing law enforcement officials that violent acts within the home are criminal.<sup>47</sup> At the international level this is translated into difficulties women face in convincing the international community that domestic violence is of international, in addition to national, concern.

While there is general agreement among feminist scholars that the international human rights legal system could do more to address the particular concerns of women, there is far less agreement as to the reasons for women's exclusion, how the system may be reformed to be more inclusive, or whether it is capable of being transformed.

Equality and non-discrimination provisions, although considered central tenets of human rights law, have been especially criticised by feminist scholars. Originally believed to be the great hope for the international human rights system in its treatment and responses to women, rights to equality and non-discrimination on the basis of sex have come under considerable scrutiny. In particular, the initial model employed by international institutions assumed a female to male progression or, as Byrnes puts it, 'if men are entitled to something, then women should be entitled to the same thing; whereas true equality may involve the reworking of the core concept of the right to ensure that women enjoy that right fully.'<sup>48</sup>

Noreen Burrows contends that human rights norms seek to place women in the same situation as men,<sup>49</sup> and this therefore fails to account for any differences. Increasingly, feminist theorists have taken issue with this approach to equality as assimilation, arguing that it fails to take account of situations in which men and women are not or cannot be similarly situated and it does not allow space for 'deep-seated reform required to realise substantive gender equality' but instead accepts the existing system as legitimate.<sup>50</sup> '[T]he prohibition of discrimination is not a prohibition of differentiation ... [D]istinctions are prohibited only to the extent that they are unfavourable. Equality could easily be transformed into injustice if it were to be applied to situations which are inherently unequal.'<sup>51</sup> It has also been asserted that the orientation of the CEDAW around non-discrimination will not compel 'a broader, nonrights-based examination of female subordination' because Article 1 defines discrimination in terms of unequal rights.<sup>52</sup> For some scholars, the paradigm of 'equality as parity' employed in the CEDAW [and other international instruments]

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<sup>46</sup> C. A. MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (M. Nijhoff, Dordrecht, 1993) 21, 25.

<sup>47</sup> D. Russell and N. Van de Ven (eds.), *Crimes against Women: Proceedings of the International Tribunal* (1984) 58-67, 110-175.

<sup>48</sup> A. Byrnes, 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues' (1992) 12 *Aust. Y B Int'l L.* 205, 224.

<sup>49</sup> N. Burrows, 'International Law and Human Rights: The Case of Women's Rights', in T. Campbell et al. (eds.), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, New York, 1986) 8, 93-95.

<sup>50</sup> V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Feminist Debates in Feminist Theory* (Hart Publishing, Oxford, 2007), 16.

<sup>51</sup> F. Krill, 'The Protection of Women in International Humanitarian Law' (1985) *Int'l Rev. Red Cross* 337, 339.

<sup>52</sup> J. Ulrich, 'Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' (1999-2000) 7 *Ind. J. Global Legal Stud.* 629, 643.

fails to recognise that ‘equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.’<sup>53</sup>

Although there have been some shifts away from traditional constructions of equality, as the latter part of this article demonstrates, the traditional equality paradigm remains the dominant framework, even after Beijing.<sup>54</sup> The international legal system has had difficulty dealing with multiple forms of discrimination, and the tendency to elide the concepts of equality and non-discrimination is said to limit their ‘transformative possibilities,’ in particular by limiting equality to a guarantee of equal opportunity.<sup>55</sup> International law has also developed a hierarchy of forms of discrimination in which race discrimination is considered more serious than other forms of discrimination.<sup>56</sup>

With these critiques in mind, this article now turns to examine the meaning of these terms generally, followed by their application to violence against women specifically.

#### **D. EQUALITY AND NON-DISCRIMINATION: GENERAL CONCEPTS**

‘[E]quality before the law is in a substantial sense the most fundamental of the rights of man/[sic]. It occupies the first place in most written constitutions. It is the starting point of all other liberties.’<sup>57</sup> ‘[I]t is philosophically related to the concepts of freedom and justice.’<sup>58</sup> The principle of equality has been recognised as one of the fundamental principles of liberal democracies and government by the rule of law, and has been absorbed into many legal systems,<sup>59</sup> including under international law. But some have considered ‘equality’ as so vague and so wide a term that it is almost meaningless.<sup>60</sup> So what do these terms mean generally, and how have they been interpreted under international law?

In spite of the centrality of principles of equality and non-discrimination in law, they are deeply contested concepts. As ideals of justice they are well accepted principles,<sup>61</sup>

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<sup>53</sup> H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’ (1991) 85 *Amer. J. Int’l L.* 613, 630; M. Etienne, ‘Addressing Gender-Based Violence in an International Context’ (1995) 18 *Harv. Women’s L. J.* 139, 148.

<sup>54</sup> R.J. Cook, ‘Advancing International Law Regarding Women’ (1997) 91 *Amer. Soc’y Int’l L. Proc.* 308, 316.

<sup>55</sup> H. Charlesworth, ‘Concepts of Equality in International Law’, in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 143-147. See, further, N. Lacey, ‘Legislation Against Sex Discrimination: Questions from a Feminist Perspective’ (1987) 14 *J. L. & Soc’y* 411.

<sup>56</sup> H. Charlesworth, ‘Concepts of Equality in International Law’, in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 143-147.

<sup>57</sup> Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (1945), 115.

<sup>58</sup> *South West Africa Cases* (xxxx) 1962 ICJ Rep. 319; 1966 ICJ Rep. 4, 303 (per Tanaka J.).

<sup>59</sup> Daniel Moeckli reports that 111 states guarantee some form of equality in written constitutions: D. Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’* (Oxford University Press, 2008).

<sup>60</sup> J.F. Stephen, *Liberty, Equality, Fraternity* (Cambridge University Press, 1873), 201, as referred to in W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) 2.

<sup>61</sup> This was not always the case, and remains a challenge in some countries. Early formulations of equality and non-discrimination were directed at equality between *men* of different religious, nationality, or linguistic minorities, or even limited to different classes: see, D. Moeckli, *Human Rights*



but their content is less obvious. At one end of the spectrum of views on equality is the liberal democratic tradition of equality as the comparison of similar situations.<sup>62</sup> This is also referred to as the Aristotelian view of equality as ‘treating like alike,’<sup>63</sup> or that persons in similar positions should not be treated unequally.<sup>64</sup> The problem with this view is that it does not address what differences are relevant to determining whether individuals are equals or unequals.<sup>65</sup> In terms of equality between men and women it is problematic on two levels. First, it assumes that the point of comparison is male; and second, it cannot be applied where a comparable male is missing.<sup>66</sup> This view of equality has largely been translated into national modern laws of equality of opportunity (or formal equality). That is, any distinction, exclusion, or restriction must not be arbitrary, but should be justified on the basis of objective and reasonable criteria. It generally requires equality *de jure*, rather than *de facto*. Formal equality in the form of equality before the law and equal rights are at the centre of liberal feminist goals in relation to women’s equal participation in employment, the economy, and education.<sup>67</sup>

The alternative approach to equality of access is in terms of outcome (or substantive equality). This formulation may envisage social justice as the end objective, albeit with a particular standard of social justice in mind. It permits deviations from strict equality, such as ‘special measures’ or differences in treatment, designed to elevate persons to that standard.<sup>68</sup> Substantive equality can be achieved for example through positive or affirmative action, protective or corrective measures, re-characterisation of human rights, or a gender-sensitive discrimination principle.<sup>69</sup> Due to its limited consideration of women’s structural disadvantage, especially in the private sphere, formal equality is rejected. Instead, substantive equality is promoted as it offers more hope to bring about ‘effective and genuine equality.’<sup>70</sup>

The concept of equality further arouses debate around issues of what distinctions can be justified as compatible with equality principles and upon what criteria should those distinctions be judged; determining whether or not intention is a requirement for

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and Non-Discrimination in the ‘War on Terror’ (Oxford University Press, 2008) for an excellent summary of the origins of the principles of equality and non-discrimination generally.

<sup>62</sup> B. Gaze, ‘Some Aspects of Equality Rights: Theory and Practice’, in B. Galligan & C. Sampford (eds.), *Rethinking Human Rights* (Federation Press, 1997) 189, 190.

<sup>63</sup> C.A. MacKinnon, ‘Equality Remade: Violence Against Women’, in C.A MacKinnon, *are women human? And Other International Dialogues* (Harvard University Press, 2006) 105.

<sup>64</sup> W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) 3.

<sup>65</sup> W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) 3.

<sup>66</sup> K. Frostell, ‘Gender Difference and the Non-Discrimination Principle in the CCPR and the CEDAW’, in L. Hannikainen and E. Nykänen (ed.), *New Trends in Discrimination Law – International Perspectives* (Turku, Turku Law School, 1999) 29, 29.

<sup>67</sup> N. Lacey, ‘Legislation Against Sex Discrimination: Questions from a Feminist Perspective’ (1987) 14 *J. L. & Soc’y* 411, 413. See, further, Ch. 1.

<sup>68</sup> W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) 3.

<sup>69</sup> K. Frostell, ‘Gender Difference and the Non-Discrimination Principle in the CCPR and the CEDAW’, in L. Hannikainen and E. Nykänen (ed.), *New Trends in Discrimination Law – International Perspectives* (Turku, Turku Law School, 1999) 29, 30.

<sup>70</sup> *Minority Schools in Albania*, Advisory Opinion, 1935 PCIL ser. A/B, no. 64, 19.

discrimination; deciding on the relevance of purpose and effect;<sup>71</sup> and articulating whether there is any real difference between discrimination and inequality. So how are these principles translated into international law?

## **E. EQUALITY AND NON-DISCRIMINATION ON THE BASIS OF SEX IN INTERNATIONAL LAW**

### *1. UN Charter and the Universal Declaration of Human Rights*

The notions of equality and non-discrimination are foundational principles of the UN system of international law. The UN Charter 1945 endorsed equality between men and women as a fundamental human right.<sup>72</sup> Of the UN Charter, the UN has stated that ‘no previous legal document had so forcefully affirmed the equality of all human beings, or specifically outlawed sex as a basis for discrimination.’<sup>73</sup> These principles were elaborated upon in the Universal Declaration of Human Rights 1948<sup>74</sup> (UDHR). Article 1 of the UDHR provides that: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’<sup>75</sup> It is claimed by some scholars that the ‘spirit of brotherhood’ was extended to women only with the adoption of the CEDAW.<sup>76</sup> Article 2 of the UDHR provides that: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Article 7 of the UDHR further guarantees equality before the law, stating:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The UDHR also calls for equal rights in respect of courts and tribunals,<sup>77</sup> within marriage,<sup>78</sup> to public service and political participation,<sup>79</sup> and in the workplace.<sup>80</sup> All other rights apply to ‘everyone,’ with the exception of measures of special protection

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<sup>71</sup> K.E. Mahoney, ‘Canadian Approaches to Equality Rights and Gender Equity in the Courts’, in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 437, 442.

<sup>72</sup> Arts. 1(3), 8 and 55(c), UN Charter, signed 26 June 1945. See, also, Preambular para. 2, UN Charter: ‘reaffirm ... faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.’

<sup>73</sup> United Nations, *The United Nations and the Advancement of Women 1945-1996* (Dept of Public Information, New York, 1995 and 1996), para. 33.

<sup>74</sup> GA res. 217 A (III), 10 Dec. 1948.

<sup>75</sup> Art. 1, UDHR. Clearly the language of ‘brotherhood’ is gender specific in its reference to men.

<sup>76</sup> R.L. Hillock, ‘Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination against Women made a Difference?’ (2004-2005) 12 *Tulsa J. Comp. & Int’l L.* 481, 482.

<sup>77</sup> Art. 10, UDHR.

<sup>78</sup> Art. 16, UDHR.

<sup>79</sup> Art. 21, UDHR. This provision is though limited to citizens in its references to political participation in the government of ‘his country.’

<sup>80</sup> Art. 23, UDHR.

during motherhood and childhood.<sup>81</sup> ‘Everyone’ in this sense means men as well as women.<sup>82</sup>

The inclusion of equality guarantees in the UN Charter and the UDHR resulted from heavy lobbying from women delegates and non-governmental organizations.<sup>83</sup> Although sex was always listed alongside other identity-based attributes in early UN documentation, such as race, religion and political opinion, it has been argued that the concept of equality that was initially conceived in international law related to the principle of equality of states,<sup>84</sup> rather than equality between persons. Early equality rights also focused heavily on racial discrimination, rather than sex discrimination.<sup>85</sup>

## 2. *International Human Rights Instruments*

These general principles in the UDHR were transferred, with little change, in binding form to the two general human rights Covenants: the ICCPR<sup>86</sup> and the ICESCR.<sup>87</sup> Each treaty contains an over-arching accessory prohibition on non-discrimination, in which the provisions of the treaty are to be applied to all individuals within the territory and subject to the jurisdiction of the state party ‘without distinction of any kind’, including on the basis of sex.<sup>88</sup> Each document includes an additional provision that spells out that states parties to each Covenant ‘undertake to ensure the equal right of men and women to the enjoyment of all [the] rights’ contained therein.<sup>89</sup> Regardless of overlap, the Third Committee at the time of drafting the ICESCR indicated that the purpose of Article 3 in addition to Article 2(3) was for emphasis, stating that this fundamental principle ‘must be constantly emphasized.’<sup>90</sup> This same

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<sup>81</sup> Art. 25, UDHR.

<sup>82</sup> At one stage during the drafting process of the UDHR, specific reference to equality between men and women had been removed and was reinserted due to arguments by some delegates that the additional non-discrimination phraseology was essential because ‘everyone’ did not necessarily mean every individual, regardless of sex, in some countries. Similarly, an early version of Article 1 that started with ‘all men’ was corrected, albeit amid considerable resistance. Even Eleanor Roosevelt stated that it had become customary to refer to ‘mankind’ when also referring to women, or that translation problems made it unadvisable to use ‘human beings’ instead of ‘men’: UN Doc. AC.2/SR.2/p.4). In fact, the Human Rights Commission had voted upon and accepted the phrase ‘all people, men and women ...’, but it is not clear how the final version reverted to ‘all human beings.’ See, J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia, 1999), 118.

<sup>83</sup> United Nations, *The United Nations and the Advancement of Women 1945-1996* (Dept of Public Information, New York, 1995 and 1996), para. 32; J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia, 1999), 117-118.

<sup>84</sup> I. Brownlie, *Principles of Public International Law* (Oxford University Press, 5<sup>th</sup> ed., 1998), 289-90, as referred to in H. Charlesworth, ‘Concepts of Equality in International Law’, in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 137.

<sup>85</sup> See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide 1948, GA res. 260 (III), 9 Dec. 1948 (entered into force 12 Jan. 1951); ICERD; and the International Convention on the Suppression and Punishment of Apartheid 1973, GA res. 3068 (XXVIII), 30 Nov. 1973 (entered into force 18 July 1976).

<sup>86</sup> Art. 2, 3, 14(1) and 26, ICCPR.

<sup>87</sup> Arts. 2 & 3, ICESCR.

<sup>88</sup> Art. 2(1), ICCPR; Art. 2(1), ICESCR.

<sup>89</sup> Art. 3, ICCPR; Art. 3, ICESCR.

<sup>90</sup> The Third Committee stated that ‘the same rights should be expressly recognized for men and women on an equal footing and suitable measures should be taken to ensure that women ha[ve] the opportunity to exercise their rights ... Moreover, even if article 3 overlapped with article 2, paragraph

argument can be extended to the drafting model in the ICCPR, and it has been accepted by a number of commentators who emphasise the positive nature of Article 3.<sup>91</sup>

These non-discrimination guarantees are non-derogable and cannot be removed or weakened by states even during states of emergency.<sup>92</sup> Similar accessory non-discrimination provisions are found in most of the major human rights instruments, including the CRC,<sup>93</sup> MWC,<sup>94</sup> and the ICPD.<sup>95</sup> However, there are no provisions outlawing sex discrimination or inequality between men and women in either the UNCAT or the ICERD.<sup>96</sup>

In addition, the ICCPR and the ICESCR each includes a number of stand-alone or autonomous rights to equality in specific fields, such as Article 26 of the ICCPR, which guarantees equality before the law and equal protection of the law.<sup>97</sup> Although there is no equivalent in the ICESCR, Article 26 of the ICCPR has been interpreted broadly so as to protect against unequal treatment in any area of law, including economic, social and cultural rights (see below). In addition, the ICCPR guarantees

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2, it was still necessary to reaffirm the equality rights between men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasized, especially as there were still many prejudices preventing its full application.' Draft International Covenants on Human Rights Report of the Third Committee, UN Doc. A/53/65 (17 December 1962), para. 85, as re-stated in ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 2.

<sup>91</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Engel, 1993), 67, who argues that Article 3 was inserted merely for emphasis, although with a 'positive goal in mind.' See, also, Lord Lester of Heme QC and S. Joseph, 'Obligations of Non-Discrimination', in D. Harris & S. Joseph (ed.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, Oxford, 1995), 565, who states that Article 2 relates to non-discrimination (a negative obligation), whereas Article 3 guarantees equality (a positive obligation).

<sup>92</sup> Art. 4, ICCPR; Art. 2, ICESCR.

<sup>93</sup> Art. 2(1), CRC: 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' Art. 2(2), CRC imposes positive obligations to protect against discrimination in particular circumstances: 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

<sup>94</sup> Art. 7, MWC: 'States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.'

<sup>95</sup> Arts. 3(b) and 5, International Convention on the Human Rights of Persons with Disabilities 2006.

<sup>96</sup> Clearly the CERD is a non-discrimination instrument, but it is specifically focused on racial discrimination. The Committee on the Elimination of Racial Discrimination has though recognised the inter-sectionality of race and sex: CERD, General Recommendation No. XXV (2000), Gender-related dimensions of racial discrimination, UN Doc. HRI/GEN/1/Rev.7.

<sup>97</sup> Art. 26 provides: '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.'

equal rights to marriage, during marriage, and at its dissolution (Article 23); equality before courts and tribunals (Article 14(1)); and the right to vote for citizens and to be elected based on universal and equal suffrage, and equal access to public service (Article 25). Under the ICCPR, children are entitled to measures of protection in line with their status as a minor on the basis of non-discrimination, including sex (Article 24). The ICESCR guarantees equality in the context of fair wages, equal remuneration for work of equal value, and access to promotion, without discrimination (Article 7). It further provides for primary education to be provided to all, for secondary education to be generally available, and higher education to be equally accessible based on capacity (Article 13).

The first UN treaty devoted entirely to equality and non-discrimination was the International Convention on the Elimination of Racial Discrimination 1965. The ICERD builds on the Charter references to dignity and equality and translates them into the context of race discrimination,<sup>98</sup> which is defined as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>99</sup>

The second treaty in which rights to equality and non-discrimination have been developed is in the specific context of sex. In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In many respects, its provisions parallel those of the ICERD. In particular, the definition in the CEDAW is very similar to that in the ICERD:

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 the 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>100</sup>

Among the main discussions held during the drafting process to the CEDAW before the Commission on the Status of Women was whether the treaty ought to be limited in its scope to sex discrimination against women specifically, or on grounds of gender/sex more generally.<sup>101</sup> The final version was a synthesis of these two views, with both discrimination 'against women' and 'distinction, exclusion or restriction on

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<sup>98</sup> H. Charlesworth, 'Concepts of Equality in International Law', in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 138.

<sup>99</sup> Art. 1(1), ICERD.

<sup>100</sup> Art. 1, CEDAW.

<sup>101</sup> See, L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993), 44. See, also, W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983) on background to the drafting of the CEDAW and other instruments on equality between women and men.

the basis of sex' included,<sup>102</sup> although the treaty clearly only covers sex discrimination as it applies to women.

Coupled with Article 2 of the CEDAW which condemns discrimination against women in all its forms and calls on governments to take all appropriate measures to eliminate such discrimination 'by any person, organization or enterprise', the CEDAW prohibits discrimination in the public and in the private. Further, Articles 2(f) and 5(a) impose obligations upon States to address cultural and traditional practices that constitute discrimination against women, and in effect, seek to redress structural causes of inequality.

The CEDAW also permits the introduction of temporary special measures (or time-limited measures of affirmative action), providing:

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.<sup>103</sup>

The third discrimination-based treaty at the UN level is the Convention on the Rights of Persons with Disabilities 2006 (ICPRD). It borrows the definition employed in the two earlier treaties, with an important addition in relation to 'reasonable accommodation':

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>104</sup>

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<sup>102</sup> L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993), 44.

<sup>103</sup> Art. 4, CEDAW.

<sup>104</sup> Art. 2, CRPD. See, also, Art. 5, which provides further explanations for what constitutes equality and non-discrimination.

Unlike the ICERD, the ICRPD contains two further provisions that acknowledge the multiple forms of discrimination suffered by women with disabilities.<sup>105</sup> The ICRPD recognises that ‘women and girls with disabilities are subject to multiple discrimination and in this regard [states parties] shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.’<sup>106</sup> It further calls upon states parties ‘[t]o combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.’<sup>107</sup>

Some other forms of discrimination have been dealt with in non-binding international instruments.<sup>108</sup> The principles of equality and non-discrimination are now well established in international legal instruments. How have they been interpreted and applied?

### 3. *International Jurisprudence*

#### (a) *Equality in law and in fact*

Cases raising equality and non-discrimination date to the inter-war period. The Permanent Court of Justice (PCJ) considered a number of cases dealing with the treatment of minorities in Europe. In *Minority Schools in Albania*, the Court noted:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations.<sup>109</sup>

The PCJ’s successor, the International Court of Justice, has also dealt with non-discrimination in a number of cases.<sup>110</sup> Of particular note is the dissenting opinion of Judge Tanaka in the *South West African Cases*.<sup>111</sup> In rejecting South Africa’s claim that differential treatment on the basis of race (apartheid) was consistent with international law, he held that ‘[t]he fundamental point in the equality principle is that all persons have an equal value in themselves.’<sup>112</sup> In endorsing the Aristotelian view that treating different matters equally would be as unjust as treating equal matters differently, he nonetheless offered some parameters on how to determine acceptable differentiation. He referred specifically to justice and reasonableness. He also rejected the idea that motive or purpose was relevant to determining whether a distinction is arbitrary or unlawful.<sup>113</sup> Distinguishing minors, disabled persons, and men and women from the unequal treatment of persons of different races, he concluded that

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<sup>105</sup> See, Arts. 3(a) and 6.

<sup>106</sup> Art. 6(a), ICRPD.

<sup>107</sup> Art. 8(b), ICRPD.

<sup>108</sup> See, e.g., UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, GA res. 36/55, reprinted in (1982) 21 I.L.M. 205.

<sup>109</sup> *Minority Schools in Albania*, Advisory Opinion, 1935 PCIL ser. A/B, no. 64.

<sup>110</sup> See, e.g., *Rights of Nationals of the USA in Morocco (France v. USA)*, ICJ 1952 (In this case, France was exempted from import controls in Morocco whereas the US was subjected to them. The ICJ held unanimously that this was discrimination in favour of France and that the US could claim for its unfavourable treatment);

<sup>111</sup> 1962 ICJ Rep. 319; 1966 ICJ Rep. 4.

<sup>112</sup> *South West Africa Cases (xxxx)* 1962 ICJ Rep. 319; 1966 ICJ Rep. 4, 288 and 303 (per Tanaka J.).

<sup>113</sup> *South West Africa Cases (xxxx)* 1962 ICJ Rep. 319; 1966 ICJ Rep. 4, 304 (per Tanaka J.).

racial physical characteristics are not relevant factors that could justify differential treatment.<sup>114</sup>

In 1981, the Human Rights Committee in its General Comment on Article 3 stated that it covers both equality in law and in fact.<sup>115</sup> In 1989, the HRC adopted a subsequent General Comment on equality and non-discrimination in relation to Article 26. The General Comment provides that ‘[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute[-] a basic and general principle relating to the protection of human rights.’<sup>116</sup> Referring to the definitions of discrimination contained in the ICERD and the CEDAW, the HRC has stated that:

the Committee believes the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>117</sup>

This definition of discrimination is ‘relatively broad’ in two main respects: it does not require proof of discriminatory intent and it encompasses both direct and indirect discrimination.<sup>118</sup> In addition the HRC notes that treatment on an ‘equal footing’ does not mean identical treatment in every instance, but it recalls that any exceptions are explicitly referred to in the Covenant itself.<sup>119</sup> In spite of its suggestion that any exceptions to identical treatment are self-contained in the Covenant, the Committee has added that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’<sup>120</sup> The HRC further accepts that affirmative action may be required to satisfy equality guarantees and that the former does not contravene the latter.<sup>121</sup>

Like the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have each

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<sup>114</sup> *South West Africa Cases (xxxx)* 1962 ICJ Rep. 319; 1966 ICJ Rep. 4, 306 (per Tanaka J.).

<sup>115</sup> HRC, General Comment No. 4 (1981), Article 3, UN Doc. HRI/GEN/1/Rev.1, para. 2.

<sup>116</sup> HRC, General Comment No. 18 (1989), Non-Discrimination, UN Doc. HRC/GEN/1/Rev.5, para. 1. See, also, CERD, General Recommendation XIV (1993), Definition of discrimination (Art. 1(1)), UN Doc. A/48/18, para. 1.

<sup>117</sup> HRC, General Comment No. 18 (1989), Non-Discrimination, UN Doc. HRC/GEN/1/Rev.5, para. 7.

<sup>118</sup> H. Charlesworth, ‘Concepts of Equality in International Law’, in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 140.

<sup>119</sup> HRC, General Comment No. 18 (1989), Non-Discrimination, UN Doc. HRC/GEN/1/Rev.5, para. 8. The Committee gives the examples of Arts. 6(5) (exception to the death penalty for pregnant women or individuals under 18 years of age), 10(3) (segregation of minors from adults in prisons), and 25 (guarantee of political rights, exception of non-citizens).

<sup>120</sup> HRC, General Comment No. 18 (1989), Non-Discrimination, UN Doc. HRC/GEN/1/Rev.5, para. 13.

<sup>121</sup> HRC, General Comment No. 18 (1989), Non-Discrimination, UN Doc. HRI/GEN/1/Rev.5, para. 10.



accepted that equality includes both formal and substantive equality.<sup>122</sup> According to the CESCR, formal equality assumes that equality is achieved if a law or policy treats men and women in a ‘neutral manner’ (that is, regardless of their sex), whereas substantive equality requires the effect of those laws, policies, and practices to alleviate any ‘inherent disadvantage’ of either sex.<sup>123</sup> In regards to the latter, the Committee has acknowledged that temporary special measures may be needed to bring disadvantaged groups ‘to the same substantive level as others.’<sup>124</sup> Deferring to the definition of discrimination in the ICERD and the CEDAW, the CESCR has stated that direct discrimination occurs when differential treatment is based exclusively on sex and characteristics of women that cannot be objectively justified.<sup>125</sup> Indirect discrimination, in contrast, occurs when a law, policy, or practice does not appear on its face to be discriminatory, but is discriminatory in its effect.<sup>126</sup> Discriminatory purpose or intent is considered irrelevant by both committees.

Generally, the HRC has held that laws that discriminate on their face between men and women breach Article 26. It has done so in the fields of, *inter alia*, immigration regulations, unemployment benefits, widow pensions, and access to courts in relation to matrimonial property.<sup>127</sup> However, the HRC has rejected other cases of facially discriminatory law. In *Vos*, for example, the HRC accepted facially discriminatory legislation on the basis that there was no discriminatory intent.<sup>128</sup> In fact, the intent of the legislation was to streamline pensions and to afford subsistence level income to all persons who qualified. The law allowed Dutch men with a disability to retain the right to a disability allowance when their wives died; but on the death of their husbands disabled women were only eligible for a widow’s pension, which in Ms. Vos’ case was less than the disability pension. Charlesworth has criticised this decision for being based on ‘outmoded historical assumptions about the working habits of women and [for] privileg[ing] administrative convenience over the guarantees in Article

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<sup>122</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, paras. 6-15; CERD, General Recommendation XIV (1993), Definition of discrimination (Art. 1(1)), UN Doc. A/48/18.

<sup>123</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, paras. 7 & 8.

<sup>124</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 15.

<sup>125</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 12.

<sup>126</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 13.

<sup>127</sup> See, e.g., *Ameeruddy-Cziffra v. Mauritius*, HRC No. 35/1978 (Mauritian legislation that required foreign husbands of Mauritian nationals to apply for residence permits, but did not make the same requirement of foreign wives of Mauritian nationals, was found to violate a number of ICCPR provisions, including Art. 26); *Avellanal v. Peru*, HRC No. 172/1984 (a Peruvian law that prevented married women from taking legal action with respect to matrimonial property was held to breach Art. 26); *Broeks v. The Netherlands*, HRC No. 172/1984 (Mrs. Broeks was successful in her challenge of unemployment legislation that excluded her from continued unemployment benefits because she was married at the time in question, which would not have been the case if she were a man, married or unmarried); *Pauger v. Austria*, HRC No. 716/1996 (a widower successfully invoked Article 26 to challenge Austrian law that distinguished between widowers, who were entitled to two-thirds of the full pension entitlement compared with widows, who were entitled to the full pension); *Zwaan de Vries v. The Netherlands*, HRC No. 182/1984 (Municipality rejected the application for continued support under unemployment benefits legislation as she was not married, although the legislation applied to married men. The HRC found discrimination on grounds of sex and marital status).

<sup>128</sup> *Vos v. The Netherlands*, HRC No. 786/1997.

26.<sup>129</sup> In fact the *Vos* judgement conflicts with other, earlier decisions of the Human Rights Committee that disregarded questions of intent, as well as its own General Comment, outlined above. Dissenting opinions in other decisions have made allowances for socio-economic developments to permit a margin of discretion to states in relation to discriminatory legislation.<sup>130</sup> The latter contrasts with the view of the CESCR that while economic and social rights are to be ‘progressively realised,’ equality guarantees are of immediate effect.<sup>131</sup>

The CERD has similarly endorsed the view that ‘[a] distinction is contrary to the [ICERD] if it has either the purpose or effect of impairing particular rights and freedoms.’<sup>132</sup> The CERD derives its view from the language of Article 2(1)(c), which imposes an obligation on states parties to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.<sup>133</sup> The CERD also indicates that any differentiation of treatment is to be judged against ‘the objectives and purposes of the Convention.’<sup>134</sup> And that ‘[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an *unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin.’<sup>135</sup> (emphasis added) The position taken by CERD appears to be a more human rights-friendly approach than that adopted by the HRC and the CESCR in two main respects. First, it requires any justifications for differential treatment to be in line with the principles and purposes of the Convention, compared with the position taken by the HRC and the CESCR, which accept ‘reasonable and objective justifications’ de-linked from the treaty scope. Second, the CERD suggests that the assessment standard should be ‘unjustified disparate impact upon a group.’ It

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<sup>129</sup> H. Charlesworth, ‘Concepts of Equality in International Law’, in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 141. Note that the dissenting opinion submitted by Urbina and Wennergren rejected the analysis of the majority, claiming that some degree of flexibility was required in the application of the two conflicting pension schemes so that an individual was not discriminated against on grounds of sex or marital status. Other problematic cases include *Ballantyne, Davidson and McIntyre v. Canada*, HRC Nos. 359/1989 and 385/1989 (a law that prohibited Canadian citizens from displaying commercial signs outside a business premises in English was held not to breach Article 26 on the grounds that ‘the prohibition [of using English] applies to French speakers as well as English speakers’. The HRC did accept other breaches, such as that of Article 19).

<sup>130</sup> *Sprenger v. The Netherlands*, HRC No. 395/90, per Messrs Ando, Herndl and N’diaye, who argued that it was necessary to take into account ‘the reality that the socio-economic and cultural needs of society are constantly evolving ...’ in suggesting that discrimination in socio-economic rights may lag behind developments in other fields. See, also, *Oulajin and Kaiss v. The Netherlands*, HRC No. 426/90, per Messrs Herndl, Müllerson, N’diaye, and Sadi.

<sup>131</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 16.

<sup>132</sup> CERD, General Recommendation XIV (1993), Definition of discrimination (Art. 1(1)), UN Doc. A/48/18, para. 2.

<sup>133</sup> Art. 2(1)(c) provides: ‘States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exist.’

<sup>134</sup> CERD, General Recommendation XIV (1993), Definition of discrimination (Art. 1(1)), UN Doc. A/48/18, para. 2.

<sup>135</sup> CERD, General Recommendation XIV (1993), Definition of discrimination (Art. 1(1)), UN Doc. A/48/18, para. 2.

thus considers racial discrimination within the context of collective disadvantage, rather than as individual aberrations.

In the specific context of discrimination against non-citizens, in which some minor distinctions are permitted within the text of various treaties,<sup>136</sup> the Committee on the Elimination of Racial Discrimination has stated that ‘differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’<sup>137</sup> It is not entirely clear if this is a different standard to that utilised in general.

Like the HRC and the CESCR, the Women’s Committee has endorsed a broad reading of discrimination. It has held that ‘discrimination against women is a multifaceted phenomenon that entails indirect and unintentional as well as direct and intentional discrimination.’<sup>138</sup> The Women’s Committee has argued against maintaining a sole focus on formal or *de jure* equality, because doing so ‘tends to impede a proper understanding of the complex issue of discrimination, such as structural and indirect discrimination...’<sup>139</sup> Both qualitative and quantitative equality are considered to be at the heart of the CEDAW.<sup>140</sup> In spite of these general statements, its case law has been mixed. In *Nguyen*, the Women’s Committee rejected a case based on *direct* discrimination in relation to financial compensation for maternity leave that differed between salaried and self-employed women due to a restriction of a so-called ‘anti-accumulation’ clause.<sup>141</sup> The complainant was a part-time salaried employee as well as a co-working spouse in her husband’s business. Only the joint dissenting opinion stated that the so-called anti-accumulation clause may constitute a form of *indirect* discrimination:

This view is based on the assumption that an employment situation, in which salaried part-time and self-employment is combined, as described by the complainant, is one which mainly women experience in the Netherlands, since, in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands’ enterprises.<sup>142</sup>

Unlike the HRC and the CESCR (and most other international bodies), however, it has not accepted what is considered the ‘widely-used pragmatic’ definition of discrimination, being seen as differential treatment in a comparable situation without a reasonable and objective justification.<sup>143</sup> The Women’s Committee has indicated

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<sup>136</sup> E.g., Art. 25, ICCPR.

<sup>137</sup> CERD, General Recommendation No. 30 (2004), Discrimination against Non-Citizens, UN Doc. HRI/GEN/Rev.7/Add.1, para. 4.

<sup>138</sup> CEDAW, Concluding observations on Ukraine, UN Doc. A/57/38 (Part II), para. 279 (2002); Concluding observations on Kyrgyzstan, UN Doc. A/54/38/Rev.1 (Part I), para. 113 (1999).

<sup>139</sup> CEDAW, Concluding observations on Bulgaria, UN Doc. A/53/38/Rev.1 (Part I), para. 232 (1998).

<sup>140</sup> CEDAW, General Recommendation No. 25 (2004), On Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women – Temporary Special Measures, para. 9.

<sup>141</sup> *Nguyen v. The Netherlands*, CEDAW No. 3/2004.

<sup>142</sup> *Nguyen v. The Netherlands*, CEDAW No. 3/2004, per Gabr, Schöpp-Schilling and Shin, para. 10.5.

<sup>143</sup> W. Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005), 71.

that ‘any objective and reasonable justification’ be used only as a basis for the implementation of temporary special measures,<sup>144</sup> not otherwise.

*(b) Discrimination versus inequality*

What then is discrimination? And, how does it relate to equality? The principles of non-discrimination and equality are often used interchangeably, but they are also accorded different, albeit subtly different, meanings. According to the Inter-American Court of Human Rights, ‘... the concepts of equality and non-discrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality.’<sup>145</sup> The UN Committee on Economic, Social and Cultural Rights has stated that they are ‘integrally related and mutually reinforcing.’<sup>146</sup> Similarly, the Women’s Committee has noted that the elimination of discrimination and the promotion of equality are ‘two different but equally important goals in the quest for women’s empowerment.’<sup>147</sup> A recent study indicates that whether there is any real difference between the two terms as applied under international law is ‘inconclusive.’<sup>148</sup> It is generally accepted however that, at a minimum, non-discrimination is a negative right as it prohibits the making of distinctions between individuals, whereas equality is the goal centred around social justice, freedom, and dignity. Equality may also require additional measures (formal and substantive) to reach that goal. Non-discrimination can be conceived as a sub-set of equality or, alternatively, as a tool to guide us on the path to equality. However, the focus on discrimination has been criticised as being to the detriment of higher goals of equality (see below).

*(c) Public and private discrimination*

In 2000, the HRC issued a further General Comment on equality of rights between women and men.<sup>149</sup> Building on their earlier statements, the General Comment provides that: ‘Articles 2 and 3 [of the ICCPR] mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions both in the public and the private sector which impair the equal enjoyment of rights.’<sup>150</sup> According to the HRC, therefore, both public and

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<sup>144</sup> CEDAW, Concluding observations on Peru, UN Doc. A/53/38/Rev.1 (Part II) (1998), paras. 319-320.

<sup>145</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84, 19 Jan. 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), Separate Opinion of Judge Rodolfo E. Piza, para. 10. See, also, *Minority Schools in Albania case*, PCIJ, Ser. A/B, No. 64, p. 19 (1935) (‘Equality in law precludes discrimination of any kind.’); Protocol No. 12 to the ECHR, Explanatory Report, E.T.S. No. 177, para. 15; A.F. Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) 11 *Hum. Rts. L. J.* 1, 1; B.G. Ramcharan, ‘Equality and Nondiscrimination’, in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia Uni. Press, New York, 1981) 246, 252.

<sup>146</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 3.

<sup>147</sup> CEDAW, Concluding observations on Belgium, UN Doc. A/57/38 (Part II) (2002), para. 146.

<sup>148</sup> W. Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005), 34.

<sup>149</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10.

<sup>150</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 4.

private inequality or discrimination are accepted as falling within the scope of the ICCPR. In clarifying its general position on public and private violations of human rights, the HRC stated:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>151</sup>

But at no time has direct horizontal effect been accepted.<sup>152</sup> As outlined above, the majority of the HRC's jurisprudence has involved forms of direct discrimination imposed and enforced by the state.

Unlike the ICCPR, the CEDAW has the advantage of an express provision that covers discrimination in public and private spheres of life.<sup>153</sup> As a core provision,<sup>154</sup> the Women's Committee has asserted that any reservation to this provision is contrary to the object and purpose of the treaty and, therefore, incompatible with international law.<sup>155</sup> Adopting the due diligence paradigm, the Women's Committee holds states parties responsible for 'private acts' if they fail 'to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation.'<sup>156</sup> This paradigm has become the accepted standard for incorporating the acts of non-state actors in international law.<sup>157</sup> In *Goecke v. Austria*, the Women's Committee held Austria liable for the failure on the part of the Austrian police to

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<sup>151</sup> HRC, General Comment No. 31 (2004), The Nature of General Legal Obligations on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>152</sup> The HRC stated that 'article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law.' HRC, General Comment No. 31 (2004), The Nature of General Legal Obligations on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8. Although not permitted by the individual communications system, there have been proposals for an international human rights court that would permit horizontal complaints: see, M. Nowak, 'The Need for a World Court of Human Rights' (2007) 7(1) *Hum. Rts. L. Rev.* 251.

<sup>153</sup> Art. 2(e), CEDAW.

<sup>154</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 10.

<sup>155</sup> CEDAW, Concluding observations on Morocco, UN Doc. A/52/38/Rev.1, para. 59. Cf. The Women's Committee's General Recommendation No. 4 (1987), Reservations, does not identify specific articles.

<sup>156</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 9.

<sup>157</sup> The due diligence standard first emerged in the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras*, IACHR Ser. C, No. 4, judgment 29 July 1988, in which the State was held liable for failing to take reasonable steps to prevent, prosecute, punish, and provide remedies to the victim. It has also been accepted by the European Court of Human Rights (e.g. *M.C. v. Bulgaria*, ECHR Applic. No. 39272/98, 4 Dec. 2003).

respond to an emergency call, which led to the death by shooting of the complainant at the hands of her husband.<sup>158</sup> It stated:

[t]he Committee considers that given this combination of factors [which included increasing frequency of violent incidents by the husband over a three-year period], the police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because [her husband] had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Şahide Goekce.<sup>159</sup>

The Women's Committee further reiterated its earlier view that a perpetrator's right to liberty cannot supersede women's human rights to life and to physical and mental integrity.<sup>160</sup> In spite of its explicit mandate over 'private' actors in Article 2(e), the Women's Committee has not however extended it any further than the other treaty bodies.

*(d) Structural inequality*

The Women's Committee has examined structural causes of discrimination. It has made statements that discrimination is rooted in 'traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles.'<sup>161</sup> The CEDAW contains a number of provisions that impose obligations upon states parties to address cultural and traditional practices that constitute discrimination against women. Article 2(f), for example, calls on states parties '[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'<sup>162</sup> Article 5(a) provides that:

States Parties shall take all appropriate measures: (a) To modify the social and cultural 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.

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<sup>158</sup> *Goekce v. Austria*, CEDAW No. 5/2005.

<sup>159</sup> *Goekce v. Austria*, CEDAW No. 5/2005, para. 12.1.4. See, also, *Yildirim v. Austria*, CEDAW No. 6/2005 (case concerned Turkish woman subjected to physical abuse who was eventually stabbed to death by her husband. The Committee considered that the failure to detain the husband breached the state party's due diligence obligation to protect the complainant).

<sup>160</sup> See, *A.T. v. Hungary*, CEDAW No. 2/2003; *Goekce v. Austria*, CEDAW No. 5/2005; *Yildirim v. Austria*, CEDAW No. 6/2005.

<sup>161</sup> CEDAW, CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 10.

<sup>162</sup> Art. 2(f), CEDAW. Art. 10(c) provides: 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: ... (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.'

The inclusion of civil, political, economic, social and cultural rights in a single treaty places the CEDAW in a better position to tackle, in a holistic manner, structural aspects of violence against women. In spite of this, both the International Covenants have referred to tradition, history, religion, and culture as at the basis of inequality.<sup>163</sup>

The case law in this regard has presented some difficulties in applying these principles. In the case of *Muñoz-Vargas y Sainz de Vicuña v. Spain*, in which the complainant argued that as the first-born daughter of Enrique Muñoz-Vargas y Herreros de Tejada, who held the nobility title of ‘Count of Bulnes’, she should succeed to that title.<sup>164</sup> Instead Spanish law maintained that first-born daughters would only succeed if she had no younger brothers. Upon the death of her father, the complainant’s younger brother succeeded to the title. She alleged that male primacy in the order of succession to titles of nobility constitutes a violation of the CEDAW. The application was declared inadmissible on two grounds, one of which is of relevance here.<sup>165</sup> Eight members of the Women’s Committee adopted a concurring opinion in which they stated that:

It is undisputed in the present case that the title of nobility in question is of a purely symbolic and honorific nature, devoid of any legal or material effect. Consequently, we consider that claims of succession to such titles of nobility are not compatible with the provision of the Convention, which are aimed at protecting women from discrimination which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of women on a basis of equality of men and women, of human rights and fundamental freedoms in all fields.<sup>166</sup>

The same view was expressed by the Human Rights Committee in two similar cases.<sup>167</sup> While recognising that titles of nobility are not generally compatible with ideals of equality, human rights, or democratic governance, a literal reading of the text of CEDAW nonetheless appears to trump general discontent with viewing titles of nobility as a human rights issue over the issue of inequality, especially equal access. In dissent, Mary Shanthi Dairiam invoked Article 5(a) of the CEDAW and re-oriented the issue in the communication around ‘the negative effects of conduct [or laws] based on culture, custom, tradition and the ascription of stereotypical roles that entrench the inferiority of women.’<sup>168</sup> She notes that:

... when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the

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<sup>163</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 5; ICESCR, Concluding observations on Zambia, UN Doc. E/C.12/1/Add.106 (2005), para. 14; Chile, UN Doc. E/C.12/1/Add.105 (2004), para. 15; Malta, UN Doc. E/C.12/1/Add.101 (2004), para. 11; Benin, UN Doc. E/C.12/1/Add.78 (2002), para. 8.

<sup>164</sup> *Muñoz-Vargas y Sainz de Vicuña v. Spain*, CEDAW No. 7/2005.

<sup>165</sup> The other ground of inadmissibility in this case involved an argument that the issue had been resolved prior to the entry into force of the CEDAW on the state party, which was also disputed by the single dissenting judge (Dairiam).

<sup>166</sup> *Muñoz-Vargas y Sainz de Vicuña v. Spain*, CEDAW No. 7/2005, para. 12.2 per Dominquez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan and Zou.

<sup>167</sup> See, HRC Nos. 1008/2001 and 1019/2001.

<sup>168</sup> *Muñoz-Vargas y Sainz de Vicuña v. Spain*, CEDAW No. 7/2005, para. 13.9 per Dairiam.

perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women's right to equality. Such exceptions serve to subvert social progress towards the elimination of discrimination against women using the very legal processes meant to bring about this progress, reinforce male superiority and maintain the status quo. This should neither be tolerated nor condoned on the basis of culture and history. Such attempts do not recognize the inalienable right to non-discrimination on the basis of sex which is a stand-alone right. If this is not recognized in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.<sup>169</sup>

In other words, inequality should not be tolerated in any situation, and the very fact that inequality exists should characterise it as a human rights issue. Titles of nobility and other titular awards, however antithetical to human rights and fundamental freedoms, must be granted on the basis of equality until they are fully dismantled, as they are part of the very fabric and foundations of society and their retention in unequal forms, reinforces a society built on inequality. Conceptualising inequality as social justice might have helped the majority of the Women's Committee arrive at a different result.

*(e) Multiple discrimination*

The inter-section of sex and other identity-based attributes or circumstances has been recognised by many of the treaty bodies. The committees have recognised the inter-section of sex and other forms of discrimination on the grounds of colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant.<sup>170</sup> Of all the treaty bodies, the Committee on the Elimination of Racial Discrimination has dealt with this issue most holistically. In 2000, the CERD issued a General Recommendation on the gender-related dimensions of racial discrimination, recognising that 'racial discrimination does not always affect women and men equally or in the same way.'<sup>171</sup> Again, in 2000, the CERD issued a General Recommendation relating to discrimination against Roma, noting that Roma women are often victims of double discrimination.<sup>172</sup> Its prior case law, however, indicates that CERD had yet to grasp the inter-section of race and sex. In *Yilmaz-Dogan v. The Netherlands*, the CERD did not address the question of discrimination based on gender stereotypes

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<sup>169</sup> *Muñoz-Vargas y Sainz de Vicuña v. Spain*, CEDAW No. 7/2005, para. 13.7 per Dairiam.

<sup>170</sup> See, e.g., ICESCR, General Comment No. 3 (1990), The Nature of States Parties Obligations (Art. 2, para. 1), UN Doc. E/1991/23, para. 5; ICESCR, General Comment No. 5 (1994), Persons with disabilities, UN Doc. HRI/GEN/1/Rev.6, paras. 19 and 31; CEDAW, General Recommendation No. 18 (1991), Disabled Women, UN Doc. HRI/GEN/1/Rev.7; CEDAW, Concluding observations on Sweden, UN Doc. A/56/38 (Part II), para. 334 (the Committee has called on governments to adopt legislation for residence permits for individuals who have a well-founded fear of being persecuted on the basis of gender/sex, particularly in cases of discrimination against women). See, further, W.Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005), fns.443, 444, 445, 446.

<sup>171</sup> CERD, General Recommendation No. XXV (2000), Gender-related dimensions of racial discrimination, UN Doc. HRI/GEN/1/Rev.7, para. 1.

<sup>172</sup> CERD, General Recommendation XXVII (2000), Discrimination against Roma, UN Doc. A/55/18, Annex V, para. 6.



when an employer sought to terminate the employment of a Turkish woman who was pregnant:

[w]hen a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest setback disappear on sick leave under the terms of the Sickness Act. They repeat that endlessly ... [W]e cannot afford such goings-on.<sup>173</sup>

Likewise, in a case involving the coerced sterilisation of a Hungarian woman of Roma ethnicity during an emergency operation to remove her dead foetus, the Women's Committee did not comment upon the impact the woman's ethnicity may have had on her treatment by the state.<sup>174</sup> This was in spite of well-documented reports at the time that discrimination against Roma was (and remains) one of the main human rights concerns in Hungary.<sup>175</sup> It was also in spite of the state party raising irrelevant considerations in its defence such as her inability to pay for health care. Issues such as the language (Latin) and manner of explanation of the sterilisation procedure and on the consent form, the speed with which the decision to sterilise her was taken (within 17 minutes from admission to the termination of the surgery), and the assumptions made about her former knowledge about family planning, were taken for granted by the state party. In a supplementary submission, the complainant recalled 'her extremely vulnerable situation when she sought medical attention ... as a woman who would lose her child and as a member of a marginalized group of society – the Roma.'<sup>176</sup> No comment was made in relation to this by the state party, or the Committee in its final 'views.'

#### 4. *Equality Law and the UN Treaty Bodies: Interim Findings*

International instruments and jurisprudence on equality have faced considerable scrutiny by feminist scholarship as outlined above. Many of these critiques are still applicable. The dominant paradigm of equality employed by the human rights treaty bodies remains centred around sameness and difference. The standard for achievement of equality is the male sex. Put another way, it calls for a female to male progression. The majority of the case law on equality has been brought by women, alleging facially unequal treatment compared with men in similar or the same situation (or at least a comparable situation).<sup>177</sup> Occasionally men have brought complaints along the same lines. On the positive side of the ledger, discriminatory intent or purpose seems to have been set aside permanently as an irrelevancy, with focus instead on the effect of any measure, law, or action on women. However, the impact of such laws or actions has not always been fully comprehended, as shown in *Vos*.

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<sup>173</sup> *Yilmaz-Dogan v. The Netherlands*, CERD No. 1/1994.

<sup>174</sup> *Szijarto v. Hungary*, CEDAW No. 4.2004.

<sup>175</sup> See, e.g., CERD, Concluding Observations on Hungary, UN Doc. A/57/18 (2002); HRC, Concluding Observations on Hungary, UN Doc. A/57/40, vol. I (2002); CEDAW, Concluding Observations on Hungary, UN Docs. A/51/38 (1996) and A/57/38 (2002).

<sup>176</sup> *Szijarto v. Hungary*, CEDAW No. 4.2004, para. 9.4.

<sup>177</sup> This is with the exception of cases before the CERD in relation to racial discrimination in which only four cases have been brought by women out of the total of 24 cases heard between 1994 and 2006, see: [www.bayefsky.com](http://www.bayefsky.com).

Moreover, any distinctions between the treatment of men and women under the sameness/difference paradigm is to be justified according to criteria of 'reasonableness' and 'objectivity.' Only the CEDAW has rejected this approach, while the CERD has offered a more nuanced version. In other words, what is prohibited is 'arbitrary' discrimination, rather than discrimination per se. This was in fact the intention of the drafters of some of the instruments.<sup>178</sup> The focus on discrimination, however, over-emphasises differences between men and women, and gives space for biological arguments to justify oppressive practices. It seems time for the committees to assert that there are limited biological differences between men and women that are relevant to justifying any difference in treatment, unless it is to correct inequality in the form of temporary special measures. These might be restricted to reproduction, childbirth, pregnancy, and pre- and post-natal issues. In fact, it is the comparative approach to equality that gives rise to this anomaly that the same factors are used to justify discriminatory treatment (e.g. arguments that assert that women are not capable of performing certain roles because of biology) as are used to justify exceptions to identical treatment (e.g. women need special care and assistance because of biological factors). On the contrary, gendered social and cultural patterns of the roles and responsibilities assigned to women and the economic and political inequalities between men and women justify introducing special measures in order to bring about equality *writ large*. This, to me, is at the heart of the sex/gender distinction.

Overall, the terms remain contested and the case law is mixed. There is inconsistency within committees and between committees. While the committees tend to speak the rhetoric of multiple discrimination, they have proven largely unable to identify the range of identity-based factors at issue, or to assess their impact, in their case law. Distinctions still seem to be made between race and sex discrimination, reinforcing a hierarchical system that posits race above sex. The distinction between sex discrimination and inequality also remains unclear. Whether the terms are synonyms or qualitatively different is 'inconclusive.'<sup>179</sup> Underlying social, political, and economic disparities within society structured around sex tend to be minimised in the framework of discrimination that prioritises individuals or individual issues, rather than equality which bears a broader ambit. Of course, it must be conceded to some degree that the nature of individual communications distorts this view in that direction.

By and large, the treaty bodies have accepted few of the state party excuses for distinctions in law or practice between women and men, although there have been serious slippages with taking into account irrelevant considerations, such as administrative convenience. There has also been rhetorical acceptance of direct and indirect forms of discrimination, although the committees have not always addressed both aspects in individual cases. The committees have further tended to disregard structural causes of inequality in their case law, which can mean they are assessing the particular case in isolation of its social and cultural context. The practice of the Women's Committee to indicate general recommendations in addition to the

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<sup>178</sup> W. McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983), 186 (pointing out that the UN Declaration on the Elimination of Discrimination of Women 1967, the predecessor to the CEDAW, was based on this premise).

<sup>179</sup> W. Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005), 34.

individual decision has however highlighted that inequality requires structurally-based solutions; and the CERD has tended to perform better in its assessments of what constitutes discrimination by looking at the differential impact it will bear on the group as a whole. Overall, international human rights law continues to struggle in its handling of these fundamental concepts, although some progress has been made, even within the confines of the sameness/difference paradigm.

The remainder of this article considers the approach of several of the treaty bodies to treat violence against women as a form of sex discrimination. Is it a satisfactory approach to the omission of an explicit prohibition on violence against women (the gender gap) in international law?

## F. VIOLENCE AGAINST WOMEN AS INEQUALITY AND SEX DISCRIMINATION

### *1. Violence against women as sex discrimination: the template*

In 1989, the Women's Committee issued a brief General Recommendation on violence against women, citing Articles 2, 5, 11, 12 and 16 as imposing obligations upon states to protect women against violence of any kind occurring within the family, at the workplace, or in any other area of social life.<sup>180</sup> The Women's Committee elaborated upon its earlier position by adopting a more comprehensive Recommendation in 1992 in which it dealt with individual treaty provisions and the links between sex discrimination and violence against women.<sup>181</sup> The Committee was particularly concerned that, in spite of its 1989 General Recommendation, not all states party reports adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.<sup>182</sup> Importantly, this General Recommendation declared that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'<sup>183</sup> Specifically the General Recommendation states that the definition of discrimination in Article 1 of the CEDAW:

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.<sup>184</sup>

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<sup>180</sup> CEDAW, General Recommendation No. 12 (1989), Violence against Women, UN Doc. HRC/GEN/1/Rev.7, Preamble.

<sup>181</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7.

<sup>182</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, Background para. 4.

<sup>183</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, Background para. 1.

<sup>184</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 6.

In particular, the Committee held that '[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.'<sup>185</sup> Clarifying its approach, the Committee states:

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.<sup>186</sup>

In many ways, the development of this 'template' transforms the CEDAW from a anti-discrimination treaty into a gender-based violence treaty. Not only is discrimination at the foundation of women's rights, the Women's Committee argues that so, too, is gender-related violence. The two issues are inseparable and both limit and restrict women's enjoyment of all other human rights.

In its 1992 General Recommendation, the Women's Committee further makes the link between custom and tradition, and violence. The General Recommendation provides that: '[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, forced marriage, dowry deaths, acid attacks and female circumcision.'<sup>187</sup> The Committee further stated that '[s]uch prejudices and practices may justify gender-based violence as a form of protection or control of women' as well as contributing to the maintenance of women in subordinate roles, their low level of political participation, and low levels of education, skills and work opportunities.<sup>188</sup> In other words, '[t]he effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.'<sup>189</sup> Moreover, the Committee asserted that '[t]hese attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.'<sup>190</sup>

In contrast to the CEDAW, the CERD contains an explicit prohibition against racially-motivated violence.<sup>191</sup> As noted above, the CERD has recognised that certain forms of racial discrimination may be directed towards women specifically because of gender.

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<sup>185</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 6.

<sup>186</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 7.

<sup>187</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 11.

<sup>188</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 11.

<sup>189</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 11.

<sup>190</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 12.

<sup>191</sup>

Adopting a near identical approach as the Women's Committee, the Committee on Economic, Social and Cultural Rights stated in 2004 that:

[g]ender based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.<sup>192</sup>

The approach of the Human Rights Committee has been similar, but less direct in its linkages between sex discrimination and violence against women. In 2000, the HRC stated that Article 3 of the ICCPR, which implies that all human beings should enjoy the rights provided for in the Covenant on an equal basis and in their totality, is impaired whenever any person is denied the full and equal enjoyment of any right.<sup>193</sup> From the catalogue of forms of violence outlined in the General Comment (see below), it is clear that the Human Rights Committee considers that violence against women impairs women's entitlement to enjoy ICCPR rights in equality and in totality. But it is not clear that the Committee considers violence against women to be a *form* of sex discrimination *per se* without additional considerations.

So what has been the consequence of these types of approaches for women?

## 2. *All in?*

Utilising a sex discrimination framework, many forms of abuse and violence committed against women have been recognised as human rights' issues.

### (a) *The Women's Committee*

Starting with the Women's Committee as the architects of the 'template', it has addressed, in state party reports, *inter alia*, sexual violence, including gang rape and marital rape, domestic violence, physical violence, sexual harassment, and pornography.<sup>194</sup> It has identified measures to eliminate violence against women, including criminalisation, awareness-raising and education, training of police, judicial and other personnel, national action plans, and assistance to victims in the form of

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<sup>192</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 27.

<sup>193</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 2.

<sup>194</sup> See, e.g., CEDAW, Concluding observations on The Netherlands, UN Doc. A/49/38 (1994), para. 274 (The Netherlands' delegate disputed that the legality of pornography had led to the increase in sexual violence); Japan, UN Doc. A/49/38 (1994), para. 577; South Africa, UN Doc. A/53/38/Rev.1, para. 104 (1998); Algeria, UN Doc. A/54/38/Rev.1 (1999), para. 79; Kyrgyzstan, UN Doc. A/54/38/Rev.1 (1999), para. 122; India, UN Doc. A/55/38 (2000), para. 68; Democratic Republic of Congo, UN Doc. A/55/38 (2000), para. 202; Burkina Faso, UN Doc. A/55/38 (2000), para. 270; Finland, UN Doc. A/56/38 (2001), para. 301; Nicaragua, UN Doc. A/56/38 (2001), para. 292; Trinidad and Tobago, UN Doc. A/57/38 (2002), para. 145; Iceland, UN Doc. A/56/38 (2002), para. 225; Brazil, UN Doc. A/58/38 (2003), para. 112; Kuwait, UN Doc. A/59/38 (2004), para. 78; Samoa, UN Doc. A/60/38 (2005), para. 29; Cambodia, UN Doc. A/61/38 (2006), para. 33; Eritrea, UN Doc. A/61/38 (2006), para. 77.

crisis centres, hotlines, legal, medical, psychological and emotional support, socio-economic integration measures, and effective remedies.<sup>195</sup> The Committee has directly criticised traditional practices such as dowry, sati and devadasi systems,<sup>196</sup> and female genital mutilation.<sup>197</sup> Education and public awareness campaigns have been seen as a key solution to eradicating such practices.<sup>198</sup>

Article 16 of the CEDAW, the family and marriage provision, has been utilised to address compulsory sterilisation or abortion<sup>199</sup> and family violence.<sup>200</sup> Article 5 has also been considered relevant here in relation to traditional and cultural stereotypes of gendered roles. In relation to the latter, the Committee has stated that:

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, 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.<sup>201</sup>

In 1994, the Committee adopted a general recommendation on equality in marriage and family relations, which, although referring to a woman's right to legal autonomy in Article 15 of the CEDAW, does not link lack of autonomy, whether financial, emotional or legal, to risk of family violence.<sup>202</sup> No specific mention is made of inequalities that exist in many jurisdictions in relation to the prosecution of marital rape or domestic violence, including laws or customs that exclude such violence as crimes or that provide defences to men that are not available to women. Further, the General Recommendation does not link the right to equal freedom of movement and choice of residence and domicile to the ability to escape domestic and other forms of violence; nor does it recognise that permitting such controlling behaviour by men over women, whether through law, custom or both, is often a precursor to violent

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<sup>195</sup> W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005) 152-153, referring to a range of concluding observations on State party reports

<sup>196</sup> CEDAW, Concluding observations on India, UN Doc. A/55/38 (2000), para. 68. Sati is the ritual suicide of a wife after her husband's death, usually on her husband's funeral pyre, which is practised in Hindu/Indian culture; Devadasi is the practice of marrying girls to a Deity, but today it is associated with being marrying off into prostitution. Also in Hindu/Indian culture.

<sup>197</sup> See, e.g., CEDAW, Concluding observations on Ethiopia, UN Doc. A/51/38 (Part I) (1996), para. 155; Nigeria, UN Doc. A/59/38 (2004), para. 276; Benin, UN Doc. A/69/38 (2005), para. 132.

<sup>198</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 24(f), referring to earlier CEDAW, General Recommendation No. 3 (1987) on Education and public information campaigns, UN Doc. A/42/38.

<sup>199</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 22.

<sup>200</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 23.

<sup>201</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 23.

<sup>202</sup> CEDAW, General Recommendation No. 21 (1994), Equality in family and marriage relations, UN Doc. HRC/GEN/1/Rev.7, paras. 7-10 (on Art. 15).

conduct. Rather, the General Recommendation simply inserts a paragraph referring readers back to its 1992 General Recommendation on violence against women.<sup>203</sup> In the legal wording of Article 16(2), betrothals and marriage of children are deemed to have no legal effect. Forced marriage is specifically referred to in the 1994 General Recommendation as breaching ‘a woman's right to choose when, if, and whom she will marry’ under Article 16(1)(a) and (b), although it is not characterized as a form of violence per se or as discrimination.<sup>204</sup> As far as inheritance laws are concerned, the Women’s Committee seeks to ensure equal laws relating to inheritance and as noted above, it has dealt with these issues in relation to harmful traditional practices. The Committee has elsewhere referred to the non-consensual genital examinations of women,<sup>205</sup> unequal marriage practices between men and women, including low legal age of marriage, dowry practices, early and forced marriage, inheritance of women, and levirate<sup>206 207</sup>.

Sexual harassment in the workplace has also been identified as an issue of equality by the Women’s Committee: ‘[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.’<sup>208</sup> Surprisingly, the Committee on Economic, Social and Cultural Rights in its 2006 General Comment on the Right to Work did not refer to sex discrimination in the workforce in any form, whether as sexual harassment, exploitation, trafficking for forced labour, servitude, or debt bondage.<sup>209</sup> Economic exploitation and forced labour are referred to in the context of children, but no particular mention is made of the particular situation of the girl-child.<sup>210</sup> The CESCR has, however, made references to lack of legislation outlawing sexual harassment in its concluding observations on state party reports.<sup>211</sup>

In its jurisprudence, the Women’s Committee has closely followed its 1992 General Recommendation. In its first admissible decision in *A.T. v. Hungary*, the Committee consistently pointed out the links between domestic violence and sex discrimination, recalling in several places its 1992 General Recommendation. In finding that the state party had failed in its due diligence responsibilities to protect A.T. from domestic violence and threats of such violence in breach of Article 2(a), (b) and (e) of the CEDAW, in particular the recognition by the state administrative apparatus of unrestricted property rights of the husband to the family home, the Committee reiterated that ‘traditional attitudes by which women are regarded as subordinate to

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<sup>203</sup> CEDAW, General Recommendation No. 21 (1994), Equality in family and marriage relations, UN Doc. HRC/GEN/1/Rev.7, para. 40.

<sup>204</sup> CEDAW, General Recommendation No. 21 (1994), Equality in family and marriage relations, UN Doc. HRC/GEN/1/Rev.7, para. 16.

<sup>205</sup> CEDAW, Concluding observations on Turkey, UN Doc. CEDAW/C/TUR/CC/4-5, para. 25.

<sup>206</sup> Levirate marriage is a type of marriage in which a woman marries one of her husband’s brothers after her husband’s death, if there are no children, in order to continue family succession of the deceased husband.

<sup>207</sup> W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (intersentia, Antwerpen, 2005), 150.

<sup>208</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, paras. 17 and 18.

<sup>209</sup> ICESCR, General Comment No. 18 (2006), Article 6: The right to work, UN Doc. E/C.12/GC/18, para. 13.

<sup>210</sup> ICESCR, General Comment No. 18 (2006), Article 6: The right to work, UN Doc. E/C.12/GC/18, paras. 15 & 24.

<sup>211</sup> ICESCR, Concluding observations on Chile, UN Doc. E/C.12/1/Add.105 (2004), para. 21.

men contribute to violence against women,<sup>212</sup> and that these attitudes plagued the state's dealings with her. Similar discussions have occurred in the above mentioned cases of *Goekce* and *Yildirim*.<sup>213</sup> However, in the latter two cases none of the more general recommendations made to the state party targeted socio-economic inequality outside the specific context of domestic violence.<sup>214</sup>

In the Women's Committee's fact-finding mission to Mexico, sex discrimination was seen as a contributing factor to the abduction, rape and murder of poor and young women, including adolescents, in Ciudad Juárez area of Chihuahua, Mexico, alongside social and cultural breakdown, lack of social services, poverty, class, and other social and economic factors. The disjuncture between evolving gender roles of women and traditional 'patriarchal attitudes and mentalities' fostered an environment that was said to have developed 'specific characteristics marked by hatred and misogyny. There have been widespread kidnappings, disappearances, rapes, mutilations and murders.'<sup>215</sup> The Committee stated:

Along with combating crime, resolving the individual cases of murders and disappearances, finding and punishing those who are guilty, and providing support to the victims' families, *the root causes of gender violence in its structural dimension and in all its forms* — whether domestic and intra-family violence or sexual violence and abuse, murders, kidnappings, and disappearances must be combated, specific policies on gender equality adopted and a gender perspective integrated into all public policies.<sup>216</sup>

In relation to the health consequences for women of violence, the Women's Committee has stated that '[v]iolence against women puts [women's] health and lives at risk.'<sup>217</sup> In this respect, the Committee refers to traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children, and female genital mutilation.<sup>218</sup> A 1990 General Recommendation on 'female circumcision' squarely views such actions as a threat to health,<sup>219</sup> rather than a form of violence more specifically. The General Recommendation refers only to Articles 10 and 12 of the CEDAW, the former in relation to access to information about health and well-being and family planning, and the latter in relation to equal access to healthcare.<sup>220</sup> Although equal access to health care facilities is referenced specifically in Article 12 of the CEDAW, the Committee further recommends that

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<sup>212</sup> *A.T. v. Hungary*, CEDAW No. 2/2003, para. 9.4.

<sup>213</sup> CEDAW Nos. 5/2005 and 6/2005.

<sup>214</sup> The general recommendations, for example, called for strengthening of implementation and monitoring of the relevant legislation for the protection against violence in the family; vigilant and speedy prosecution; and enhance coordination between law enforcement and judicial officers etc.

<sup>215</sup> CEDAW, Report on Mexico, UN doc. CEDAW/C/2005/OP.8/MEXICO, para. 24.

<sup>216</sup> CEDAW, Report on Mexico, UN doc. CEDAW/C/2005/OP.8/MEXICO, para. 34.

<sup>217</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 19.

<sup>218</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 20.

<sup>219</sup> CEDAW, General Recommendation No. 14 (1990), Female circumcision, UN Doc. HRI/GEN/1/Rev.7.

<sup>220</sup> CEDAW, General Recommendation No. 14 (1990), Female circumcision, UN Doc. HRI/GEN/1/Rev.7, para. (d).



states parties supply information on access to health care and/or safe abortion for victims of rape or coercion in fertility and reproduction.<sup>221</sup> Similarly, in the Committee's 1990 General Recommendation on HIV/AIDS, there is mention of the risk of women to HIV/AIDS due to their subordinate position in many societies.<sup>222</sup>

The inclusion of a specific provision on rural women in the CEDAW is heralded by feminist scholars as one of the unique and important additions that the CEDAW adds to pre-existing treaties.<sup>223</sup> The Women's Committee has noted two specific issues relating to violence in respect of rural women, namely their risk of gender-based violence due to traditional attitudes and the 'special risks of violence and sexual exploitation' faced by girls in the context of rural to urban migration for the purposes of migration.<sup>224</sup> In the latter context, it is not clear why reference is only made to 'girls' rather than to 'women' more generally, as certainly rural to urban migration is an issue for many women over the age of 18 years. The Women's Committee does not go as far as to recognise economic exploitation as a form of violence within rural communities. This is an issue of growing concern. For example, the UN Food and Agriculture Organization reports that rural women are responsible for half the world's food production, and between 60 to 80 percent in developing countries.<sup>225</sup>

*(b) The CESC*

The CESC has sought to incorporate violence against women within a number of its free-standing provisions, sometimes using the discrimination lens, sometimes considering it implicit. Many of the same issues of violence are referenced as being of international concern. For example, the CESC has referred to 'widow-cleansing', early marriages, and female genital mutilation.<sup>226</sup> Under Article 10 (right to family life), in conjunction with Article 3, the CESC has dealt with issues of domestic violence, forced marriage, and gender-based violence generally.<sup>227</sup> The Committee has also referred to domestic violence<sup>228</sup> and the domestic servitude of children in other families who are subject to abuse, exploitation and trafficking,<sup>229</sup> without identifying the applicable treaty provision. The Committee has further raised concern regarding family laws that provide an obligation upon a wife to obey her husband,<sup>230</sup>

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<sup>221</sup> The Committee does insert a specific recommendation that provides: 'States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.'

<sup>222</sup> CEDAW, General Recommendation No. 15 (1990), Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS), UN Doc. HRI/GEN/1/Rev.7.

<sup>223</sup> Art. 14, CEDAW.

<sup>224</sup> CEDAW, General Recommendation No. 19 (1992), Violence against Women, UN Doc. HRI/GEN/1/Rev.7, para. 21.

<sup>225</sup> UN FAO, Gender and Food Security, <http://www.fao.org/GENDER/en/agri-e.htm> (last accessed 20 July 2007).

<sup>226</sup> ICESCR, Concluding observations on Zambia, UN Doc. E/C.12/1/Add.106 (2005), para. 14; Chile, UN Doc. E/C.12/1/Add.105 (2004), para. 15; Malta, UN Doc. E/C.12/1/Add.101 (2004), para. 11; Benin, UN Doc. E/C.12/1/Add.78 (2002), para. 8.

<sup>227</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 27.

<sup>228</sup> ICESCR, Concluding observations on Malta, UN Doc. E/C.12/1/Add.101 (2004), para. 19.

<sup>229</sup> ICESCR, Concluding observations on Benin, UN Doc. E/C.12/1/Add.78 (2002), para. 18.

<sup>230</sup> ICESCR, Concluding observations on Algeria, UN Doc. E/C.12/1/Add.71 (2001), para. 14.

polygamy,<sup>231</sup> unilateral divorce by husbands,<sup>232</sup> more severe punishment for adultery imposed upon women,<sup>233</sup> and ‘honour’ crimes.<sup>234</sup>

Under the health guarantee in Article 12 of the ICESCR, in combination with Article 3, the CESCR has referred to female genital mutilation, as well as unequal access to water and sanitation resources that bear on a women’s health.<sup>235</sup> In its General Comment on the Right to Health, the CESCR has stated that it includes control over one’s body and sexual and reproductive freedom,<sup>236</sup> and that a wider definition takes into account violence and armed conflict.<sup>237</sup> The CESCR further requires that a gender perspective be integrated into all policies and programs relating to health, including special attention to women’s issues such as domestic violence, maternal mortality, and harmful traditional practices that deny full reproductive rights.<sup>238</sup> Reiterating the scope of the Convention on the Rights of the Child, the CESCR also refers to the need for states to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, and preferential feeding and care of male children.<sup>239</sup>

In the context of Articles 11 (right to an adequate standard of living) and 3, the CESCR has further called on States to eradicate traditional practices that allow men to eat prior to women, or in which women are given the least nutritious food.<sup>240</sup> In its General Comment on the right to adequate housing, however, the CESCR overlooked victims of domestic violence or trafficking as a group in need of accessible and safe housing, although it mentioned a whole range of other ‘disadvantaged groups’ such as victims of natural disasters, the elderly, and the physically disabled.<sup>241</sup>

In a General Comment on forced evictions, the CESCR gives specific recognition is given to women, alongside ‘children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups’, who are considered to ‘all suffer disproportionately’ from the practice of forced evictions.<sup>242</sup> Women are considered ‘especially vulnerable’ given the extent of statutory and other

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<sup>231</sup> ICESCR, Concluding observations on Algeria, UN Doc. E/C.12/1/Add.71 (2001), para. 14.

<sup>232</sup> ICESCR, Concluding observations on Algeria, UN Doc. E/C.12/1/Add.71 (2001), para. 14.

<sup>233</sup> ICESCR, Concluding observations on Syrian Arab Republic, UN Doc. E/C.12/1/Add.63 (2001), para. 31.

<sup>234</sup> ICESCR, Concluding observations on Syrian Arab Republic, UN Doc. E/C.12/1/Add.63 (2001), para. 31.

<sup>235</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 29.

<sup>236</sup> ICESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health, UN Doc. HRI/GEN/1/Add.6, para. 8.

<sup>237</sup> ICESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health, UN Doc. HRI/GEN/1/Add.6, para. 10.

<sup>238</sup> ICESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health, UN Doc. HRI/GEN/1/Add.6, paras. 12(b), 20 & 21.

<sup>239</sup> ICESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health, UN Doc. HRI/GEN/1/Add.6, para. 22, referring to

<sup>240</sup> ICESCR, General Comment No. 16 (2004), Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/3, para. 28.

<sup>241</sup> ICESCR, General Comment No. 4 (1991), The right to adequate housing, UN Doc. HRI/GEN/1/Rev.6, paras. 8(e) & 11.

<sup>242</sup> ICESCR, General Comment No. 7 (1997), Forced evictions, and the right to adequate housing, UN Doc. HRI/GEN/1/Rev.6, para. 11.

forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.<sup>243</sup> The CESCR holds that the non-discrimination provisions of Articles 2(2) and 3 of the Covenant impose an additional obligation upon governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no forms of discrimination are involved.<sup>244</sup>

(c) *The HRC*

In comparison to the Women's Committee and the CESCR, most of the communications brought under Article 26 of the ICCPR before the Human Rights Committee have not related to violence against women. This may be because the ICCPR contains a number of other possible rights within which violence may be prescribed. For example, violence against women tends to be framed by the HRC within the context of other rights, such as the right to life or the prohibition against torture.<sup>245</sup> In its concluding observations on state party reports, the HRC has mentioned, *inter alia*, wife inheritance,<sup>246</sup> forced marriage,<sup>247</sup> female genital mutilation,<sup>248</sup> pledging of girls for economic gain,<sup>249</sup> detention of women rejected by their families,<sup>250</sup> domestic violence,<sup>251</sup> lack of rape prosecutions<sup>252</sup> or exemption from prosecution if marriage follows rape,<sup>253</sup> sexual exploitation of foreign women,<sup>254</sup> and

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<sup>243</sup> ICESCR, General Comment No. 7 (1997), Forced evictions, and the right to adequate housing, UN Doc. HRI/GEN/1/Rev.6, para. 11.

<sup>244</sup> ICESCR, General Comment No. 7 (1997), Forced evictions, and the right to adequate housing, UN Doc. HRI/GEN/1/Rev.6, para. 11.

<sup>245</sup> See, Chs. 4 and 5.

<sup>246</sup> See, e.g., HRC, Concluding observations on Kenya, UN Doc. CCPR/CO/83/KEN, para. 10.

<sup>247</sup> See, e.g., HRC, Concluding observations on Uzbekistan, UN Doc. CCPR/CO/83/UZB, para. 24; Nigeria, UN Doc. UN Doc. CCPR/C/79/Add.65, paras. 25 & 29.

<sup>248</sup> See, e.g., HRC, Concluding observations on Kenya, UN Doc. CCPR/CO/83/KEN (2005) (Arts. 3 & 7), para. 12; Benin, UN Doc. CCPR/CO/82/BEN (Arts. 3 & 23), para. 11; Mali, UN Doc. CCPR/CO/77/MLI (2003) (Arts. 3 & 7), para. 11; Yemen, UN Doc. CCPR/CO/75/YEM (2002) (Arts. 3, 6 & 7), para. 6; Zimbabwe, UN Doc. CCPR/C/79/Add.89 (1998) (Arts. 3, 7, 23, 24 and others), para. 12; Nigeria, UN Doc. CCPR/C/79/Add.65 (1996), para. 29.

<sup>249</sup> Zimbabwe, UN Doc. CCPR/C/79/Add.89 (1998) (Arts. 3, 7, 23, 24 and others), para. 12.

<sup>250</sup> See, e.g., HRC, Concluding observations on Yemen, UN Doc. CCPR/CO/75/YEM (2002) (Arts. 3, 9 & 26), para. 12.

<sup>251</sup> See, e.g., HRC, Concluding observations on Mauritius, UN Doc. CCPR/CO/83/MUS (2005), para. 10 (Arts. 3 & 7); Uzbekistan, UN Doc. CCPR/CO/83/UZB (2005), para. 23 (Arts. 3, 7 & 26); Yemen, UN Doc. CCPR/CO/75/YEM (2002) (Arts. 3 & 7), para. 6; Iceland, UN Doc. CCPR/CO/83/ISL (2005) (Arts. 3, 7 & 26), para. 12; Albania, UN Doc. CCPR/CO/82/ALB (2004) (Arts. 2, 3 & 26), para. 10; Poland, UN Doc. CCPR/CO/82/POL (2004) (Arts. 3 & 7), para. 11; Morocco, UN Doc. CCPR/CO/82/MAR (2004) (Arts. 3 & 7), para. 28; Benin, UN Doc. CCPR/CO/82/BEN (2005) (Arts. 3 & 7), para. 9.

<sup>252</sup> See, e.g., HRC, Concluding observations on Iceland, UN Doc. CCPR/CO/83/ISL (2005) (Arts. 3, 7 & 26), para. 11.

<sup>253</sup> See, e.g., HRC, Concluding observations on Egypt, UN Doc. CCPR/CO/76/EGY (2002) (Arts. 3 & 26), para. 9; Venezuela, UN Doc. CCPR/CO/70/VEN, para. 20; Mongolia, UN Doc. CCPR/C/79/Add.120 (2000) (Arts. 3 & 26), para. 8; Morocco, UN Doc. CCPR/C/79/Add.97, paras. 11 & 15; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) (Arts. 3 & 23), paras. 18-19.

<sup>254</sup> See, e.g., HRC, Concluding observations on The Netherlands, UN Doc. CCPR/CO/72/NET, para. 10.

trafficking in women.<sup>255</sup> Some of these references take account of discriminatory factors, but others do not.

The HRC identifies that many issues fall within its Covenant and which may affect women's enjoyment of a myriad of other rights not limited to rights to equality, including the vulnerability of women to rape, abduction and other forms of gender-based violence within international and internal armed conflict,<sup>256</sup> high infant and maternal mortality rates, female infanticide, dowry killings, widow burning, risk of death from clandestine abortion (all considered under Article 6),<sup>257</sup> domestic and other violence against women, including rape, forced abortion, forced sterilization, and genital mutilation (Article 7),<sup>258</sup> trafficking in women and forced prostitution, slavery disguised as domestic or other service (Article 8),<sup>259</sup> refusal to wear the veil or other clothing requirements that carry penalties of corporal punishment, restrictions on freedom of movement, or detention (Articles 7, 9 and 12),<sup>260</sup> humane treatment in detention including separation between men and women and female guards,<sup>261</sup> prosecutions for rape in marriage, and access to abortion, sterilisation or pregnancy without consent from husbands or not reliant upon it (Article 17).<sup>262</sup> By and large, the HRC has tied these forms of violence to a particular human right, rarely being Article 26. The HRC has further noted that inequality, based in tradition, history, religion, or culture, contributes to particular abuses against women, listing in particular pre-natal sex selection and abortion of female fetuses.<sup>263</sup>

#### (d) *The CERD*

As noted above, the CERD has issued a General Recommendation on the gender-related dimensions of racial discrimination, in which it takes account of various forms of violence suffered by women. The CERD refers to sexual violence against women members of particular racial or ethnic groups, coerced sterilization of indigenous women, and abuse of women workers in the informal or domestic sectors. The CERD has also recognised that the *consequences* of such violence may impact upon women differently, such as pregnancy resulting from racially-motivated rape, in which some women may be ostracised by their communities. Women may not have the same

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<sup>255</sup> See, e.g., HRC, Concluding observations on Greece, UN Doc. CCPR/CO/83/GRC, para. 10; Albania, UN Doc. CCPR/CO/82/ALB (2004) (Arts. 8, 24 & 26), para. 15; Serbia and Montenegro, UN Doc. CCPR/CO/81/SEMO (2004) (Arts. 3, 8 & 24), para. 16; Lithuania, UN Doc. CCPR/CO/80/LTU (2004) (Arts. 3 & 8), para. 14; Suriname, UN Doc. CCPR/CO/80/SUR (2004) (Arts. 3 & 8), para. 13; Czech Republic, UN Doc. CCPR/CO/72/CZE (2001) (Arts. 3 & 8), para. 13.

<sup>256</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 8.

<sup>257</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 10.

<sup>258</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 11.

<sup>259</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 12.

<sup>260</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 13.

<sup>261</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 15.

<sup>262</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 20.

<sup>263</sup> HRC, General Comment No. 28 (2000), Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 5.

access to remedies or complaints mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in the private spheres of life.<sup>264</sup> But the real difficulty for the ICERD is that any sexual violence must have an element of racial discrimination, which is difficult to sustain in the context of intra-racial violence or family violence where members belong to the same racial or ethnic group.

It is now generally accepted by at least the four treaty bodies studied in this article that violence against women is either a form of sex discrimination, or alternatively, that conditions of inequality in society foster and perpetuate violence against women. Either way, there has been a plethora of statements attesting to the inter-linkages between sex discrimination and violence. But how effective is this approach in filling this gender gap (that is, the absence of an explicit prohibition on violence against women) in international law?

### 3. *Filling the gender gap?*

Undoubtedly treating violence against women as sex discrimination fills an important gap in international human rights law. However, it also carries its own set of problems for women and their status within the system.

The first, and most obvious, advantage of the template formulated by the Women's Committee, and followed to a greater or lesser extent by most of the other treaty bodies, is that had it not been developed, the UN treaty bodies would not have otherwise been able to deal with violence against women in such a broad way. In much the same way as MacKinnon's work on sexual harassment as sex discrimination in the US, the Women's Committee's approach is a pragmatic response to a gap in the law.<sup>265</sup> The Women's Committee, in particular, would have been limited to the scope of the treaty and restricted to dealing with violence against women within specific contexts, such as trafficking in Article 6 of the CEDAW. Likewise, the HRC would only have had the option of dealing with it as a violation of other provisions such as those on torture, slavery, security of person, or life.<sup>266</sup>

Practically speaking, an equality paradigm would not permit exceptions or distinctions in criminal laws for particular forms of gender-related violence, or its selective prosecution.<sup>267</sup> Joan Fitzpatrick argues, for example, that domestic violence in particular results from the failure of the legal system to treat such violence in the same manner and to the same degree as violence by strangers. Thus, women are denied the equal protection of criminal law, in contravention of the principle of

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<sup>264</sup> CERD, General Recommendation No. XXV (2000), Gender related dimensions of racial discrimination, UN Doc. HRI/GEN/1/Rev.7, para. 2.

<sup>265</sup> See, C. MacKinnon, *are women human? And Other International Dialogues* (Harvard University Press, 2006)..

<sup>266</sup> At least the practice of the HRC has been to utilise the other provisions in spite of obvious sex discrimination issues.

<sup>267</sup> J. Fitzpatrick, 'The Use of International Human Rights Norms to Combat Violence Against Women', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University Pennsylvania Press, Philadelphia, 1994) 532, 538..

equality before the law.<sup>268</sup> Similarly, rape inside and outside of marriage would be treated in an like way as a criminal offence. It would also bar selective failures ‘to prosecute rapists of prostitutes or members of vulnerable groups, such as disabled women.’<sup>269</sup> Anthony Ewing suggests that an equality paradigm could prove useful when a state investigates murder cases against men, but fails to do the same in respect of ‘honour’ killings against women.<sup>270</sup> Additionally, defences available to men that are not available to women, such as formal or customary rules that permit men to invoke unilateral divorce, or where the state maintains Hudood Ordinances that are not applied equally would be unlawful.<sup>271</sup> However, the equality paradigm, if taken as treating like alike, can also be used with the opposite result (see below).

Second, the sex discrimination template contextualises violence as a social justice issue, rather than treating it as an individual anomaly. It approves the understanding of violence against women in a wider socio-political context, characterised variously by patriarchy, traditional and cultural stereotypes of women, rigid gender roles, poverty, and lack of economic and political autonomy for women. Violence against women seen in this way is a symptom of a much wider social problem. Julie Goldscheid writes that ‘the daily experience of domestic and sexual violence survivors reflects the ongoing legacy of sex discrimination, both in the persistent gender-based differences in who generally commits and is harmed by the abuse, and in the responses victims encounter from legal, criminal justice, and social service systems.’<sup>272</sup> In other words, it is an accurate portrayal of the reality of women’s lives. Treating violence against women as rooted in unequal relations between women and men allows the committees to delve deeper into the causes of it. The sex discrimination template may in fact respond to some of the feminist critiques of international human rights law that it fails to respond to women’s particularised experiences, it oversimplifies complex power relations, or that it does not allow transformative outcomes.

A third value in constructing violence against women as sex discrimination is that it turns what may otherwise be characterised as a private indiscretion or criminal activity into political violence. Inequality as a social phenomenon, rather than an

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<sup>268</sup> J. Fitzpatrick, ‘The Use of International Human Rights Norms to Combat Violence Against Women’, in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University Pennsylvania Press, Philadelphia, 1994) 532, 538.

<sup>269</sup> J. Fitzpatrick, ‘The Use of International Human Rights Norms to Combat Violence Against Women’, in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University Pennsylvania Press, Philadelphia, 1994) 532, 538. See, ECHR decision, *X and Y v. The Netherlands*, 91 Eur. Ct. H. R. (Ser. A) (1985), in which obligations to provide a remedy for rape of an institutionalised girl with mental disability under the right to privacy in Art. 8 ECHR.

<sup>270</sup> A.P. Ewing, ‘Establishing State Responsibility for Private Acts of Violence against Women under the American Convention on Human Rights’ (1995) 26 *Colum. Hum. Rts. L. Rev.* 751, 780.

<sup>271</sup> A Hudood Ordinance is a law to enforce Islamic shar’ia law, in which individuals engaged in extramarital relations are punished by stoning to death for married persons or lashes for unmarried women, or more commonly by imprisonment. It has been heavily criticised because women who have been subjected to rape and who cannot prove this, have subsequently been prosecuted for breaching the Hudood Ordinance. In some countries, different witness standards are required of men versus women and thus make it exceptionally difficult to prove rape. For more on Hudood Ordinances, see: R. Coomaraswamy, ‘To bellow like a cow: women, ethnicity and the discourse of rights’, in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 43.

<sup>272</sup> J. Goldscheid, ‘Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches’ (2006) 28 *T. Jefferson L. Rev.* 355, 356.

individual experience (although it is played out against individual women), requires social and political responses. It deconstructs the public/private dichotomy in so far as so-called 'private' violence is turned into a public issue because it is set against the structural or public context of sexual inequality.

The sex discrimination template can also be utilised in favour of men who experience gender-related violence because they do not adhere to accepted social and cultural mores.

Definitions under international law of 'violence,' or 'violence against women' favour physical, psychological and sexual abuse.<sup>273</sup> They rarely extend as far as to include economic exploitation, militarisation, globalisation, or structural violence.<sup>274</sup> Broad understandings of inequality, on the other hand, can include a number of forms of harm that do not fit the narrow definition of violence, and may extend to include other acts that may not generally be conceived as 'violence', such as pornography, or practices that foster and reinforce subordination and violence but which are not always characterised in this way, such as polygamy.

The sex discrimination template is not, however, the panacea to the missing prohibition on violence against women. First, attaching violence against women to the concepts of sex discrimination and inequality is subject to understandings of these latter terms, which, as shown above, are complex, contested, and difficult to pin down. Moreover, the exact content and meaning of these terms is far from agreed among the treaty bodies, and their implementation record varies. The prohibition on discrimination is, although a non-derogable right, a limited one. Apart from the Women's Committee, all the treaty bodies' approaches to discrimination give room to justify discriminatory practices on the basis of 'reasonable and objective' criteria. These two criteria have been strongly criticised by feminist scholars in other contexts as being gender-neutral and, therefore, likely to exclude or disregard the particular circumstances facing women. The concern would be that these same excuses would be available to be argued and applied to failures to protect women from violence, to prosecute or punish alleged offenders, or to provide appropriate redress.

What follows from the difficulty to pin down the concepts of equality and non-discrimination on the basis of sex is that this gives rise to implementation difficulties. Julie Goldscheid notes that the connection between sex discrimination and sexual and domestic violence is 'not easily, nor precisely, described.'<sup>275</sup> The experience of the

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<sup>273</sup> See, e.g., Art. 1 of the UN Declaration on the Elimination of Violence against Women defines 'violence against women' as: 'Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.' See, also, Art. 1 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, which defines 'violence against women' as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'

<sup>274</sup> Only Art. 1(j) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women defines 'violence against women' as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and *economic harm*, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.' (my emphasis)

<sup>275</sup> J. Goldscheid, 'Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches' (2006) 28 *T. Jefferson L. Rev.* 355, 360.

International Criminal Tribunals shows that recognising rape, for example, as sex discrimination (in this case that it constituted a crime against humanity) can be problematic. In *Kunarac, Kovac and Vukovic*, the defendants admitted rape, but argued that the rape in question was an indiscretion or personal, rather than political.<sup>276</sup> Similarly, under international refugee law, arguments are often made by governments and judiciaries that acts of gender-based violence do not amount to political persecution as they are simply personal. In the United Kingdom House of Lords' asylum decision of *Shah and Islam*, Lord Hoffman acknowledged that there was a threat of violence to the claimants from their husbands, but he stated: 'This is a personal affair, directed against them as individuals.'<sup>277</sup> Only in recognising the inability or unwillingness of the state to do anything to protect them because they were women did state responsibility become invoked. Lord Hoffman stated that it was '[t]he combination of these two elements' that made the otherwise private violence fall within the meaning of the 1951 Convention relating to the Status of Refugees, as amended by its 1967 Protocol.<sup>278</sup> The violence or threat of violence itself was insufficient, even though it was perpetuated by a social and legal context that endorsed differential treatment between women and men.

Second, the CEDAW template deals only with *gender-related* forms of violence, or violence that is *based upon or linked to* discrimination. It does not, for instance, cover violence perpetrated against women outside this context, such as the torture of women by physical violence in state custody. Such violence remains to be dealt with under other provisions. Requiring a link to be established between violence and sex discrimination in order to recognise that violence as an issue of human rights law narrows the scope of human rights law considerably. Gender alone may not be a significant or relevant factor in each act of domestic or sexual violence, for example. That is, describing such violence as 'gender violence' may be 'underinclusive because individual acts may be informed by other socio-political factors as well as gender.'<sup>279</sup> It also speaks to some feminist scholars who have resisted the priority or exclusiveness of gender over other identity-based factors.

Ultimately this approach still results in men and women being treated unequally. Violence that disproportionately affects men, for example, is not burdened with an additional link to sex discrimination, or any other additional factors. Under international human rights law, torture is torture. Women victims of violence, whatever its form or manifestation, are only protected by human rights law if she can establish that the violence is discriminatory, or otherwise fits another provision. While it has been widely argued in feminist academic circles that rape of women, for example, is always discriminatory (that is, women are at risk of rape due to gendered assumptions and stereotypes concerning the value and worth of women and due to

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<sup>276</sup> E.g., *Prosecutor v Kunarac, Kovac and Vukovic*, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001, para. 816. Courts did not accept this argument however.

<sup>277</sup> *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of the State for the Home Department*, UK House of Lords [1999] 2 AC 629, [1999] 2 All ER 545, per Lord Hoffman.

<sup>278</sup> *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of the State for the Home Department*, UK House of Lords [1999] 2 AC 629, [1999] 2 All ER 545, per Lord Hoffman.

<sup>279</sup> J. Goldscheid, 'Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches' (2006) 28 *T. Jefferson L. Rev.* 355, 360.



women's oppression in society at large),<sup>280</sup> this is far more difficult to prove through empirical evidence in individual cases. Doing so further splits violence against women into two categories – those acts motivated by gender and those that are not; those that are worthy of international human rights protection, those that are not. This in turn undermines the feminist message of women's subordination; as well as the alternative view that women are autonomous human beings.

Finally, it has been claimed that the rhetoric of an inequality paradigm can be a powerful one. However, in domestic jurisdictions where it has been applied, commentators have emphasised that many if not most of the reforms or responses to sexual and domestic violence target neither sex discrimination nor other socio-political factors.<sup>281</sup> Moreover, the rhetoric of inequality may in fact be weaker than the language of violence.

## G. CONCLUSION

Settling the meaning and content of the fundamental principles of equality and non-discrimination on the basis of sex remains one of the greatest challenges for international human rights law. In fact, the 'defining development of our time' has struggled under the weight of uncertain and varying definitions, interpretations, and applications. This article has shown that the debate has not changed significantly in the last twenty years, except to the extent that ideas of formal and substantive equality are now generally accepted components of equality law. But these advances are still held to ransom by the usage of gender-charged criteria of exception, such as reasonableness and objectivity. The first half of this article pointed to a system that continues to struggle with interpreting and applying these concepts, in particular because they remain tied to the sameness/difference ideology. This in turn causes difficulties in applying them to the issue of violence against women. At least three feminist scholars have called for a re-conceptualisation of equality.

Drawing on the work of the Canadian Supreme Court, Kathleen Maloney has recommended a new vision of equality in terms of 'socially created advantage and disadvantage' instead of sameness and difference.<sup>282</sup> She claims that the sameness/difference model does not permit any examination of how the legal system maintains and constructs the disadvantage of women, or how the law is 'male-defined and built on male conceptions of problems and of harms.'<sup>283</sup> Under the Aristotelian model, systemic and persistent disadvantage is not contemplated.

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<sup>280</sup> Judith Gardam has stated in the context of armed conflict that 'in one sense rape is never truly individual but is an integral part of the system of ensuring the maintenance of the subordination of women': J.G. Gardam, 'The Law of Armed Conflict: A Gendered Regime?', in Dorinda G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (American Society of International Law, 1993) 171, 174.

<sup>281</sup> J. Goldscheid, 'Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches' (2006) 28 *T. Jefferson L. Rev.* 355, 362.

<sup>282</sup> K.E. Mahoney, 'Canadian Approaches to Equality Rights and Gender Equity in the Courts', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 437, 441.

<sup>283</sup> K.E. Mahoney, 'Canadian Approaches to Equality Rights and Gender Equity in the Courts', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 437, 442.

In a similar re-think, Iris Marion Young has proposed an analysis of inequality in terms of oppression and domination. She notes that:

[w]hile discriminatory policies sometimes cause or reinforce oppression, oppression involves many actions, practices, and structures that have little to do with preferring or excluding members of groups in the awarding of benefits.<sup>284</sup>

Under this analysis, special measures would not be framed as an exception to the principle of non-discrimination, but rather as one strategy to deal with structures of oppression and domination.<sup>285</sup> Supporting the view of Young, Charlesworth has suggested less emphasis be given to non-discrimination. Instead, she recommends that a broader idea of equality ought to be developed. She has argued that the elision between the two concepts has constrained their ability to deal with women's realities.<sup>286</sup>

The third feminist scholar I wish to mention who has recommended a re-orientation of the concept of equality is Catharine MacKinnon. Because women are below men in social, economic and political indicators, she argues that the movement for equality should not be oriented to being the same as men, but on 'ending violation and abuse and second-class citizenship' of women because of their sex.<sup>287</sup> The concept that has emerged in this re-orientation, which she suggests has already emerged in many different jurisdictions, is:

equality as lack of hierarchy, rather than sameness or difference, in a relative universality that embraces rather than eliminates or levels particularity. A refusal to settle for anything less than a single standard of human dignity and entitlement combines here with a demand that the single standards themselves are equalized. All this leaves Aristotle in the dust. ... Its principles include: if men do not do it to each other, they cannot do it to us ...<sup>288</sup>

MacKinnon, too, praises the approach of Canada's Supreme Court. But would these new frameworks make any real difference for women victims of violence seeking to utilise the UN human rights treaty system?

All three proposals are strides ahead of the current general approaches of the treaty bodies to discrimination and inequality. It is possible though to see glimpses of these alternative approaches to equality within the statements of some of the committees, which may hint of new directions yet to come. The CESCR has, for instance, used the language of 'inherent disadvantage', while the CERD has applied ideas of

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<sup>284</sup> I.M. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), 195.

<sup>285</sup> H. Charlesworth, 'Concepts of Equality in International Law', in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 147.

<sup>286</sup> H. Charlesworth, 'Concepts of Equality in International Law', in G. Huscroft & R. Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 137, 147.

<sup>287</sup> C.A. MacKinnon, 'Equality Remade: Violence Against Women', in C.A. MacKinnon, *are women human? And Other International Dialogues* (Harvard University Press, 2006) 105, 108.

<sup>288</sup> C.A. MacKinnon, 'Equality Remade: Violence Against Women', in C.A. MacKinnon, *are women human? And Other International Dialogues* (Harvard University Press, 2006) 105, 108-109.

‘unjustifiable disparate impact.’ Nonetheless, none of the re-conceptualisations appear to overcome the difficulties of applying them in practice in the context of violence against women. Ideas of disadvantage and oppression/domination are still complex concepts; they still add an additional element of proof for individual complainants, one that is not applied in other contexts; not all forms of violence against women can be linked to such disadvantage or oppression/domination; and they relegate women to positions of disadvantage in perpetuity. Furthermore, the discrimination-violence link, however discrimination is re-cast, does not get away from the fact that there is a separation between the act (the violence) and the cause (discrimination or disadvantage). In no other area of human rights law is the cause of the violence built into the prohibition. It seems that whatever definition of discrimination and equality is applied, the remedy for violence suffered by women is ‘exceptionalised.’ In this way, it masks the fact that egregious harm is being done on a widespread basis to half the world’s population, wherever they happen to live. This in turn perpetuates a system of law and politics that excludes, marginalises, and silences women.