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# Committee on the Elimination of Discrimination Against Women

## Women Claiming Economic, Social and Cultural Rights – The CEDAW Potential

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### 1. INTRODUCTION

[I]nternational law accords priority to civil and political rights, rights that may have very little to offer women generally. The major forms of oppression of women operate within the economic, social and cultural realms.<sup>1</sup> *Hilary Charlesworth, Christine Chinkin and Shelly Wright*

Economic, social and cultural rights have a particular significance for women because as a group, women are disproportionately affected by poverty, and by social and cultural marginalization.<sup>2</sup> *Montreal Principles on Women's Economic, Social and Cultural Rights*

It is now generally recognised that economic, social and cultural rights are of particular significance to women, especially in light of women's historic and ongoing experiences of discrimination and inequality in social, economic and cultural realms.<sup>3</sup> What remains relatively unexplored,

however, is the issue of where, within the international human rights system, women's economic, social and cultural rights are best protected and promoted. This chapter argues that while a number of international treaties may be applicable, the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW Convention'), which has been ratified by 182 States,<sup>4</sup> has the potential to be the most effective international human rights instrument for the protection and promotion of economic, social and cultural rights for women.

The chapter unfolds in two main sections. It commences with an analysis of the characteristics of the Convention that make it particularly well placed to advance women's economic, social and cultural rights claims. It highlights, for instance, the Convention's focus on women and women's real living conditions, its equality rights

*Women and the Law*, Vol. 14, No. 1 (2002), pp. 185–220; D. Otto, "Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?", *Canadian Journal of Women and the Law*, Vol. 14, No. 1 (2002), pp. 158–184; L. Farha, 'Is There a Woman in the House? Re/conceiving the Human Right to Housing', *Canadian Journal of Women and the Law*, Vol. 14, No. 1 (2002), pp. 118–136; K. Frostell and M. Scheinin, 'Women', in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 2001), pp. 331–352.

<sup>4</sup> Division for the Advancement of Women (March 02, 2006), available at <<http://www.un.org/womenwatch/daw/cedaw/states.html>>. This is one of the most ratified human rights treaties within the UN System. The Convention on the Rights of the Child has been ratified by 189 states, available at <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>.

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<sup>1</sup> 'Feminist Approaches to International Law', *American Journal of International Law*, Vol. 85, No. 4 (1991), pp. 613–645, at 635.

<sup>2</sup> Reprinted in *Human Rights Quarterly*, Vol. 26, No. 3 (2004), pp. 760–780.

<sup>3</sup> See United Nations Division for the Advancement of Women, Promoting women's enjoyment of their economic and social rights, Report of the Expert Group Meeting, Abo/Turku, Finland, 1–4 December 1997, UN Doc. EGM/WESR/1997/Report, para. 18; S. Day and G. Brodsky, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty', *Canadian Journal of*

framework and its individual complaints mechanism. This Section is contextualised in the work of the Committee on the Elimination of Discrimination Against Women ('the CEDAW Committee'): its General Recommendations, Concluding Comments and Decisions. In some instances, the work of other treaty monitoring bodies is compared with that of the CEDAW Committee. The second part of the chapter provides an overview of the central weaknesses of the CEDAW Convention and the Committee's work in terms of protecting and promoting women's economic, social and cultural rights. Issues touched upon include the marginalisation of the CEDAW Committee, and the inherent risks in equality rights analysis. The chapter concludes with modest recommendations of how the work of the CEDAW Committee might be improved to ensure the full exercise and enjoyment of economic, social and cultural rights for women, in light of current debates on the reform of the human rights treaty monitoring system.

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## 2. THE ROAD TO CEDAW

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Undoubtedly, the covenant with the greatest potential influence is the Convention on the Elimination of All Forms of Discrimination Against Women... It's as though it were the Magna Carta for women. No other convention is quite so powerfully worded. Not only does it aggressively assert equality, but it does so, article by article, in every domain: health, education, justice, social welfare, ad infinitum.<sup>5</sup>

The CEDAW Convention is particularly well-placed to promote and protect women's economic, social and cultural rights. It is women focused, it codifies a broad range of economic, social and cultural rights drawing on women's living conditions, it recognises the indivisibility of all rights, it has an expansive and progressive understanding of equality, it addresses women's inequality in both the private and public spheres, and it includes an individual complaints mechanism. What follows is an overview of these five key strengths.

<sup>5</sup> S. Lewis, *Race Against Time* (Toronto: Anansi Press, 2005), pp. 112–113.

## 2.1 Women Focused

Unlike the other human rights treaties, the focus of the CEDAW Convention is on women. As a result, the CEDAW Committee is devoted to understanding and addressing the human rights implications of women's experiences in political, economic, social, cultural and civil fields. This focus on women is reflected in the Committee's work: the review of State party compliance with the Convention and the drafting of General Recommendations.<sup>6</sup> This is not the case for other treaty monitoring bodies. As Dianne Otto notes, up until the mid-1990s, little attention was paid by the treaty bodies to women-specific human rights violations.<sup>7</sup> Otto shows that before 1995, the General Comments adopted by the Human Rights Committee ('HRC') make scant reference to specific gender differences.<sup>8</sup> For example, the HRC's General Comment 19 on the family refers to a variety of issues of particular importance to women, such as marriageable age, and family planning policies. And yet, the Comment fails to consider that men and women might be affected differently by these issues.<sup>9</sup> Even since gender mainstreaming became part of the United Nations human rights system,<sup>10</sup> the treaty bodies, with the exception of the CEDAW Committee, have been reluctant to focus their work on women. For example, some members of the Committee on Economic, Social and Cultural Rights ('CESCR') are still of the view that a focus

<sup>6</sup> General recommendations or comments are legal interpretations of treaty provisions.

<sup>7</sup> Otto, 'Gender Comment' (n. 3 above), p. 22. Otto notes that of the treaty monitoring bodies, in the pre-1995 period the CESCR had the best record with several of its General Comments demonstrating a 'nascent understanding of the differences gender can make in the enjoyment of economic, social and cultural rights'. (p. 23).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. p. 23.

<sup>10</sup> Gender mainstreaming was called for at the World Conference on Human Rights in Vienna. See Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) at para.18. The Beijing Platform for Action establishes gender mainstreaming as the 'conceptual approach and strategy for achieving gender equality' (UN Division for the Advancement of Women and Department of Economic and Social Affairs, Promoting Women's Enjoyment of Economic and Social Rights in the Framework of the Platform for Action, prepared for the Expert Group Meeting on Promoting Women's Enjoyment of their Economic and Social Rights, UN Doc. EGM/WESR/1997/BP.2, November 1997, para. 58).

on women in the context of the rights contained in the International Covenant on Economic, Social and Cultural Rights ('ICESCR') is more appropriately handled by the CEDAW Committee.<sup>11</sup> This is not to suggest that the CESCR is disinterested in the economic, social and cultural rights of women. In fact, in some instances – for example during the review of some States parties – the CESCR has demonstrated an interest in and a good understanding of the barriers to women's enjoyment of these rights. Rather, the CESCR appears to be wary of delving *too deeply* into economic, social and cultural rights matters of concern to women for fear of usurping the mandate of CEDAW.<sup>12</sup> To some extent, the CESCR's work has been affected by this reluctance. For example, in its recent General Comment No. 16 on Article 3, the equal right of men and women to the enjoyment of all economic, social and cultural rights,<sup>13</sup> the Committee vacillates between acknowledging that this Article, and equality rights more specifically, are particularly important for women<sup>14</sup> and emphasising that Article 3 is of equal significance and is equally applicable to men and women.<sup>15</sup> During the development of the General Comment, the CESCR often rejected the suggestion that the comment is really about *women's* equality with respect to the rights in the Covenant, insisting instead that it is about the equal right of *men and women* to the enjoyment of the rights in the ICESCR.<sup>16</sup>

## 2.2 Contextualising and Interpreting Rights

In every aspect of society, women experience structural discrimination and inequality. This is particularly so in economic, social and cultural realms – health, education, housing, food, standard of living, and employment. In order for women to exercise and enjoy economic, social and cultural rights, it is imperative that discrimination against women and women's inequality in these areas are addressed. The CEDAW Convention provides an effective legal framework to do this.

At the heart of the CEDAW Convention are economic, social and cultural rights, with the bulk of the protections falling in these areas.<sup>17</sup> Because the Convention focuses on the elimination of discrimination against women in all areas, it does not codify specific economic, social and cultural rights (e.g., the right to health, education, etc.) as does, for example, the ICESCR. Instead, the CEDAW Convention protects women's *right to equality and non-discrimination* in economic, social and cultural realms,<sup>18</sup> including education,<sup>19</sup> employment and labour,<sup>20</sup> social security,<sup>21</sup> health,<sup>22</sup> access to family benefits, bank loans, mortgages and other forms of credit,<sup>23</sup> participation in all aspects of cultural life,<sup>24</sup> housing for rural women,<sup>25</sup> legal capacity, especially with respect to property rights,<sup>26</sup> and marriage and family relations.<sup>27</sup> 'The Convention is the only

<sup>11</sup> At least one CESCR Committee member expressed this view as recently as May 2006, during the review of Canada.

<sup>12</sup> This is not an official, 'on the record' position adopted by the CESCR, rather it has been conveyed to the author orally and occasionally by Committee members in session.

<sup>13</sup> (34th session, 2005), U.N. Doc. E/C.12/2005/3.

<sup>14</sup> See, for example, paragraph 5 which notes that women in particular are often denied equal enjoyment of their human rights and paragraph 11 which discusses the meaning of discrimination against women.

<sup>15</sup> For example, in the opening paragraph the Committee makes sure to assert, 'The International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) protects human rights that are fundamental to the dignity of every person'.

<sup>16</sup> This information was shared verbally between Committee members and the author. The CESCR indicated that if the General Comment was too obviously about women, certain members of the CESCR would have some difficulty adopting it. Therefore, it was felt that vacillating between the two positions would be the most effective way to proceed.

<sup>17</sup> F. Acar, 'Promotion and Protection of Women's Economic and Social Rights: Possibilities Offered by CEDAW', [unpublished paper, on file with author], p. 4. Prepared for, Expert Group Meeting, Promoting women's enjoyment of their economic and social rights, Finland, Abo/Turku, December 1997.

<sup>18</sup> On a practical level, for women to enjoy and exercise their economic, social and cultural rights it makes little difference whether specific rights are codified, as in the ICESCR, or whether the rights entitlement comes through women's right to equality. Regardless of how the rights are articulated, the end goal is the same: women's full and equal enjoyment of economic, social and cultural rights.

<sup>19</sup> Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, GA Res. 34/180 (entered into force Sept. 3, 1981) [hereinafter CEDAW], Article 10.

<sup>20</sup> *Ibid.* Article 11.

<sup>21</sup> *Ibid.* Article 11.1.e.

<sup>22</sup> *Ibid.* Article 12.

<sup>23</sup> *Ibid.* Article 13.a and 13.b.

<sup>24</sup> *Ibid.* Article 13.c.

<sup>25</sup> *Ibid.* Article 14.2.h.

<sup>26</sup> *Ibid.* Article 15.

<sup>27</sup> *Ibid.* Article 16.

human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations.<sup>28</sup>

Because the Convention is focused on women, its provisions and their application by the CEDAW Committee are based on women's lived-experiences and tailored to address the specific barriers encountered by women in economic, social and cultural areas of life. Beyond providing detailed, women-specific rights, the Convention also identifies discrimination in economic, social and cultural rights areas that are of unique concern to women, such as social and cultural patterns<sup>29</sup> and the suppression of trafficking in women and exploitation of prostitution of women.<sup>30</sup>

The CEDAW Committee has adopted a number of General Recommendations to assist States parties in their periodic reports. Many of these also address economic and social issues of particular concern to women and that are based in women's experiences. General Recommendations have been adopted on a number of issues, including: equal remuneration for work of equal value,<sup>31</sup> female circumcision,<sup>32</sup> women and AIDS,<sup>33</sup> unpaid women workers in rural and urban family enterprises,<sup>34</sup> and the measurement and quantification of the unremunerated domestic activities of women and their recognition in the GDP.<sup>35</sup> The focus of these General Recommendations on social and economic issues that are of specific concern to women stands in contrast to

the General Comments of the CESCR, for example.<sup>36</sup> The CESCR to date has addressed women's inequality through the adoption of a single general comment on Article 3 of the ICESCR and by incorporating a few paragraphs about women in general comments on broader themes or issues, such as the right to education, and the right to health.<sup>37</sup>

Many of its Concluding Comments demonstrate that the CEDAW Committee examines the economic, social and cultural realities of women closely, and at times, much more closely than other Committees do.<sup>38</sup> For example, in the 2005 review of Ireland,<sup>39</sup> the CEDAW Committee expressed concern with respect to the absence of a detailed definition of discrimination to cover all areas of life in compliance with the CEDAW Convention,<sup>40</sup> the persistence of traditional stereotypical views of the social roles and responsibilities of women and men in the family and society at large,<sup>41</sup> the prevalence of violence against women and girls,<sup>42</sup> the trafficking of women into Ireland,<sup>43</sup> the under-representation of women in certain

<sup>28</sup> Division for the Advancement of Women (May 2006), available at: <<http://www.un.org/womenwatch/daw/cedaw/states.html>>. CEDAW (n. 20 above), Article 10.

<sup>29</sup> Ibid. Article 5.

<sup>30</sup> Ibid. Article 6.

<sup>31</sup> *General Recommendation 13, Equal remuneration for work of equal value* (Eighth session, 1989), U.N. Doc. A/44/38 at 76 (1990).

<sup>32</sup> *General Recommendation 14, Female circumcision* (Ninth session, 1990), U.N. Doc. A/45/38 at 80 (1990).

<sup>33</sup> *General Recommendation 15, Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS)*, (Ninth session, 1990), U.N. Doc. A/45/38 at 81 (1990).

<sup>34</sup> *General Recommendation 16, Unpaid women workers in rural and urban family enterprises* (Tenth session, 1991), U.N. Doc. A/46/38 at 1 (1993).

<sup>35</sup> *General Recommendation 17, Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product* (Tenth session 1991), U.N. Doc. A/46/38 at 2 (1993).

<sup>36</sup> Other treaty monitoring bodies have adopted General Comments/Recommendations on discrimination against women and equality. See for example: Human Rights Committee, *General Comment No. 28: Article 3. (Equality of Rights between Men and Women)*, 68th Session, 2000, UN Doc. HRI/GEN/Rev.5, 26 April 2001 (this General Comment updates its 1981 comment on the same article); Committee on the Elimination of Racial Discrimination, *General Recommendation XXV: Gender Related Dimensions of Racial Discrimination*, 56th Session, 2000, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001.

<sup>37</sup> For example, in the CESCR's *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (22nd session, 2000) UN Doc. E/C.12/2000/4, (2000), women are mentioned in a number of paragraphs (e.g., paragraphs 12.b, 21, 34, 35, 51). While these provisions are an important component of the General Comment, they stand in contrast to the General Recommendations adopted by the CEDAW on a number of health matters of specific concern to women such as: AIDS, violence against women, and female circumcision.

<sup>38</sup> It should be noted that it is difficult to do a comparison of Concluding Observations/Comments because a number of factors can influence the content of these documents, for example, NGO materials before the Committee, different government representatives may provide more/less information, the attendance of NGOs during the review of the State party.

<sup>39</sup> CEDAW, *Concluding Comments Ireland*, UN Doc. Supplement No. 38 (A/60/38).

<sup>40</sup> Ibid. para. 22.

<sup>41</sup> Ibid. para. 24.

<sup>42</sup> Ibid. para. 28.

<sup>43</sup> Ibid. para. 30.

jobs,<sup>44</sup> particular groups of women who are at risk of consistent poverty and social exclusion,<sup>45</sup> barriers to education, employment, health care and other social services for marginalised women,<sup>46</sup> the concentration of women in part-time, low-paid work and the significant pay gap between women and men,<sup>47</sup> and restrictions on access to abortions.<sup>48</sup> This stands in stark contrast with the CESCR which, in its 2002 review of Ireland,<sup>49</sup> did not express any concerns regarding the position of women in Ireland in any economic, social or cultural context, though they did note the lack of consistency between the provisions in the Constitution pertaining to equality before the law and Articles 2(2) and 3 of the ICESCR.

In many instances, the CESCR's Concluding Observations do provide a more robust analysis of women's experiences of economic, social and cultural rights than the example above.<sup>50</sup> However, a comparison of Concluding Observations/Comments from both bodies over the last five years reveals that those of the CEDAW Committee generally provide a more complete picture of women's experiences of inequality in economic, social and cultural realms by addressing a greater number of issues. This can, of course, be attributed to the nature of the CEDAW Convention, with its focus on women and with the bulk of its provisions pertaining to the economic, social and cultural spheres.

The CEDAW Convention and Committee are also committed to the concept of the indivisibility of human rights. Because the CEDAW Convention is aimed at eliminating *all forms* of discrimination against women, it recognises that economic, social, cultural, civil and political rights are inter-related and of equal importance.<sup>51</sup> It also recog-

nises that the infringement of one right will invariably lead to the infringement of another right. The CEDAW Convention recognises that de facto equality for women will not be achieved unless the indivisibility of human rights is taken seriously. It demonstrates this by codifying at once women's equality in civil, cultural, economic, social and political realms. For example, the Convention codifies the right to equality in education and health, as well as in legal and civil matters. Similarly in General Recommendation No. 19, Violence Against Women, the CEDAW Committee recognises that violence is as much about women's rights to economic security as it is about women's right to life and liberty of the person.<sup>52</sup>

To better understand how both the Convention and the CEDAW Committee contextualise and interpret women's equality in economic, social and cultural realms, examples of how women's rights to education, health, and employment have been addressed and applied are illustrative and examined below.

## EDUCATION

Article 10 of the CEDAW Convention codifies the right to be free from discrimination and to equality in the field of education. Rather than merely providing for a general 'equal right to education', the Convention highlights, in some detail, specific aspects of education where women experience inequality: access to career and vocational guidance;<sup>53</sup> access to studies and for the achievement of diplomas in educational categories in all areas (urban and rural) and at all levels and types of educational institutions;<sup>54</sup> access to the same curricula, examinations, and teaching staff as men;<sup>55</sup> stereotypes about the roles of men and women at all levels and in all forms of education;<sup>56</sup> opportunities to benefit from scholarships and grants;<sup>57</sup> access to continuing education;<sup>58</sup> female drop-out rates;<sup>59</sup> equal access to sports

<sup>44</sup> Ibid. para. 32.

<sup>45</sup> Ibid. para. 34.

<sup>46</sup> Ibid. para. 34.

<sup>47</sup> Ibid. para. 36.

<sup>48</sup> Ibid. para. 38.

<sup>49</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, UN Doc. E/C.12/1/Add.77, 5 June 2002.

<sup>50</sup> See for example: *Concluding Observations on Brazil*, UN Doc. E/C.12/1/Add.87, 23 May 2003; *Concluding Observations on Germany*, UN Doc. E/C.12/1/Add. 68, 24 September 2001; *Concluding Observations on Jamaica*, UN Doc. E/C.12/1/Add. 75, November 30, 2001; *Concluding Observations on Canada*, UN Doc. E/C.12/1/Add.31, May 2006.

<sup>51</sup> Partners for Law in Development (PLD), *CEDAW: Restoring Rights to Women* (New Delhi, 2004), p. 12.

<sup>52</sup> CEDAW Committee, *General Recommendation No. 19, Violence Against Women* (11th Session, 1992), UN Doc. HRI/GEN/1/Rev.6, at para 243.

<sup>53</sup> Article 10 (a).

<sup>54</sup> Article 10 (a).

<sup>55</sup> Article 10 (b).

<sup>56</sup> Article 10 (c).

<sup>57</sup> Article 10 (d).

<sup>58</sup> Article 10 (e).

<sup>59</sup> Article 10 (f).



and physical education;<sup>60</sup> and equal access to specific educational information, including information and advice on family planning.<sup>61</sup> With this rather detailed description of the many aspects in which women are denied equal rights to education, the CEDAW Committee consistently has applied this Article in its review of States parties.<sup>62</sup> In so doing, it has expressed concern on a number of issues including: high or disproportionately high female illiteracy rates;<sup>63</sup> high drop-out rates of girls;<sup>64</sup> low enrolment for girls;<sup>65</sup> disproportionately low enrolment of women in post-secondary education;<sup>66</sup> and the marginalisation or segregation of particular groups of women within education systems.<sup>67</sup>

The CEDAW Committee has applied women's right to education in a manner that exposes the indivisibility of human rights in the lives of women. The Committee is concerned, for example, with the direct relationship between women's inequality in education and women's ability to secure opportunities for economic survival.<sup>68</sup> On occasion, the Committee also highlights the relationship between high rates of teenage pregnancies and/or early or forced marriage and high school drop-out rates<sup>69</sup> and between access to non-discriminatory education and family planning.<sup>70</sup> This textured analysis of the implications

of the failure to fulfil the right to education for women is in keeping with the women centred indivisibility approach of the Convention and the Committee. The CEDAW Committee also consistently applies Article 10 in a manner that obliges States parties to undertake positive obligations to address women's inequality in education. For instance, in its Concluding Comments on Togo the Committee recommends that the government increase the educational infrastructure available to women by increasing the number of facilities and qualified teachers<sup>71</sup> and commends the State party for having undertaken temporary special measures in the area of women's education.<sup>72</sup> This commitment to requiring States parties to undertake positive obligations is in keeping with the CEDAW Convention and the Committee's substantive equality approach to women's human rights.<sup>73</sup>

## HEALTH CARE SERVICES

Article 12 of the Convention addresses women's right to be free from discrimination in access to health care services including those related to family planning, 'pregnancy, confinement and the post-natal period'.<sup>74</sup> Though, on its face, this article is somewhat narrow in scope, it places women at its centre by focusing on a few health issues of particular and unique concern to women. To offer a more expansive understanding of the equality issues of concern to women in the area of health, the CEDAW Committee relies upon its General Recommendations. Beyond recommendations adopted on female circumcision, and HIV/AIDS as well as others that touch

<sup>60</sup> Article 10 (g).

<sup>61</sup> Article 10 (h).

<sup>62</sup> The CEDAW Committee has not yet adopted a general recommendation on education.

<sup>63</sup> See for example: *CEDAW Concluding Comments on Congo* (n. 80 below), para. 223; *Egypt* (2001), UN Doc. A/56/38, para. 338; *Morocco* (n. 83 below) and *Portugal* (2002), UN Doc. A/57/38, para. 339; *Togo* (2006), UN Doc. CEDAW/C/TGO/CO/5, para. 24; *Cambodia* (2006), UN Doc. CEDAW/C/KHM/CO/3, para. 25.

<sup>64</sup> See for example: *CEDAW Concluding Comments on Congo* (n. 63 above), para. 223; *Saint Lucia* (2006), UN Doc. CEDAW/C/LCA/CO/6, para. 27; *Togo* (n. 63 above), para. 24; *Cambodia* (n. 63 above), para. 26.

<sup>65</sup> *Ibid.*

<sup>66</sup> See for example: *CEDAW Concluding Comments on Austria* (2000), UN Doc. A/55/38, para. 231; *New Zealand* (2003), UN Doc. A/58/38, para. 409.

<sup>67</sup> See for example: *CEDAW Concluding Comments on Spain* (2004), UN Doc. A/59/38, para. 344, on Roma women; *Uzbekistan* (2001), UN Doc. A/56/38, para. 189 on rural women.

<sup>68</sup> See for example: *CEDAW Concluding Comments on Eritrea* (2006), UN Doc. CEDAW/C/ERI/CO/3, para. 26; and *Cambodia* (n. 63 above), para. 25.

<sup>69</sup> See for example: *CEDAW Concluding Comments on Togo* (n. 63 above), para. 24; *Cambodia* (n. 63 above), para. 26.

<sup>70</sup> See for example: *CEDAW Concluding Comments on Saint Lucia* (n. 64 above), para. 27.

<sup>71</sup> *CEDAW Concluding Comments on Togo* (n. 63 above), paras. 24 and 25.

<sup>72</sup> *Ibid.*

<sup>73</sup> For more about substantive equality, see section 2.3 ('Equality rights framework') below.

<sup>74</sup> CEDAW (n. 19 above), Article 12. Article 12 states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

on health related matters,<sup>75</sup> in 1999 the CEDAW Committee adopted the broad-reaching General Recommendation No. 24 pertaining to women and health.<sup>76</sup> This recommendation lays down overarching principles regarding women's equality in the area of health. For example, it notes that societal factors, along with biological differences, are determinative of the health status of women and men and that therefore attention needs to be paid to women in disadvantaged groups.<sup>77</sup> The recommendation then notes that the full realisation of women's right to health<sup>78</sup> can only be achieved if States parties 'respect, protect, and promote women's fundamental human right to nutritional well-being through their life span by means of a food supply that is safe, nutritious and adapted to local conditions'.<sup>79</sup> The recommendation suggests that States parties should report on how their policies and measures on health care address women's specific health needs and interests, outlining a number of distinctive features that may have health-related ramifications for women such as: biological factors, socio-economic factors such as the unequal power relations between women and men, psycho-social factors such as post-partum depression, and confidentiality issues in relation to the reporting of sexual or physical violence. The recommendation also outlines specific and general actions that States parties must undertake to meet their obligations to respect, protect and fulfil women's right to health. Throughout, the recommendation highlights health issues of particular concern to women, including: the provision of reproductive health services to women; the restriction of women's access to health services on the ground that women do not have the authorisation of husbands, partners, parents or health authorities; gender-based violence; the criminalisation of medical procedures required only by women; maternal mortality; HIV/AIDS and other

sexually transmitted diseases; female genital mutilation; and barriers (e.g., fee for service) to health care services for women.

The CEDAW Committee applies Article 12 and General Recommendation No. 24 in its review of State party compliance with the CEDAW Convention, albeit in a more sparse and general way. For example, in a number of instances the Committee expresses concern about high rates of maternal and/or infant mortality<sup>80</sup> and low rates of contraceptive use.<sup>81</sup> It also expresses concern about the use of abortion as a form of contraception in some countries<sup>82</sup> and the lack of access to health services for women and particular groups of women.<sup>83</sup> Because Concluding Observations are concise documents, often highlighting only the most egregious conditions, the breadth of health issues confronting women in every country and reflected in General Recommendation No. 24 are not always touched upon.

## WORK

Article 11 of the CEDAW Convention situates the elimination of discrimination against women in employment in the broader context of the human right to work. The Article also provides a detailed list of obligations of States parties to ensure that women can exercise and enjoy this right. These obligations include: guaranteeing that women and men enjoy the same employment opportunities; the right to free choice of profession and employment (so that women are not relegated to gendered work); the right to equal remuneration and pay equity (equal pay for work of equal value); the right to social security; and the right to a violence-free work place. The second part of Article 11 focuses on the prevention of discrimination against women in employment and labour on

<sup>75</sup> For example: *General Recommendation 18, Disabled women* (Tenth session, 1991), U.N. Doc. A/46/38 at 3 (1993); *General Recommendation 19* (n. 52 above); *General Recommendation 21, Equality in marriage and family relations* (Thirteenth session, 1992), U.N. Doc. A/49/38 at 1 (1994).

<sup>76</sup> CEDAW, *General Recommendation No. 24, Women and Health*, (Twentieth session, 1999) UN Doc A/54/38/Rev.1.

<sup>77</sup> *Ibid.* para. 6.

<sup>78</sup> This General Recommendation suggests that there is little difference between 'women's right to health' and women's right to be free from discrimination with respect to health. On this issue see discussion in n. 18 above.

<sup>79</sup> *Ibid.* para. 7.

<sup>80</sup> See for example: *CEDAW Committee review of Democratic Republic of Congo* (2000) UN Doc. A/55/38, para. 227; *Brazil* (2003) UN Doc. A/58/38, para. 126; *Ukraine* (2002) UN Doc. A/57/38, para. 289.

<sup>81</sup> See for example: *CEDAW Committee review of Democratic Republic of Congo* (200) UN Doc. A/55/38, para. 227; *Jamaica* (2001) UN Doc. A/56/38, para. 224; *Russian Federation* (2002) UN Doc. A/57/38, para. 399.

<sup>82</sup> See for example: *CEDAW Committee review of Russian Federation* (2002), *Ibid.* para. 399; *Uzbekistan* (2001) UN Doc. A/56/38, para. 185.

<sup>83</sup> See for example: *CEDAW Committee review of Morocco* (2003) UN Doc. A/58/38, para. 172; *Uzbekistan*, *Ibid.* para. 189.



the grounds of marriage or maternity. This part requires States parties to prohibit dismissal on these grounds; introduce maternity leave with pay and without loss of former employment; encourage the provision of the necessary social services to allow families to balance family obligations, work and participation in public life; and to provide special protection to women during pregnancy in types of work proved to be harmful to them.

Although Article 11, like Article 10, offers States parties some detail with respect to the content of the right to work, its scope is somewhat slanted toward women in the formal work sector and concern for pregnant and parenting women in the workforce, as opposed to other groups of women (e.g., young women, immigrant and racialised women, older women) who may also be discriminated against for gendered reasons.<sup>84</sup> In this way, the CEDAW Convention may be regarded as protecting the labour rights of more privileged women over more marginalised women.

This critique is answered, at least in part, by the CEDAW Committee's General Recommendations and country specific Concluding Comments. The CEDAW Committee has attempted to elaborate on the meaning of Article 11 by adopting several General Recommendations on issues not covered or fully elaborated upon in the Convention such as: unpaid women workers in family enterprises;<sup>85</sup> equal remuneration for work of equal value;<sup>86</sup> violence against women,<sup>87</sup> which refers to sexual harassment as a form of gender discrimination at the workplace; and the measurement and quantification of unremunerated domestic activities of women and their recognition in the gross national product.<sup>88</sup> Moreover, in the application of women's right to work when reviewing States

parties, the CEDAW Committee is often able to address a broad range of relevant issues, sometimes moving beyond the content areas of the Convention and General Recommendations. For example, in its review of Togo, the Committee expressed concern for women in both the formal and informal sectors.<sup>89</sup> In its review of Saint Lucia, the CEDAW Committee expresses concern about sexual harassment in the labour sector, women migrant workers and their susceptibility to violence, exploitation and trafficking,<sup>90</sup> occupational segregation and the concentration of women in low-wage, low-skill areas of work,<sup>91</sup> and discrimination against ethnic minority women and disabled women in accessing employment.<sup>92</sup> As with its application of other rights, the CEDAW Committee consistently demonstrates the indivisibility of women's right to work with other rights, particularly the right to education and health.

Overall, this brief review of the rights to education, health and employment for women demonstrates that the Convention and its application are tailored to address the specific barriers women encounter in these economic and social areas. The CEDAW Committee's work is clearly focused on ensuring that women's real, everyday conditions of disadvantage and inequality are being addressed, reflecting the often complicated interdependence of rights in the lives of women.

### 2.3 Equality Rights Framework

The CEDAW Convention, like other treaties, calls for the elimination of discrimination against women. Not only does it require equality between women and men, but it also prohibits practices that may perpetuate women's inequality.<sup>93</sup> For

<sup>84</sup> The Committee on Economic, Social and Cultural Rights adopted *General Comment No. 18 on the Right to Work* in 2006 (Thirty-fifth session, 2006), UN Doc. E/C.12/GC.18 (2006). This comment includes one paragraph on the right to work and women (para. 13) and adopts a somewhat narrow interpretation of the systemic issues that might impede women's exercise and enjoyment of this right, focusing on equal pay for work of equal value and pregnancy. The CESCR does include reference to cultural practices that might impede the enjoyment of this right as well as the difficulty many young women have in accessing employment opportunities.

<sup>85</sup> *General Recommendation No. 16* (n. 34 above).

<sup>86</sup> *General Recommendation No. 13* (n. 34 above).

<sup>87</sup> *General Recommendation No. 19* (n. 52 above).

<sup>88</sup> *General Recommendation No. 17* (n. 34 above).

<sup>89</sup> *Concluding Comments on Togo* (n. 63 above), para. 26.

<sup>90</sup> *CEDAW Concluding Comments on Cambodia* (n. 63 above), para. 21.

<sup>91</sup> *Ibid.* para. 27.

<sup>92</sup> *Ibid.* para. 35.

<sup>93</sup> Association for Women's Rights in Development, 'The Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol', August 2002, p. 2, available at: <<http://www.awid.org/publications/primers/factsissues2.pdf>> Article 3: 'States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment

the equality provisions in any treaty to have real-world significance for women, the right to non-discrimination and equality must be understood substantively and not just formally.<sup>94</sup>

Discrimination and inequality can occur in different ways. The most obvious form of discrimination that results in inequality is when a law, policy, or practice blatantly excludes or restricts a protected group or prefers and distinguishes between people based on an enumerated ground, for example, laws which prohibit women from owning title to land or voting. To remedy this type of discrimination and inequality, treating everyone the same or de jure equality may be effective. In contemporary times, however, discrimination is not always this blatant. In particular, discriminatory effects are often obscured by the non-discriminatory language of a law, policy, or practice. For example, a government may establish a lending scheme to assist individuals to buy land or housing. The scheme is open to all individuals, but some form of collateral is required to secure the loan. On the face of it the policy is neutral, as it is open to everyone. But the policy may have discriminatory effects, as women are often over-represented amongst the poor and thus they are less likely than men to have the necessary collateral to secure the loan. In turn, the scheme is, in practice, unavailable to most women. In instances such as this, the discrimination arises not because women are treated differently by the rule itself but, rather, because they are situated differently in the world in which the rule operates.

If the different situation of women is not taken into account in defining discrimination and equality, then women enjoy only formal equality – that is, they would be equal only in the sense that they would be treated in the same way that men are treated. To the extent that women and men are situated identically in the world, being treated equally in a formal sense is, of course, important.

of human rights and fundamental freedoms on a basis of equality with men’.

<sup>94</sup> S. Day and G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998), p. 43. For a discussion of the need for substantive equality (rather than formal equality) in the context of housing rights, see L. Farha, ‘Is There a Woman in the House?’ (n. 3 above). This section of the chapter has been adapted from that publication.

However, to the extent that women experience different and often disadvantageous conditions, a merely formal conceptualisation of equality is insufficient. ‘Gender-neutral laws and policies can perpetuate sex inequality because they do not take into account the economic and social disadvantage of women; they may therefore simply maintain the status quo’.<sup>95</sup> Rather, ‘in those circumstances where women and men are not identically situated, which is most of the time’, a substantive conceptualisation of equality is necessary.<sup>96</sup> Substantive equality recognises that equality is not a matter of ‘superficial sameness and difference’<sup>97</sup> but, rather, that it is about the ‘accommodation of differences’.<sup>98</sup> It understands that women as a group are disadvantaged and that equality must address the economic, social, legal, and political dimensions of that group.<sup>99</sup> Consequently, adopting a substantive conceptualisation of equality means recognising that inequality exists when gender-neutral laws, policies, or practices have differential negative effects on women and also when the differential disadvantage of women is not addressed by laws, policies, or practices. As a result, substantive equality may require positive action by States to address the needs that are related to disadvantage.<sup>100</sup>

The CEDAW Convention and the work of the CEDAW Committee are particularly strong tools for enforcing economic, social and cultural rights for women because they embrace substantive equality. The CEDAW Convention contains several provisions, which indicate that it is premised

<sup>95</sup> Montreal Principles (n. 2 above), para. 9

<sup>96</sup> Day and Brodsky, *Women and the Equality Deficit* (n. 94 above), p. 43.

<sup>97</sup> G. Brodsky and S. Day, ‘Women’s Economic Inequality and the Canadian Human Rights Act’, in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999), pp. 113–176, at 135.

<sup>98</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. See discussion in M. Jackman and B. Porter, ‘Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act’, in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999), pp. 43–113, at 56.

<sup>99</sup> Day and Brodsky, *Women and the Equality Deficit* (n. 94 above), p. 45.

<sup>100</sup> Jackman and Porter, ‘Substantive Equality’ (n. 98 above), p. 56.

on the principle of substantive equality.<sup>101</sup> For example, it includes the following definition of discrimination: “discrimination against women” shall mean 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... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>102</sup> And then, Article 3 of the Convention requires States parties to take ‘all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’.<sup>103</sup> These Articles impugn laws and practices, which are detrimental in their effect, even if they are expressed in gender-neutral terms.<sup>104</sup> In this way, the Convention acknowledges that gender neutrality – or de jure equality – may not achieve de facto equality – because gender-neutral laws may still have discriminatory effects.

Article 4 of the Convention on temporary special measures, and General Recommendation No. 25,<sup>105</sup> which explores the meaning and application of Article 4, underscore the Convention’s commitment to substantive equality. Temporary special measures are used by governments to accelerate the improvement of the position of women in recognition of the fact that even if de jure equality exists, women may not experience de facto equality.<sup>106</sup> The General Recommendation asserts that ‘a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the

Committee interprets as substantive equality’.<sup>107</sup> Temporary special measures require governments to assess the particular disadvantage experienced by women ‘in a contextual way’<sup>108</sup> and to take positive steps to achieve a ‘real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’.<sup>109</sup> This stands in stark contrast with a formal equality approach that requires gender neutral laws only and does not necessitate an examination of the historic and real conditions of women, nor the undertaking of positive obligations by the State.

This commitment to substantive equality is also reflected in the Concluding Comments issued by the CEDAW Committee. For example, in its 2003 review of Canada, the Committee urged the State party to ‘take additional measures to increase the representation of women in political and public life’ and to introduce ‘temporary special measures with numerical goals and timetables’.<sup>110</sup> In its review of Cuba, the Committee called on the Government to implement temporary special measures to address the high levels of unemployment found amongst women.<sup>111</sup> And in its review of Romania, the Committee called on the Government to ‘improve the availability, acceptability, and use of modern means of birth control to avoid the use of abortion as a method of family planning. It encourages the Government to include sex education systematically in schools’.<sup>112</sup>

The inclusion of substantive equality within the CEDAW Convention along with the understanding and application of substantive equality by the CEDAW Committee is somewhat unique within the treaty monitoring body system. No other treaty includes an explicit understanding of substantive equality within its provisions. Furthermore, the CEDAW Committee itself has embraced substantive equality unequivocally, as reflected

<sup>101</sup> See A. Lewis-Landsberg, *Bringing Equality Home* (New York: UNIFEM, 1998), p. 12.

<sup>102</sup> CEDAW Convention, Article 1. Emphasis added.

<sup>103</sup> *Ibid.* Article 3.

<sup>104</sup> R. Cook, ‘State Accountability Under the CEDAW Convention’ in Rebecca Cook (ed.), *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1994), pp. 437–461, at para. 236.

<sup>105</sup> CEDAW, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, (Thirtieth session, 2004). UN Doc. No. CEDAW/C/2004/1/ WP.1/Rev.1.

<sup>106</sup> *General Recommendation No. 25* (n. 105 above), para. 15 and UNHCHR, ‘Fact Sheet No. 22, Discrimination Against Women: The Convention and the Committee’, Geneva (1994), p. 11.

<sup>107</sup> *General Recommendation No. 25* (n. 105 above), para. 8.

<sup>108</sup> *Ibid.* para. 10.

<sup>109</sup> *Ibid.*

<sup>110</sup> CEDAW, *Concluding Comments on Canada*, UN Doc. Supplement No. A/58/38, para. 372 (1997).

<sup>111</sup> CEDAW, *Concluding Comments on Cuba*, UN Doc. Supplement No. A/55/38, para. 270. (2000).

<sup>112</sup> CEDAW, *Concluding Comments on Romania*, UN Doc. Supplement No. A/55/38, para. 315, (2000).

in the definitive manner in which they invoke substantive equality in General Recommendation No. 25. While other Committees have also embraced substantive equality in their General Comments<sup>113</sup> and Concluding Observations, some uncertainty has been expressed about its meaning and application.<sup>114</sup>

## 2.4 Private Realm Violations

The CEDAW Convention is regarded as a particularly useful legal tool for women because it is the only international human rights treaty that explicitly prohibits discrimination in the private sector.<sup>115</sup> Article 2 obliges States parties to:

[C]ondemn discrimination against women . . . and, to this end, undertake: . . . (e) To take all appropriate measures to eliminate discrimination against women by *any person, organization or enterprise* . . .<sup>116</sup>

Article 5 obliges States parties to 'modify the social and cultural patterns of conduct of men and women' to eliminate customary and other practices which are discriminatory and based in stereotypes.<sup>117</sup>

The Convention extends the ambit of State party accountability to preventing and deterring *private acts* of discrimination.<sup>118</sup> This is not to suggest that the State is directly responsible for the actions of

private persons. Rather, it means that States are bound to:

[U]ndertake means to eliminate or reduce and mitigate the incidence of private discrimination, and to achieve the result that such private discrimination should not recur . . . A state will not be directly accountable for the behavior of private individuals or agencies, but their behavior indirectly implicates the state through its lack of due diligence in awareness of the risk of violation of human rights, or the failure of its punitive and/or compensatory responses to such violations.<sup>119</sup>

The CEDAW's commitment to having discrimination in the private realm addressed is reflected in several General Recommendations. For example, General Recommendation No. 17 recommends that States focus on quantifying the unremunerated domestic activities of women and include their labour in the gross national product.<sup>120</sup> General Recommendation No. 24 on women and health discusses the relationship between HIV/AIDS and unequal power relations within a household that make it difficult for women to refuse sex or insist on safe and responsible sex.<sup>121</sup> And, the General Recommendation on violence against women includes a focus on family violence, recommending that States parties ensure that 'laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women'.<sup>122</sup>

As these General Recommendations expose, women's economic and social disadvantage often takes place within the private sector (the home) or at the hands of non-State actors (landlords, employers, family members). In turn, the explicit extension of the ambit of State party accountability to private acts of discrimination is essential if women are to exercise and enjoy equality in all

<sup>113</sup> See Human Rights Committee, *General Comment No. 18, Non-discrimination* (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) and CESCR, *General Comment No. 16* (n. 13 above).

<sup>114</sup> The meaning and applicability of substantive equality in the context of the ICESCR was one of the most fraught issues during the drafting process of General Comment No. 16 on Article 3 of the ICESCR.

<sup>115</sup> Otto, 'Gender Comment' (n. 3 above), p. 43.

<sup>116</sup> CEDAW, Article 2(e). Emphasis added.

<sup>117</sup> CEDAW, Article 5.

<sup>118</sup> Cook, 'State Accountability' (n. 104 above), p. 236. It should be noted that the CESCR has also recognised that States parties are responsible for the violations of ICESCR rights by private actors such as landlords and employers. See for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991).

<sup>119</sup> Cook, *ibid.* p. 237; CEDAW, General Recommendation No. 19 (n. 52 above), para. 9.

<sup>120</sup> *General Recommendation No. 17* (n. 88 above).

<sup>121</sup> *General Recommendation No. 24* (n. 76 above), para. 18.

<sup>122</sup> *General Recommendation No. 19* (n. 52 above), paras. 23, 24 (b).

realms, including economic, social and cultural realms.

## 2.5 Optional Protocol

There are two principal ways in which the CEDAW Convention can be enforced. States parties are required to submit a national report every four years on measures they have taken to comply with their obligations under the Convention. The Committee reviews these reports and has an opportunity to ask the State party questions. Based on this review, the Committee issues Concluding Comments, which include recommendations as to how the State party could improve its performance. The CEDAW Committee also makes General Recommendations on issues of relevance to women, upon which States should focus. General Recommendations provide further guidance to States regarding their obligations under the Convention. And now, the CEDAW Convention can be enforced through the Optional Protocol.

In October 1999, the UN General Assembly adopted the Option Protocol to CEDAW,<sup>123</sup> which came into force in December 2000 after it had been ratified by ten States.<sup>124</sup> The Optional Protocol provides two special procedures: a communications procedure for individual complaints<sup>125</sup> and an investigation procedure regarding grave or systemic violations of women's rights. To date the CEDAW Committee has heard four communica-

tions and has issued three decisions.<sup>126</sup> Each of the decisions raises equality rights concerns in social, economic, and cultural contexts. *B.J. v. Germany*, concerned gender based discrimination in equalisation payments in the context of divorce; *A.T. v. Hungary*, concerned domestic violence by a common law partner and raised a number of housing issues; and *Rahime Kayhan v. Turkey*, concerned the dismissal of a female public school teacher because of the headscarf she wore to work. The Committee has also undertaken one country visit to investigate the abduction, rape and murder of women in Juarez, Mexico.<sup>127</sup>

While two of the three cases failed to meet admissibility criteria and thus decisions on the merits were not rendered,<sup>128</sup> as a whole, the cases expose the potential that the Optional Protocol to CEDAW offers in the enforcement of economic, social and cultural rights of women. Each raises economic and social rights claims that are gender specific. In *Rahime Kayhan v. Turkey*, the complainant was dismissed from her employment as a public school teacher because she wore a headscarf to work. She alleged that her dismissal and termination as a civil servant for wearing a headscarf, 'a piece of clothing unique to women',<sup>129</sup> was in violation of Article 11 of the CEDAW Convention. In *A.T. v. Hungary*, the complainant alleged that the

<sup>123</sup> Resolution Adopted by the General Assembly, 54/4. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. A/RES/54/4, 15 October 1999.

<sup>124</sup> As of 13 March 2006, 78 countries have acceded to or ratified the Optional Protocol to CEDAW. See: Division for the Advancement of Women, available at <[www.un.org/womenwatch/daw/cedaw/states.html](http://www.un.org/womenwatch/daw/cedaw/states.html)>.

<sup>125</sup> In order to make a valid communication, the following conditions must be met: exhaustion of all domestic legal remedies; the country against which they are complaining is a party to CEDAW and the Optional Protocol; the violation occurred after the date that the Optional Protocol came into effect; the right they are claiming is found in the CEDAW Convention; another international procedure has not been engaged to address the same complaint; if the communication is being submitted on behalf of someone else, that person must provide consent (AWID, 'The Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol', August 2002).

<sup>126</sup> *B.-J. v. Germany*, 1/2003 (concerning gender based discrimination in equalisation payments in the context of divorce in Germany); *A.T. v. Hungary*, 2/2003 (concerning domestic violence by a common law partner and raises a number of housing issues – access to a shelter for abused women that will also accommodate her disabled child); *Rahime Kayhan v. Turkey*, 8/2005 (concerning the dismissal of a female public school teacher because of the headscarf she wore to work).

<sup>127</sup> CEDAW Committee, *Report on Mexico Produced by the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol*, UN Doc. CEDAW/C/2005/OP8/MEXICO, 22 January 2005.

<sup>128</sup> In *Rahime Kayhan v. Turkey*, the CEDAW Committee found that the complainant had failed to exhaust domestic legal remedies (see para. 7.9) and thus did not consider the merits of the case. In *B.-J. v. Germany*, the CEDAW Committee also found that the complainant had failed to exhaust domestic legal remedies, see para. 8.8. In the latter case, two Committee members issued a dissenting opinion, stating that the issues of spousal maintenance and accrued gains were in accordance with the admissibility criterion that domestic remedies that are unreasonably prolonged may be considered exhausted for the purposes of engaging the Optional Protocol.

<sup>129</sup> *Rahime Kayhan v. Turkey* (n. 126 above), para. 7.7.



State party had failed to provide her with effective protection (e.g., safe housing) from her abusive common law husband.<sup>130</sup> In *B.-J. v. Germany*, the complainant – a fifty-seven year old woman who sacrificed her career and education by staying at home to raise the children to allow her husband to pursue his career – alleged that the State regulations regarding the law on the legal consequences of divorce systematically discriminate against older women who are divorced after long marriages. Moreover, two of the cases, *A.T. v. Hungary* and *B.-J. v. Germany*, required the Committee to address State responsibility with respect to economic and social rights violations that occurred in the private realm (the home), where women most often experience economic and social disadvantage. In this way, the CEDAW Committee underscores the principle that States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights.<sup>131</sup>

*A.T. v. Hungary* – the sole decision on its merits under the Optional Protocol – sets a good example for subsequent cases by demonstrating the CEDAW Committee's unequivocal commitment to the realisation of substantive equality for women in economic and social realms. The Committee's analysis recognises the particularity of the complainant's case and situates it within the broader context of women's position in Hungarian society. For example, in its decision the Committee considers the specific recourse taken by A.T. to try to escape the abuse and concludes that the legal and social protections available were grossly inadequate.<sup>132</sup> At the same time, the Committee expresses concern regarding the entrenched stereotypes regarding the roles and responsibilities of men and women within families, drawing on its own concluding comments on Hungary from August 2002.<sup>133</sup>

Complementarily, the Committee fashions a remedy that addresses the complainant's particular situation while simultaneously instructing the State party on actions it must take to respect, protect, promote and fulfil women's human right to be free from all forms of domestic violence. To this end, and in keeping with the principle of substantive equality, the CEDAW Committee requires the State party to undertake positive obligations to remedy the complainant's situation and to ensure better protections for women more generally. In this regard, the State is required to ensure that the complainant is given a safe home in which to live with her children, and that she receives child support, legal assistance and reparations for the violations of her rights.<sup>134</sup> More generally, the State is required to introduce a 'specific law which prohibits domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters'.<sup>135</sup> Under a formal equality approach, the Committee could have concluded that A.T. and other women in Hungary were no worse off than men because safe shelters were unavailable to the entire population, not just women. Clearly, this formal analysis would be nothing more than 'equality with a vengeance'<sup>136</sup>, and an unsatisfactory answer to the violation of A.T.'s rights.

In order for rights to be meaningful, individuals must be able to claim and enforce them. As these cases indicate, the Optional Protocol to CEDAW is positioned to play an important role in the realisation of women's economic, social and cultural rights, in light of the fact that in many jurisdictions, these rights cannot always be claimed in domestic courts and tribunals, and in light of the fact that as of yet there is no individual complaints mechanism associated with the ICESCR.

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### 3. THE ROAD BLOCKS TO CEDAW

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In order to accurately assess whether the CEDAW Convention and Committee can truly be effective tools in the struggle to enforce women's economic,

<sup>130</sup> In this case, the State's failure to provide the complainant with safe housing and her economic dependence on her spouse were key factors in her ongoing experiences of violence and in the deprivation of her human rights. For this reason, this case can be understood as being about the complainant's equal right to an adequate standard of living, including adequate housing in conjunction with her right to be free from all forms of discrimination and violence.

<sup>131</sup> *A.T. v. Hungary* (n. 126 above), para. 9.2.

<sup>132</sup> *Ibid.* para. 9.4.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> This term was coined by the Canadian based Women's Legal Education and Action Fund (LEAF) and was referred to in a Supreme Court of Canada case: *Schachter v. Canada* [1992] 2 S.C.R. 679 at 701–702.

social and cultural rights, it is imperative to discuss the weaknesses of both the Convention and the Committee's work.

### 3.1 Marginalisation

The marginalisation of the CEDAW Committee in relation to other treaty monitoring bodies is well documented.<sup>137</sup> Of course, over time this is changing. The CEDAW Committee now meets, like other treaty bodies, for two three-week sessions each year. The Convention has influenced constitutional reform in a number of instances,<sup>138</sup> has been used in many domestic legal challenges,<sup>139</sup> and has influenced national legislation.<sup>140</sup> Also, over time its General Recommendations have become more detailed and in many respects pioneering. That being said, there is some concern that the CEDAW Committee still does not garner the same respect as other human rights treaty bodies, such as the Human Rights Committee and the Committee Against Torture. This concern is underscored by the number of reservations that have been made to the CEDAW Convention.

### 3.2 Reservations

It is well documented that the CEDAW Convention is subject to a large number of reservations.<sup>141</sup> These reservations often go to the very core of

the document, attached to Article 2 (pertaining to the obligations of States parties) and/or Article 16 (pertaining to marriage and family). The common perception is that it is mostly countries in the Middle East that have registered reservations. While it is true that some countries in the Middle East have done so, they do not stand alone. As Katarina Tomaševski notes,

Some reservations reflect the exclusively male heritage in the exercise of royal powers (Belgium, Luxembourg, Spain), others exclude women from employment in the armed forces or from the access to combat duties (Germany, New Zealand, Thailand), yet others restrict employment of women in night work or at jobs deemed hazardous to their health (Malta, the United Kingdom). Most, however, retain restrictions on equal rights regarding women's personal status, namely marriage, family, citizenship and the legal personality and capacity of women in general.

Australia has a reservation with respect to Article 11(2)(b) to exempt itself from having to provide women with paid maternity leave.

Reservations such as these suggest a lack of genuine commitment to the realisation of women's equality in all fields, as mandated by the Convention. There is no doubt that the sheer number as well as the content of the reservations casts a long shadow over the CEDAW Convention.

### 3.3 Equality and Non-Discrimination

Some have argued that one of the central weaknesses of the CEDAW Convention is that it is focused on non-discrimination and equality. In particular, it is argued that the paradigm of 'equality with men' is insufficient as it only allows women to argue that they have a right to enjoy the same opportunities, results and outcomes as men who are similarly situated. This is regarded as insufficient because women are uniquely situated in the world and an effective rights strategy must be able to respond to and address women's particular disadvantage. Of course, this is only a problem if equality is understood formally. If, however, a substantive understanding of equality is employed, this critique is moot. Substantive equality is an expansive principle that is based on

<sup>137</sup> D. Otto (n. 3 above), p. 21. See also A. Byrnes, *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*, (London: Centre for Comparative and Public Law, 1997).

<sup>138</sup> I. Landsberg-Lewis, *Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (New York: UNIFEM, 1998), pp. 11–19. Landsberg-Lewis cites a number of examples: the CEDAW Convention influenced constitutional debates in Colombia, in particular by having substantive equality included within the new Colombian constitution. Similar results were achieved in South Africa and Brazil.

<sup>139</sup> H. Shin, 'CEDAW and Women's Human Rights: Achievements and Obstacles', paper presented at the Annual Conference of the Castan Center for Human Rights Law, 3 December 2004. See also Landsberg-Lewis *ibid.* pp. 19–27, where examples from India, Botswana, Nepal, and Australia, among others, are highlighted.

<sup>140</sup> Landsberg-Lewis, *ibid.* pp. 28–32. Examples from Hong Kong, Costa Rica, China, Japan and the United States are provided.

<sup>141</sup> Division for the Advancement of Women (n. 124 above).

women's real conditions and experiences. It allows women to achieve what men have achieved, but it also recognises that women are differently situated as a result of historic, institutional and systemic discrimination. That being said, the CEDAW Convention is vulnerable – like all laws that codify discrimination and equality – to a narrow or formal interpretation, one that does not guarantee women's de facto equality. This is where, particularly for women, the strength of the ICESCR may lie. In that treaty, women do not necessarily have to invoke rights to equality and non-discrimination to claim their economic, social and cultural rights, because the ICESCR codifies distinct rights (the right to health, education, food, etc.), which can be claimed directly by women and men.

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#### 4. CONCLUSIONS

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The international human rights community is at a crossroads. The treaty monitoring bodies are being critiqued as ineffective, with States parties filing reports so late that they become irrelevant and with backlogs that make the timely review of States parties impossible. A number of suggestions have been put forward for the reform of treaty monitoring bodies, including the suggestion that States parties submit a single report to the UN detailing their progress with respect to all the treaties to which they are a party.<sup>142</sup> It has also been suggested that this single report would be submitted to a single body responsible for monitoring compliance with all treaties. What does this type of reform mean for the realisation of women's equality in economic, social and cultural realms? While there is no doubt that the protection and promotion of economic, social and cultural rights for women have suffered from the limits of the treaty monitoring body system, there is little doubt that under a 'single report' system, women's equal rights will not be better protected.<sup>143</sup>

<sup>142</sup> See: *Report of the Secretary-General, Strengthening of the United Nations: an agenda for change*, UN Doc. A/57/387, 9 September 2002, paras. 52–54, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/N02/583/26/PDF/N0258326.pdf>>.

<sup>143</sup> It should be noted that a 'single report approach' to treaty reform was not supported by a meeting of international experts on treaty body reform in Malbun, Liechtenstein. See UN General Assembly, Letter from the UN Permanent Representative of Liechtenstein to the United Nations

This chapter has exposed that the CEDAW Committee has particular expertise in the analysis of women's economic, social and cultural disadvantage. They are the only body that is unequivocally concerned with women's equality in all realms. There is a real concern that under the proposed reporting system, women's particular disadvantage and inequality will not receive the same attention that it currently receives through this specialised body.<sup>144</sup> Women's inequality in economic, social and cultural realms can only be detected, understood and addressed if the details of women's particular experiences are exposed, analysed and assessed. It is the details, the particularity of women's experiences, which substantive equality aims to address. And so, any reform to the treaty monitoring system must leave intact a mechanism that requires States parties to report, in depth, on women's equal enjoyment of economic, social and cultural rights and that allows a specialised body, with expertise on the application of substantive equality in all realms, to review State party compliance with the CEDAW Convention.

That being said, it cannot be denied that the current treaty monitoring body system is not as effective as it could be. There are a number of reforms

Addressed to the Secretary-General, Annex: Report of a meeting on reform of the UN human rights treaty body system, Malbun, Liechtenstein, 4–7 May, 2003, UN Doc. A/58/123, paras. 20–28.

<sup>144</sup> This cause for concern has been expressed in other areas of United Nations reform. For example, Stephen Lewis, UN Special Envoy for HIV/AIDS in Africa, in a speech at Harvard University for a conference on UN reform, critiqued the new High-Level Panel on UN System-Wide coherence in areas of development, humanitarian assistance and environment on the basis that it is not promoting women's rights. The panel, comprised of fifteen experts, includes just three women and calls for gender mainstreaming within the three identified areas. Lewis states:

[I]t's darn near criminal to believe, as so many nation states apparently believe, that mainstreaming gender through those three operational activities will lead to improvement in the human rights of women. It never has; in fact, mainstreaming, with its pathetic illusion of transformation, leads to a cul de sac for women. What is needed – I've said it before, and I shall say it ad nauseam – is an international women's agency, within the United Nations, to do for women what UNICEF does for children. It's as simple and straightforward as that.

See Speech by Stephen Lewis to Harvard University Rights Journal Conference on UN Reform and Human Rights, 25 February 2006.

that could be implemented that would ensure a focus on women's rights is not lost, while rendering the CEDAW Committee more effective in terms of enforcement. For example, the CEDAW Committee could try to create a real dialogue between States parties and NGOs. This could assist in the establishment of more constructive relationships between NGOs and governments. The CEDAW Committee could require States parties to file frequent periodic updates on progress made on particular issues of concern, to ensure that the State party is taking concrete action on the issue. The CEDAW Committee could ensure that its Concluding Comments are concrete and specific, rather than overarching and general. This would make it very clear to States parties what actions are

required of them to be in compliance with the CEDAW Convention.

Ultimately, the efficacy of the CEDAW Committee may be determined by the political will of States parties. And so, perhaps the most important work to be done to ensure States parties meet their human rights obligations to women is to continue to pressure, shame and embarrass governments by reminding them of their commitments made and their commitments broken.<sup>145</sup>

<sup>145</sup> A good starting point for exerting this type of pressure would be to draw on the 'pledges' made by those countries appointed to the newly established Human Rights Council. Many of these pledges refer broadly to commitments within the treaty monitoring body system.