USE OF THESES

This copy is supplied for purposes of private study and research only. Passages from the thesis may not be copied or closely paraphrased without the written consent of the author.
VIOLENCE AGAINST WOMEN,
FEMINIST THEORY,
AND THE UNITED NATIONS
HUMAN RIGHTS TREATY BODIES

Thesis submitted for the degree of Doctor of Philosophy
The Australian National University

December 2008

Alice Jill Edwards
I confirm that this thesis is my own original work.

Alice Jill Edwards
Acknowledgements

This thesis has been inspired by and is dedicated to the many women and girls I have had the privilege of meeting since I began human rights work over ten years ago, in Bosnia and Herzegovina, Mozambique, Morocco, Rwanda, and Uganda. These women remain anonymous here, but their faces are always in my thoughts. I also dedicate the thesis to my friend and colleague, the late Bettina Goislard, whose life and death reminds me of the special struggles and dangers faced by the many women carrying out humanitarian work for the United Nations. Bettina was killed in Afghanistan in 2003. I miss her dearly.

I wish to acknowledge first and foremost the patience, support, and guidance of my principal supervisor, Professor Hilary Charlesworth, who is one of the greatest feminist international legal scholars around and a wonderful human being. I would also like to thank Adjunct Professor Peter Bailey and Dr Penelope Mathew, who sat on my supervisory panel and provided generous support, thoughtful insights, and lively discussions on various aspects of my thesis. I would further like to thank Dinah Rigg for her help over the years in responding to my many queries from afar. She made me continue to feel very much a part of the College of Law community at the ANU. I would also like to thank Professor Michael Coper and the late Professor Philippa Weeks for making the ANU College of Law such a wonderful place at which to study.

I am grateful to Professor Vanessa Munro and Professor Thérèse Murphy at the University of Nottingham, who kindly agreed to read and comment on various parts of my thesis in its latter stages, entirely voluntarily.

This thesis could not have been completed without the personal and professional support and friendship of my small doctoral community at the ANU – Joanne Lee, Dr Susan Harris-Rimmer, and Dr Usha Natarajan – and other friends who made this journey an enriching one, particularly Carla Ferstman, and Brooke and Amber Bristow.

In addition, I am grateful to Dr Volker Türk for believing in me enough to offer me my first UN position, which set me on a lifelong path of human rights and refugee advocacy and learning.

Undertaking this PhD would not have been possible without the financial support of the Australian government through an Australian Postgraduate Award and a Research Training Scheme Scholarship. Thanks are also due to the ANU College of Law for their generous bursary, which allowed me to attend the annual four-week training session of the Institut International des Droits de l'Homme in Strasbourg in 2005, which had women's rights as its theme in that year; and to the United Nations Institute for Training and Research (UNITAR), the Project on International Courts and Tribunals at New York University, and the Victoria University of Wellington for my attendance at a week-long seminar course in Wellington, New Zealand, on international courts and tribunals in 2004.

Finally, thank you to my family and my wonderful husband, Des, whose love, support, and belief in me have been ever present, even when I have been miles away geographically or mentally (being buried deeply in this thesis).
Abstract

Drawing on feminist theories of international law, this thesis critically examines how women’s lives, particularly the violence they face, have been understood and responded to in the international human rights jurisprudence of the United Nations human rights treaty bodies. My aim is to connect feminist theories to the practice of these international decision-making bodies. These bodies have adopted two main strategies to include violence against women within the existing human rights framework: the first, to conceptualise violence against women as a form of sex discrimination and second, to creatively interpret existing human rights so that the experiences of women are included. Discussion of the latter strategy is centred on the right to life and the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment. These strategies have developed because there remains no universally agreed binding treaty norm explicitly prohibiting violence against women and form part of the UN’s ‘gender mainstreaming’ agenda.

As pragmatic responses to gaps in the law, I acknowledge that these strategies have been both conceptually and substantively powerful for the advancement of women’s rights, including putting violence against women on the international human rights agenda. However, rereading existing provisions to apply them to the specific circumstances of women has had mixed results, carries its own problems and limitations, and ultimately serves to continue to treat women unequally under international law. A common thread of the treatment of the three rights studied in this thesis is that women’s experiences are seen as an exception to the main or general understandings of those particular provisions. That is, women are seen as a deviation from that standard and as an exception to the rule.

The practical effect of holding women to the same standards as men de jure is to impose additional burdens on women de facto. Put another way, women need to convince international bodies that what has been done to them is worthy of international attention, by either equating it to harm normally perpetrated against men and incorporating their experiences into provisions designed with the experiences of men in mind (and thereby reinforcing sexual hierarchies), or justifying why their experiences ‘deserve’ the establishment of an exception to the rule (and thereby exceptionalising and ‘essentialising’ the experiences of women). I argue that the effect of these processes is
to treat women unequally under international law, to support the gender bias in the system, and to prevent any deeper transformation. It can thus be seen that international human rights law has shifted from a period of excluding women from mainstream human rights, an exclusion that characterised its first 50 years, to a stage of rhetorical inclusion, albeit one of continuing inequality.
# Table of Contents

Acknowledgements v-vi  
Abstract vii  
Table of Contents ix-xi  
Selected Abbreviations xiii-xiv  

## Introduction  
Structure and content 1  
Terms and terminology  
- *Sex, Gender, Women* 5  
- *Violence against women* 12  
Violence against women in international law: Progress and transition 17  
Feminist methods employed 24  

## Chapter 1: Feminist Theories on International Law and Human Rights 37  
A. INTRODUCTION 37  
B. FOUR STAGES IN FEMINIST THEORISING ON HUMAN RIGHTS 40  
C. FOUR FEMINIST CRITIQUES OF INTERNATIONAL LAW AND HUMAN RIGHTS 46  
   1. Absence of women and women’s voices 46  
   2. Human rights as ‘men’s rights’ 54  
   3. The public/private dichotomy 72  
   4. Essentialised women 80  
D. CONCLUSION 98  

## Chapter 2: The UN Human Rights Treaty Bodies: Practice and Procedure 101  
A. INTRODUCTION 101  
B. MANDATES 106  
C. MEMBERSHIP AND EXPERTISE OF THE TREATY BODIES 106  
   1. Membership and expertise criteria 106  
   2. General problems 109  
   3. Where are the women? 111  
   4. Where is the expertise in women’s rights and gender? 113  
   5. Why argue for more women? What are the consequences of more women for decision-making? 115  
D. STATE PARTY REPORTS 124  
   1. General overview 124  
   2. General problems 127  
   3. What about women? 130  
E. GENERAL COMMENTS 134  
F. INTER-STATE COMMUNICATIONS 135  
G. INDIVIDUAL COMMUNICATIONS 137  
   1. General procedures 137  
   2. General weaknesses 141
3. What about female complainants? 143
H. INQUIRY OR FACT-FINDING PROCEDURES 156
I. TREATY BODY REFORM 158
J. CONCLUSION 165

Chapter 3: Equality and Non-Discrimination on the Basis of Sex 169
A. INTRODUCTION 169
B. EQUALITY AND NON-DISCRIMINATION: GENERAL CONCEPTS AND FEMINIST CRITIQUES 171
C. EQUALITY AND NON-DISCRIMINATION ON THE BASIS OF SEX IN INTERNATIONAL LAW 179
1. The UN Charter and the Universal Declaration of Human Rights 179
2. International human rights instruments 181
3. International jurisprudence 187
   (a) Formal versus substantive equality 187
   (b) Discrimination versus inequality 194
   (c) Public and private discrimination 196
   (d) Culture, custom, and structural inequality 198
   (e) Multiple discrimination 202
4. Equality law and the UN treaty bodies: Interim findings 204
D. VIOLENCE AGAINST WOMEN AS SEX DISCRIMINATION 209
1. Violence against women = sex discrimination 209
2. Assessing the VAW = SD formula 213
   (a) Benefits of the VAW = SD formula 213
   (b) Concerns relating to the VAW = SD formula 221
E. CONCLUSION 226

Chapter 4: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 229
A. INTRODUCTION 229
B. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT UNDER INTERNATIONAL LAW 230
1. International instruments 230
2. International jurisprudence: Traditional constructs of torture 237
3. Feminist critiques of traditional constructs of torture 242
C. VIOLENCE AGAINST WOMEN AS TORTURE: EMERGING INTERPRETATIONS 250
1. The severity threshold 250
   (a) Rape and sexual violence 253
   (b) Psychological forms of torture 260
   (c) Forced sterilisation 262
   (d) Other unconventional claims 263
   (e) Discrimination and torture 264
2. Public/private dichotomy 270
3. Contextual analysis 284
4. The Women's Committee and torture 289
D. THE FEMINIST RECORD ON TORTURE 290
E. CONCLUSION 295
Chapter 5: The Right to Life
A. INTRODUCTION

B. THE RIGHT TO LIFE UNDER INTERNATIONAL LAW
   1. International instruments
   2. International jurisprudence: The scope and meaning of the right to life
      (a) Protected by law?
      (b) The arbitrary deprivation of life?
      (c) Exceptions to the prohibition
      (d) Feminist critiques of constructs of the right to life
   3. Rights bearers: When does life begin for the purposes of Article 6?

C. VIOLENCE AGAINST WOMEN AS A BREACH OF THE RIGHT TO LIFE
   1. Benefits of the right to life
   2. Concerns with the right to life
      (a) Sex-selective abortion – right-to-life dialogue
      (b) Domestic violence against pregnant women that results in miscarriage

D. CONCLUSION

Conclusion: Conundrums, Paradoxes, and Inequality
A. INTRODUCTION

B. FEMINIST NARRATIVES ON INTERNATIONAL LAW AND HUMAN RIGHTS REVISITED
   1. The absence of women and women’s voices
   2. Human rights are ‘men’s rights’
   3. The public/private dichotomy
   4. Essentialised women

C. CONUNDRUMS AND FEMINIST STRATEGIES: WHAT NEXT?
   1. Structural reforms
   2. Procedural reforms
   3. Individual litigation and contextual reasoning: Humanising Women
   4. A proposal for a protocol on violence against women

D. CONCLUSION

Selected Bibliography
### Selected Abbreviations

<table>
<thead>
<tr>
<th>International Human Rights Treaties</th>
<th>Abbreviations</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Charter on Human and Peoples' Rights 1981</td>
<td>African Charter or ACHPR</td>
</tr>
<tr>
<td>American Convention on Human Rights</td>
<td>ACHR</td>
</tr>
<tr>
<td>Commission on the Status of Women</td>
<td>CSW</td>
</tr>
<tr>
<td>Committee against Torture</td>
<td>CAT</td>
</tr>
<tr>
<td>Committee on Economic, Social and Cultural Rights</td>
<td>CESCR</td>
</tr>
<tr>
<td>Committee on the Elimination of All Forms of Discrimination against Women</td>
<td>Women’s Committee</td>
</tr>
<tr>
<td>Committee on the Elimination of All Forms of Racial Discrimination</td>
<td>CERD</td>
</tr>
<tr>
<td>Committee on the Rights of the Child</td>
<td>Children’s Committee</td>
</tr>
<tr>
<td>Committee on the Rights of Migrant Workers and Members of their Families</td>
<td>MWC</td>
</tr>
<tr>
<td>Committee on the Rights of Persons with Disabilities</td>
<td>CRPD</td>
</tr>
<tr>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984</td>
<td>UNCAT</td>
</tr>
<tr>
<td>Convention for the Protection of All Persons from Enforced Disappearances 2006</td>
<td>ICED</td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination against Women 1979</td>
<td>CEDAW</td>
</tr>
<tr>
<td>Convention on the Rights of the Child 1989</td>
<td>CRC</td>
</tr>
<tr>
<td>Convention on the Rights of Persons with Disabilities 2006</td>
<td>ICRPD</td>
</tr>
<tr>
<td>Democratic Republic of Congo</td>
<td>DRC</td>
</tr>
<tr>
<td>Economic and Social Council</td>
<td>ECOSOC</td>
</tr>
<tr>
<td>European Convention on the Protection of Human Rights and Fundamental Freedoms 1950</td>
<td>ECHR</td>
</tr>
<tr>
<td>European Court of Human Rights</td>
<td>ECtHR</td>
</tr>
<tr>
<td>Human Rights Committee</td>
<td>HRC</td>
</tr>
<tr>
<td>Inter-American Court of Human Rights</td>
<td>IACHR</td>
</tr>
<tr>
<td>Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women</td>
<td>IA-VAW</td>
</tr>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination 1965</td>
<td>ICERD</td>
</tr>
<tr>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990</td>
<td>IMWC</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights 1966</td>
<td>ICCPR</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights 1966</td>
<td>ICESCR</td>
</tr>
<tr>
<td>International Criminal Court</td>
<td>ICC</td>
</tr>
<tr>
<td>International Criminal Tribunal for the former Yugoslavia</td>
<td>ICTY</td>
</tr>
<tr>
<td>International Criminal Tribunal for Rwanda</td>
<td>ICTR</td>
</tr>
<tr>
<td>Liberation Tigers of Tamil Eelam</td>
<td>LTTE</td>
</tr>
<tr>
<td>Office of the High Commissioner for Human Rights</td>
<td>OHCHR</td>
</tr>
<tr>
<td>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002</td>
<td>OPCAT</td>
</tr>
<tr>
<td>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2000</td>
<td>OPCEDAW</td>
</tr>
<tr>
<td>Permanent Court of International Justice</td>
<td>PCIJ</td>
</tr>
<tr>
<td>Protocol to the African Charter on Human and Peoples' Rights</td>
<td>Protocol on the Rights</td>
</tr>
</tbody>
</table>
Rights on the Rights of Women 2000
Sub-Committee on the Prevention of Torture
Universal Declaration of Human Rights 1948
Western Europe and Other States Group

of Women in Africa or
(PRWA)
SPT
UDHR
WEOG
Introduction

On the concluding day of the Fourth World Conference on Women in Beijing in 1995, the Secretary-General of the United Nations declared: 'The movement for gender equality the world over has been one of the defining developments of our time.¹' He added that, despite progress having been made, 'much, much more remains to be done'.² This thesis explores how the international legal system has been affected by the campaign for women's equality. It uses the context of international human rights law and examines how the United Nations' human rights treaty bodies have responded to the varying realities of women's lives, in particular the violence they face. The UN human rights treaty bodies are the main supervisory mechanisms that oversee the implementation of human rights treaties by states parties.³ My focus is on the way these international human rights institutions have dealt with violence against women. For the purposes of this thesis, violence against women is understood as encompassing, but not limited to, any act or threat of physical, sexual, or psychological violence perpetrated against women, as well as their structural and economic manifestations.⁴ My area of research is how women's lives, particularly the violence they face, have been understood and responded to in international human rights 'jurisprudence'.⁵

¹ 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.
² Ibid.
³ The treaty bodies and their mandates are explained in Ch. 2.
⁴ See, discussion on the definition of 'violence against women' below.
⁵ Throughout this thesis, when I refer to 'jurisprudence' of the human rights treaty bodies, I mean the authoritative (quasi—judicial) statements of the treaty bodies, including their Concluding observations on state party reports, General Comments or General Recommendations, and 'views' (decisions) on individual communications. For more on this, see Ch. 2.
I draw on four feminist critiques of international law in order to understand how international human rights law responds to issues of concern to women. Even though these critiques have different theoretical roots and are sometimes in tension with each other, they remain important sources of analysis. These critiques are discussed in Chapter 1. My aim is to connect feminist theories to the practice of international decision-making bodies. I do so by critically examining the two main strategies employed by the human rights treaty bodies to incorporate violence against women within their mandates and jurisprudence: the first conceptualises violence against women as a form of sex discrimination and the second relies on creative interpretations of existing human rights so that the experiences of women are included. Discussion of the latter strategy centres on the right to life and the right to be free from torture and other cruel, inhuman and degrading treatment or punishment. This type of analysis has been undertaken elsewhere only in relation to sexual violence perpetrated against women in armed conflict,⁶ and rape in domestic criminal law.⁷

Over the past 20 years, there has been extensive feminist analysis of international law. By feminism or feminist theory, I mean the body of literature, ideas, and concepts that emerged in the mid to late 1980s that attempted to explain women's exclusion from human rights mechanisms and doctrine. This body of literature has more recently become known as 'feminist international legal scholarship'.⁸ The central issue of much of this scholarship concerns why international law has not done more to address the inequality and oppression of women.⁹ International feminist legal scholarship is

---

⁷ Although see, C. McGlynn and V. Munro (eds.), Rethinking Rape Law: International and Comparative Perspectives (Routledge-Cavendish, forthcoming 2010).
⁹ Ibid., 2.
explicitly concerned with and engaged in the ways in which women have been ‘excluded, marginalised, silenced, misrepresented, patronised, or victimised by [international] institutions that reflect and represent the perspectives of their fore-fathers and their male progeny’. Scholars have examined a number of areas of the international legal system, from the use of force and collective security to environmental law, self-determination, trade law, humanitarian law, refugee law, and human rights law. A common thread in these analyses is that international law privileges the realities of men’s lives while ignoring or marginalising those of women.

Feminist concepts and methods are useful for illuminating the processes at play in the context of international human rights law. They can help uncover the dynamics of a particular situation. The use of feminist methods and theories to examine the work of a range of international human rights treaty bodies is, however, complex because the treaty bodies may not directly or consciously apply feminist concepts or methods, and they offer very few signals as to how they arrive at their conclusions (see Chapter 2). For example, the terms of sex or gender are rarely used in the documentation of the human rights treaty bodies, and if they are, they are often used interchangeably and without explanation.

The strategies employed by the human rights treaty bodies correspond to the broader UN strategy of ‘gender mainstreaming’. This is because there remains no universally agreed binding treaty norm explicitly prohibiting violence against women. Calls have therefore been made to reinterpret existing laws so as to include women’s experiences

---

11 For an explanation of ‘gender mainstreaming’, see Ch. 1.
12 Note that there are some binding treaty rights at the regional level: see, in particular, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, 33 ILM 1534, 6 Sept. 1994; entered into force 3 May 1995. Also note that many women’s rights activists and NGOs have promoted the agreement of separate instruments, at the same time as working within the framework that is available.
generally and of violence in particular. Underlying these strategies is an intention to benefit from the symbolic labels of such peremptory norms as the prohibition against torture and the right to life (Chapters 4 and 5 respectively), or to address underlying causes of such violence by recourse to provisions outlawing discrimination on the basis of sex and inequality between men and women (Chapter 3).

Has the ‘defining development of our time’\textsuperscript{13} of gender equality resulted in any real progress in the practical application of international law to women, especially in the area of violence against women? Has the strategy of rereading existing human rights norms produced any real results for women, or has it bolstered the myriad feminist critiques of the international system? Are women in a better position under international human rights law today than at its inception?

This thesis finds that the responses of international human rights institutions to women’s lives in the context of violence against women has been mixed and, at times, arbitrary, superficial, and inconsistent. Although there has been a dramatic increase in the number of references to ‘women’ and ‘violence against women’ in international jurisprudence, the analysis of women’s lives has been largely ‘rhetorical’\textsuperscript{14} rather than structural. For example, women’s representation on international decision-making bodies has improved, although they are still primarily found in the specialist treaty bodies on women and children. Despite some attempts to dismantle the public/private dichotomy (discussed in Chapter 1), major hurdles to women gaining access to human rights mechanisms remain. Many norms continue to be constructed and understood around the life cycle of men, with occasional ‘add on’ references to women and girls.

\textsuperscript{12} See above n. 1.

Moreover, the process of 'gender mainstreaming' as it has been pursued by the treaty bodies, women's rights activists, and some feminist theorists and reflected in international law has reinforced the feminist paradox, namely that the more that women's specific concerns of violence are raised in human rights institutions, the more women become reduced to essences and are marginalised. In this way, international human rights law and 'gender mainstreaming' strategies play into the way in which women are stereotyped as victims or rendered as mothers or the 'Exotic Other Female'. At the same time, harm perpetrated against men is viewed as an exclusively male preserve and, thus, similar treatment of women is not registered as an issue of international priority.

My original contribution to the literature in this field is an in-depth analysis of the effectiveness of these strategies of 'gender mainstreaming' or of including women within existing human rights guarantees for the advancement of women's rights. Widely adopted within the UN system and by many women's rights activists and feminist scholars, this strategy has been broadly accepted as having achieved major strides in the advancement of women's rights at the international level. I assess to what extent this is true by examining the jurisprudence of the treaty bodies in detail, and assessing what the costs of it are, if any, for women.

As pragmatic responses to gaps in the law, I acknowledge that these strategies have been both conceptually and substantively powerful for the advancement of women's rights, including putting violence against women on the international human rights agenda. However, I argue that rereading existing provisions to apply them to the specific circumstances of women has had mixed results, carries its own problems and

---

16 For background on developments in international law and violence against women, see below.
limitations, and ultimately serves to continue to treat women unequally under international law. A common thread of the treatment of the three rights studied in this thesis is that women’s experiences are seen as an exception to the main or general understandings of those particular provisions. That is, women are seen as a deviation from that standard and as an exception to the rule. The practical effect of holding women to the same standards as men de jure is to impose additional burdens on women de facto. At issue is the fact that women still need to convince international bodies that what has been done to them is worthy of international attention.

The strategies referred to in this thesis require women to either equate their experiences to harm normally perpetrated against men so those experiences can be subsumed into provisions designed with the experiences of men in mind, or to justify why their experiences ‘deserve’ the establishment of an exception to the rule. The first route reinforces sexual hierarchies; while the second route exceptionalises the experiences of women and thereby essentialises women. Although the system of international human rights law may no longer exclude women, it continues to treat them unequally. By doing so, the gender bias in the system is supported and any deeper transformation is prevented. These strategies reinforce feminist critiques of the international system, rather than respond to them. I conclude that international human rights law has shifted from a period of excluding women from mainstream human rights, an exclusion that characterised its first 50 years, to a stage of rhetorical inclusion, albeit one of continuing inequality.
Structure and content

This thesis starts, in Chapter 1, with an overview of four of the main feminist critiques of international law and human rights, namely that women and women’s voices are absent from mainstream institutions; that the formulation, interpretation, and application of human rights norms reflect the experiences of men while ignoring or marginalising those of women; that women’s issues are relegated to the ‘private’ sphere and thereby outside of politics, law, and international relations; and that, throughout this process, women are stereotyped into ‘gendered’ roles. Chapter 1 forms the theoretical framework for the remainder of the thesis. It is against these four critiques that the responses of international human rights law to women are examined in subsequent chapters.

Chapter 2 provides a comprehensive overview of the UN human rights treaty body system, outlining its mandates, working methods, procedural rules, and composition. It is provided as background material, but these structural issues also inform the treatment of the norms studied in this thesis. I explore women’s (lack of) participation in the processes of the treaty bodies and enquire into the reasons for this. In doing so, I find that there are few institutional safeguards or incentives to women’s participation and that without them the default position of the UN system is towards gender inequality. Informing the material presented in this chapter are the opinions and experiences of present and former treaty body members and officials of non-governmental and international organisations. Between May 2006 and October 2008, I conducted qualitative interviews with five present and former members of various treaty bodies, and six qualitative interviews with officials of international non-governmental and
international organisations working with the treaty bodies.\textsuperscript{17} This chapter also looks at UN initiatives to reform the treaty body system, and I argue in favour of a single unified treaty body, with progressive movement towards an international human rights court, with a special chamber of dedicated gender experts to deal with particularly complex cases of women’s rights.

In Chapters 3, 4, and 5, I examine the interpretation and application of three human rights norms to the issue of violence against women. These norms are the right to equality and the related right to freedom from discrimination on the basis of sex (Chapter 3), the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment (Chapter 4), and the right to life (Chapter 5). A separate chapter is devoted to each provision, and an account is provided of how each has developed under international law and how women have fared in the respective jurisprudence. I ask whether these interpretative inclusion (or ‘gender mainstreaming’) strategies have been effective in terms of recognising and reflecting women’s concerns within international law, especially the violence they suffer, and what the consequences of them have been for women.

These norms have been selected for a number of reasons. First, two of the norms chosen – prohibition against torture and the right to life – are individually considered to be rights either of fundamental importance within the international legal system or upon which universal consensus exists. In other words, they are higher-order rights. This is in spite of the basic principle of international law that human rights are universal,

\textsuperscript{17} Information in relation to Decision on Human Ethics Protocol 2006/136 (ethics approval for this project) is on file with the author and is available from The Australian National University Ethics Committee.
indivisible, and non-hierarchical. The principles of non-discrimination on the basis of sex and equality between women and men are also both fundamental rights, as well as the raison d'être of the feminist movement. These three rights also have in common their non-derogable status under international law. That is, they cannot be derogated from even in times of a state of emergency. Thus their examination here in the context of violence against women is particularly pertinent as they can each act as a barometer to women’s standing within the international system.

Second, feminist scholars have highlighted norms such as the prohibition against torture and the right to sexual equality and their early interpretation and application by international bodies as reinforcing a system that excludes women. These same norms have later been harnessed as part of feminist strategies of inclusion because of their symbolism as international crimes of abhorrence. Moreover, international institutions have attempted to extend these broad rights to cover the varying situations of women, even if their situations are not strictly covered by the terms in which the rights are expressed.

Other human rights norms could have been analysed in this thesis in its treatment of violence against women, such as the right to liberty and security of the person, provisions relating to freedom of movement, privacy, and health, and rights pertaining to marriage. Although these rights have also been considered by the treaty bodies within

---


20 See, Chs. 3, 4, and 5.
the context of violence against women, they have not been as extensively considered as
those studied here, 21 although where they are relevant, they will be mentioned within
the context of the foregoing rights. Furthermore, where they have been applied, they
have not readily been identified as forms of violence against women (cf. torture or sex
discrimination), but as rights that are nullified or impaired because of violence against
women (e.g. health, privacy, freedom of movement).

In the final chapter, I draw out some thoughts on what this system means for women
and what it means for feminist theory and the four main feminist critiques of the
international system, as already previewed above.

In doing so I am forced to consider what I refer to as 'the conundrum' 22 of international
human rights law: on the one hand, feminist strategies of inclusion reinforce sexual
hierarchies, yet on the other hand, they have made advances for women’s rights and are
arguably the only realistic solution available within the current nation-state legal
system. The paradox is that the more that we work within the system, the more the
inequalities in the system are reinforced. Despite this, I do not advocate a complete
transformation of the existing legal framework. This is partly because the gender

21 See, e.g., the Human Rights Committee (HRC) has referred to a range of rights that impact on the issue
of violence against women: Art. 16 (right to be recognised everyone as a person before the law – not to be
treated as objects) (per HRC, General Comment No. 28: The Equality of Rights between Men and
Women (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 Mar. 2000, para. 19); Art. 17 (privacy – ‘an
example of such interference arises where the sexual life of a woman is taken into consideration in
deciding the extent of her legal rights and protections, including protection against rape) (para. 20 of the
same General Comment); Art. 19 (dissemination of obscene or pornographic material which portrays
women as objects of violence or degrading or inhuman treatment is likely to promote these kinds of
inclusion (para. 22 of the same General Comment). Art. 23 (right to marry without coercion and with
consent or forcing victims of rape to marry their attacker) (para. 24 of the same General Comment; see
also HRC, General Comment No. 19 (1990), Protection of the Family, the Right to Marriage and Equality
of Spouses (no UN Doc.).

22 Dianne Otto observes that her ‘conundrum’ is that she is uncertain that it is possible to imagine
‘women’s full inclusion in universal representations of humanity … so long as the universal subject (the
“standard”) continues to rely for its universality on its contrast with feminized particularities (the
“other”), see: D. Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human
Press, 2006) 318, 321. My ‘conundrum’ is that in arguing that the international human rights system
continues to treat women unequally, I am partially rejecting the very system that is available to bring
about other forms of equality, even if it is arguably only formal or partial equality.
mainstreaming approach is now generally well established, has made some significant breakthroughs, and any change of direction could be counter-productive. However, I do propose a number of reforms to the existing system, including the agreement of a protocol on violence against women.

I also advocate, as already mentioned, moving towards a single unified treaty body with a view to progressing towards a more formalised international human rights court, with a special chamber to deal with complex cases of serious violations of women’s rights staffed by gender specialists. I also explore other possible reforms of the system, whilst noting that each of these reforms carries its own conceptual and practical limitations. Such reforms might include improved working practices of the treaty bodies and the introduction of legal safeguards and quotas for equal gender representation, the preparation of a joint general comment of all the treaty bodies on violence against women noting the myriad provisions that are at issue across the treaty bodies but are not necessarily contained within a single treaty, as well as the later introduction of a detailed protocol on violence against women attached to the merged treaty body system or human rights court. A protocol on violence against women remains important, not least because it recognises violence against women as a human rights violation in its own right, rather than via attachment to other norms. However, it cannot overcome all the problems of the existing human rights framework and thus can only be one part of a comprehensive solution to the inequality of women generally and under international law in particular.

This thesis is focused on law, but it recognises that there are many complementary and important non-law-based approaches to violence against women, such as policy discourse, monitoring and advocacy, and local non-legal remedies; and improvements
in women’s education, health, and socio-economic development; and political empowerment. These non-law-based approaches are not however considered in this thesis.

**Terms and terminology**

There is a large amount of contested terminology in this area: sex, gender, women, violence against women, gender-based violence. These are dealt with below.

**Sex, gender, and women** are often applied interchangeably or are misunderstood. This thesis uses the categories of sex and gender in its analysis of international law, but it is primarily interested in and focused upon international responses to the lives of women. I prefer the usage of ‘women’, as it avoids the conceptual difficulties associated with the first two terms that international decision-makers seem to have in applying them consistently and with authority. However, it is not possible to ignore the other terms altogether and hence they are discussed here, including their conceptual difficulties.

Many feminist scholars adopt ‘gender’ as a category of analysis, as do many UN human rights policies and programmes. So what is the difference between ‘sex’ and ‘gender’? ‘Gender’ is generally understood as a concept that is socially constructed. Its construction is complex and influenced by culture, the roles women and men are expected to play, the relationship between those roles, and the value that society places on those roles, which then determine social standing and status. The concept of ‘gender’

---

can vary within and among cultures, and over time. That is, ‘[gender] draws attention to social relations that are culturally contingent and without foundation in biological necessity’.\(^{24}\) Power relations are often considered to be at the root of ‘gender relations’. That is, ‘gender’ is not about women specifically; rather it is about social and culturally constructed roles, identities, statuses, and responsibilities that are attributed to men and women respectively. Its usage in UN discourse applying to women has led to gender being synonymous with women, but this is not technically correct. In comparison, sex is typically used to refer to biological differences between women and men.\(^{25}\)

According to the Committee on the Elimination of All Forms of Discrimination against Women (the Women’s Committee), ‘gender’ is defined as:

... the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.\(^{26}\)

The Committee on Economic, Social and Cultural Rights (CESCR) has also offered a definition of ‘gender’, providing:

Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic,

---


\(^{25}\) Ibid.

social and political development, and to make decisions concerning their circumstances and conditions. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.27

None of the other committees has specifically defined gender for their purposes.28

Inherent in the range of definitions available is an understanding that those who fall outside the accepted construction of ‘gender’ may suffer varying degrees of ‘ostracism or other penalties’ in the societies in which they live.29 The concept of ‘gender’ is similarly understood for the purposes of my thesis, while adding that what frames understandings of ‘gender’ in a particular society includes historically unequal power relations between men and women (in other words, patriarchy) and in this way, I endorse the emphasis of the Women’s Committee’s definition.

Applying these terms is not always straightforward, and frequently, ‘gender’ is used or co-opted in international discourse to mean and to refer to sex and/or women. All the committees, for example, regularly request states parties to furnish them with ‘gender disaggregated statistics’.30 But what are these? ‘Gender disaggregated statistics’ are an anomaly, as there are only ranges of responses based on gender, rather than neat categories. What the committees really want to know is how many women are involved in particular activities (that is, sex disaggregated statistics).31


28 See, e.g., the Committee on Racial Discrimination has a specific general recommendation on gender-related dimensions of racial discrimination, in which it employs the term ‘gender’ 12 times, but it is not defined: CERD, General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7. See, also, HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10.


30 See, e.g., HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 10.

31 See, e.g., HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 8.
In the early 1980s, some feminists began to find problems within the sex/gender distinction. Some argued that gender is socialised, that is, it is behaviour learned from childhood, and that it is *individually* constructed, reinforced, and perpetuated. This approach has now been widely rejected because it disregards the significance of power in gender relations, as well as structural and institutional factors, and is predicated on women being ‘passive subjects’.

But the individual component of gender relations is not entirely obsolete. The alternative view is that gender is seen as a social institution in and of itself. As Judith Lorber states:

> I see gender as an institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, [and] is built into the major social organizations of society, such as the economy, ideology, the family, and politics.

Ultimately, Lorber acknowledges that both individual and structural aspects determine gender relations, that is, women and men reinforce individually the social spaces in which they live, work, and operate.

In addition to the difficulties of conceptualising gender, other feminist scholars began to ask whether even the biological differences between women and men are as unchangeable as assumed. Alison Jaggar argues that changing social practices led to changes in the body. For example, a cultural preference for smaller women in some societies may have resulted in the selection of such women for procreation, or as physical fitness has become more socially acceptable for women, women’s external physique has strengthened.

---


women and men are not static, and that accepting them as distinctions between women and men does not take into account differences between women.

By the late 1980s and early 1990s, a growing body of literature had begun to question the usefulness of the sex/gender distinction. Increasingly, as noted above, the terms are used interchangeably, including by some feminist scholars. Relying on the work of Simone de Beauvoir who wrote that ‘one is not born a woman but rather becomes one’, Otto, for example, uses the terms interchangeably in order to ‘disavow the idea that either of these categories might be natural and thus immutable.’ Instead, she argues that the law creates its own subjects, including by ‘(re)produc[ing] and naturaliz[ing] dominant social norms and practices.’ For these reasons, and others, some feminist scholars have called for a reimagining of the meaning of gender and gender relations, as fluid, variable, and multiple, rather than unchangeable, static, and singular. The risk associated with such a liberal understanding, however, may erase the very female subject it seeks to embrace. This concern over the ‘essential’ characteristics of being male or female is dealt with further in Chapter 1.

So where does the term ‘woman’ fit within the sex/gender distinction? Commonly, the term ‘woman’ has been used as a synonym for ‘sex’ and/or ‘gender’. For example, sex discrimination and gender discrimination have been used interchangeably to refer to

---


37 Ibid.

38 Ibid., 320.


40 Ibid.
discrimination against women. Similarly gender-based violence has been interpreted as applying to violence perpetrated solely against women. For the purposes of this thesis, I am particularly interested in women and less interested in whether one traces the discrimination and violence they face to biological or social/cultural factors or to social and cultural prejudice based on biological difference (gender). In fact, the difficulties that international decision-making bodies have in tracing particular acts to sexual or gendered prejudice can render the distinctions unhelpful. In most circumstances, the discrimination relates to social or cultural prejudice relating to the value and worth of women (gender). It is the social meaning (gender) given to sexual difference (sex) that creates discrimination for women. In other words, the two terms collide in discussions of women. An understanding of gender is therefore important as arguably another feminist method to excavate the landscape of discrimination against women, but as it can be intangible and culturally contingent, focusing on the reality of women's lives within their particular social-political-economic context may be more effective in the long-term. This is because women face both sex-based and gender-based prejudice and discrimination. Some forms of discrimination are rooted in biological differences between women and men, which as shown above are contested, and other discrimination is related to social and cultural understandings of the value and worth of women. The latter of course may be influenced by, or in fact rooted in, the former. Focusing on women's lives in context allows us to consider the concerns and needs of women in both her individual and social and cultural context and to transcend stereotypes about women that keep her in her place. This is the approach adopted in this thesis.

'Violence against women' has also been variously defined in international law, and it too has been used interchangeably with 'gender-based' and 'gender-related' violence.
None of the treaty bodies has adopted definitions of ‘violence against women’ or ‘gender-based violence’ but rather rely on those elaborated in related human rights instruments. Interestingly the preference in these instruments has been the terminology of ‘violence against women’, whereas ‘gender-based violence’ has tended to be more readily applied in the jurisprudence, guidelines, and policy statements of the UN.

The UN Declaration on the Elimination of Violence against Women\(^{41}\) (DEVAW) adopts the language of ‘violence against women’, which it defines in turn by reference to ‘gender-based violence’, 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.\(^{42}\)

The DEVAW further provides that: ‘Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.\(^{43}\)

Appearing also in the Beijing Platform for Action\(^{44}\) and most recently reconfirmed by the UN General Assembly in their 2006 resolution on violence against women\(^{45}\), this is the leading definition relied upon in international discourse.

\(^{42}\) Art. 1, DEVAW.
\(^{43}\) Art. 2, DEVAW.
Broadly construed and non-exhaustive, it has been praised for ‘being very different from the decontextualised, feigned neutrality of traditional human rights instruments.’ Otto argues that, ‘By introducing the notion of power into human rights discourse, the [DEVAW] takes the definition of human rights into new and transformative territory. It recognises that inequalities in power are the fundamental problem …’\textsuperscript{46} Inequalities in this sense move away from the relations of power between the state and the individual as understood under traditional canons of civil liberties, and towards relations between women and men. Simply incorporating a declaration into the catalogue of international instruments, albeit non-binding, suggests ‘liberation’ rather than the ‘status quo.’\textsuperscript{47}

It nonetheless has a number of limitations. First, it defines violence against women by reference to gender-related violence, but does not provide an explanation of ‘gender’. That is, the definition is circular, and is concerned only with violence against women that contains an element of sex discrimination. This focus arguably limits the experiences of women worldwide by ignoring the many violations women suffer in public, and for which gender may not be the main or even a contributing factor. In contradistinction to this view, it does acknowledge the role of the women’s movement in fighting gender-related violence.\textsuperscript{48}

Second, the definition refers to physical, sexual or psychological harm or suffering, or acts likely to cause such harm or suffering. It does not mention structural or economic violence. This is to be compared with the \textit{Protocol to the African Charter on Human}

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid., referring to preambular para. 10, and Arts. 4(o) and 4(p).
and Peoples’ Rights on the Rights of Women in Africa" (Protocol on the Rights of Women in Africa or PRWA), in which ‘economic violence’ is expressly identified.

A third potential concern is that the definition appears to create a hierarchy of harms, with the primary focus on family violence, followed by violence within the general community, and finally violence perpetrated or condoned by the state. The ordering of this provision is intended to reverse the general presumption of international law that it applies exclusively to state-sponsored violence. However, such attempts to dismantle the public/private dichotomy may have the effect of simultaneously reaffirming stereotypes about women by downplaying the violence they suffer and the roles they play in the public realm.

A fourth concern is that culture, religion and tradition as oft-cited reasons for such violence are not as strongly rejected as one might wish.

The final, and most significant, concern is that the DEVAW does not recognise violence against women as a violation of human rights ‘because of states’ concerns that to do so would water down their universality.’ Instead, violence-against-women is understood as a “barrier” to women’s enjoyment of human rights ... [and] leaves DEVAW’s

---


50 Art. 1(j), PRWA.

51 D. Otto, ‘Violence against Women: Something Other than a Human Rights Violation?’ (1993) 1 Aust. Fem. L. J. 159, 162, referring to Art. 4 which provides that states ‘should not’ invoke such justifications to avoid their obligations.

subjects still marginalized in the discourse of universality, needing special measures for their protection rather than human rights.\textsuperscript{53}

The \textit{Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women}\textsuperscript{54} (IA-VAW) adopts a similar approach to the DEVAW, although in contradistinction it grants a free-standing right to be free from violence: ‘Every woman has the right to be free from violence in both the public and private spheres.’\textsuperscript{55} Article 1 provides that violence against women ‘shall be understood 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.’ Like the DEVAW, Article 2 identifies the site, rather than the nature, of the violence; and it is likewise concerned with violence perpetrated against women attributed to their gender.\textsuperscript{56} Many of the criticisms outlined above can also be levelled against this treaty. However, the IA-VAW has also been criticised because it does not include acts that are ‘likely to cause harm’ and so only applies to any act that has actually caused harm.\textsuperscript{57}

The PWRA, although a women’s rights treaty rather than a violence against women treaty, nonetheless contains a definitional clause which defines ‘violence against women’ as:


\textsuperscript{55} Art. 3, IA-VAW.

\textsuperscript{56} Art. 2, IA-VAW provides: Violence against women shall be understood to include physical, sexual and psychological violence:

(a) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;

(b) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

(c) that is perpetrated or condoned by the state or its agents regardless of where it occurs.

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.58

This definition is distinct from those contained in the DEVAW or the IA-VAW in four key ways. First, it makes clear that it covers both actual violence and acts that could lead to violence. That is, unlike the IA-VAW, it specifically covers threats of violence. Second, it encompasses acts that are not usually viewed as violence per se, but which could lead to physical, sexual, psychological or economic harm, such as restrictions on freedom of movement, unequal rights in marriage, media campaigns that portray women in negative images, polygamy, or customary, traditional or religious practices that view women as inferior or second-class citizens.59

Thirdly, the definition is not limited to gender-related violence but applies to violence against women in a global sense. That is, the definition is broader in scope than its predecessors, and covers violence that is related to gender and violence that is not. The logical follow-up question is what does this add? It means that women are protected from violence during armed conflict in which the acts in question may be more easily described as random, generalised, or indiscriminate and less easily linked to discrimination on the grounds of gender, even though statistically women as civilians are more at risk than combatants in civil conflict.

Fourthly, it is the only definition to include explicitly economic harm as a form of violence against women. While it neither provides a definition of ‘economic violence’, nor uses the language of systemic or structural violence, the inclusion here of economic

58 Art. 1(j), PRWA.
harm complements that approach. It is not clear what is meant by ‘economic violence’ as it is not defined in the instrument and limited discussion was held at the drafting conference. In another setting, it has been considered as ‘including denial of employment and other opportunities related to income generation, denial of income-related resources and violence related to work and employment situations.’\textsuperscript{60} It has similarly been defined as: ‘property grabbing by male relatives of a deceased man, forced dependency, or neglect of a wife’s material needs’ in times of economic crisis and difficulty.\textsuperscript{61} The Special Rapporteur on the Rights of Women in Africa has included within her mandate ‘abuse intended to deprive women of their economic powers and to prevent them from benefiting from the products of their own efforts.’\textsuperscript{62} It is thus normally treated as violence connected to economic activities – either caused by economic situations or exacerbated by them, whether in the specific context of employment (such as sexual harassment) or the wider context of economic exploitation (which could include trafficking in women for forced sexual slavery or labour, displacement caused by large-scale development projects, disenfranchisement of women in difficult economic times, lack of credit or loans, or domestic violence related to food insecurity, etc.). Some of this may be more aptly described as discrimination rather than violence, but the preference in Africa has been to couch it in the language of violence. This is an important breakthrough in international discourse on this subject and revisits earlier global women’s conferences that linked violence against women with the issues of equality, peace and development (see below).


It can thus be seen that where ‘violence against women’ has been defined under international law, it tends to treat it as the same as ‘gender-based’ or ‘gender-related’ violence. The argument for this is that had these instruments incorporated all forms of violence against women, regardless of gender, it would have unfairly advantaged women vis-à-vis men who do not benefit from a specific treaty. It also reflects an understanding that women are subjected to violence because of patriarchal oppression or gendered understandings of the value and worth of women. My main objection to this general conflation is that it portrays only one story of women’s lives: that is, women as subordinate victims. This is played out in the international system by, for example, the fact that the CEDAW transcribes most of the human rights provisions from ‘mainstream’ human rights treaties, but omits rights to life, to liberty and security of person, or to be free from torture; arguably because these rights are not readily perceived as being relevant to women’s lives.63

For the purposes of this thesis, therefore, violence against women is understood as encompassing, but not limited to, any act or threat of physical, sexual, or psychological violence perpetrated against women, or its structural and economic manifestations. This definition is based on Article 1 of the DEVAW, although it is not restricted to violence that is gender-based or -related, preferring instead the all-inclusive approach of PRWA.

Violence against women under international law: Progress and transition

Despite women’s entitlement to equality before the law and equal protection of the law being recognised as rights in all the major human rights treaties,64 it was not until the

---

63 See, further, Ch. 1.
64 See, further, Ch. 3.
1990s in which violence against women was on the international agenda. The mid-1990s was arguably the watershed for attention to be paid to violence against women at the level of international law, at least in the context of armed conflict. The violent conflicts in the former Yugoslavia and Rwanda, in which women were routinely raped, sexually assaulted, incarcerated, and forcibly impregnated as part of deliberate military and political strategies to debase and humiliate them and others (read: men), attracted international condemnation and outrage, albeit belatedly. 65

Prior to the 1990s, violence against women was not a major issue in the 1975 and 1980 global women’s conferences. 66 Nonetheless a number of acts of violence were identified specifically as human rights violation in 1975, including rape, prostitution, physical assault, mental cruelty, child marriage, forced marriage and marriage as a commercial transaction. 67 A decision at the 1980 global conference on ‘battered women and violence in the family’ recognised domestic violence as ‘an intolerable offence to the dignity of human beings’. 68 An explicit provision outlawing violence against women was not however included in CEDAW, the key women’s rights treaty adopted in 1979. 69 This glaring omission has required the committee supervising the treaty’s implementation to issue two general recommendations in 1989 and 1992 respectively characterising violence against women as a form of sex discrimination in order to bring the issue within its mandate. This strategy is examined in Chapter 3.

65 See, e.g., Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T (Judgment, 2 Sept. 1998); Case No. ICTR-96-4-T (Appeal Court) (Judgment, 1 June 2001); Kumparac, Kovac and Yukovic, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001; upheld on appeal, Case No. IT-96-23 and IT-96-23/1-T, 12 June 2002; Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, 10 Dec. 1998; SC res. 1325 (2000) and 1820 (2008); Arts. 7(1)(g), (c) and (h) and 8(1)(b)(xxii), Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, 2137 UNTS 93; entered into force 1 July 2002.
The 1985 Nairobi Forward-looking Strategies identified violence against women as inter-connected with the achievement of peace, but did not deal with the same in relation to equality or development, the other themes of the 1985 global women’s conference.\footnote{World Conference on Women, Report and Nairobi Forward-looking Strategies for the Advancement of Women, 1985, UN Doc. A/CONF.116/28/Rev.1.}

It has been asserted that violence against women was central to deliberations at the 1993 World Conference on Human Rights\footnote{E. Friedman, ‘Women’s Human Rights: The Emergence of a Movement’ in J. Peters and A. Wolper (eds.), Women’s Rights, Human Rights: International Feminist Perspectives (New York: Routledge, 1995) 18, 27-31.} in which women’s rights were recognised as human rights.\footnote{World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Pt I, para. 18.} Both public and private forms of violence were included, as well as gender bias in the administration of justice. The Vienna Declaration specifically called for the drafting of a declaration prohibiting violence against women and the appointment of a special rapporteur on the same subject.\footnote{Ibid., Pt II, para. 38.}

Still in 1994, the International Conference on Population and Development in Cairo acknowledged the inter-linkages between women’s empowerment and autonomy and protection from gender-based violence.\textsuperscript{77} The following year, the Beijing World Conference placed violence against women squarely on the women’s rights agenda, identifying it as one of 12 priority areas of concern.\textsuperscript{78} Beijing highlighted particular harms not specifically mentioned in the DEVAW, including systematic rape and forced pregnancy during armed conflict [not however during peacetime], sexual slavery, forced sterilisation and forced abortion, female infanticide, and pre-natal sex selection.\textsuperscript{79} A follow-up to DEVAW and Beijing, the UN General Assembly called upon the UN Development Fund for Women to strengthen its role in eliminating violence against women.\textsuperscript{80} The Beijing +5 review further called for the criminalisation of all forms of violence against women\textsuperscript{81} and recognised links between gender-related violence and prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism, and terrorism.\textsuperscript{82}

By the late 1990s, and following developments in international criminal law, rape perpetrated by state officials for the purposes of interrogation or to force a confession of
women within state custody had been recognised as a form of torture under international and regional human rights instruments.\textsuperscript{83}

In 2000, two further human rights treaty bodies issued general comments on the gender-related dimensions of human rights violations, recognising in particular that rape is a form of torture.\textsuperscript{84} In 2005, the CESC\textsuperscript{R} followed suit by specifically mentioning that obligations upon states to protect the family included taking measures against domestic and other gender-related violence in the family.\textsuperscript{85}

In 2006, the then UN Secretary-General issued his first comprehensive report on violence against women\textsuperscript{86} and the UN General Assembly adopted a resolution calling for the intensification of efforts to eliminate all forms of violence against women, thus reaffirming international focus on violence against women.\textsuperscript{87} Building on this momentum, the current Special Rapporteur issued her second report in 2009 in which she acknowledges that there are no agreed benchmarks or indicators to assess progress at the international level and she sets out to develop these.\textsuperscript{88}


\textsuperscript{84} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 11; CERD, General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7.

\textsuperscript{85} CESC\textsuperscript{R}, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 27.

\textsuperscript{86} Report of the UN Secretary-General, \textit{In-Depth Study on All Forms of Violence against Women}, UN Doc. A/61/122/Add.1, 6 July 2006.

\textsuperscript{87} GA res. A/RES/61/143 30 Jan. 2007 (resolution dated 19 Dec. 2006), on \textit{Intensification of Efforts to Eliminate All Forms of Violence against Women}.

At the regional level, the IA-VAW mentioned above was agreed in 1994 and entered into force in 1995;\textsuperscript{89} meanwhile the Protocol on the Rights of Women in Africa or PRWA was agreed in 2003 and entered into force in 2005.

The above catalogue of developments is testament to an international human rights legal system in transition.\textsuperscript{90} There has been a significant shift from a system that excluded entirely the issues of violence against women from the international human rights agenda to one that now recognises its elimination as a necessary precondition to the enjoyment of all human rights for women, acknowledges the structural causes of women’s inequality and the associated risk of violence, and the role of the state in fostering directly and indirectly women’s subordinate position in society. This thesis explores in detail the treatment of violence against women by the UN human rights treaty bodies.

**Feminist methods employed**

This thesis is positioned within feminist international legal studies and feminist legal theory. Feminist methods tend to emphasise conversations and dialogue rather than the production of ‘a single, triumphant truth’.\textsuperscript{91} Feminist methods seek to expose and question the claim of international law to objectivity and impartiality and, in the human rights context, universality. This is done through using ‘gender’ or gender relations,


discussed above, as a category of analysis. In this way, feminist methods build on aspects of critical legal thinking. According to Christine Littleton:

[A] feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us. [emphasis in original]

There are a range of feminist techniques, each with contributions to make at each stage of the process of analysis. In essence, ‘feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women’. Likening feminist theories and methods to an archaeological dig, Hilary Charlesworth points out several layers in any feminist analysis of international law:

An obvious sign of power differentials between women and men is the absence of international legal institutions. Beneath this is the vocabulary of international law, which generally makes women invisible. Digging further down, the apparently neutral principles and rules of international law can be seen as operating differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law.

---

I undertake a similar excavation of the layers of the ‘jurisprudence’ of the international human rights treaty bodies. I use the range of feminist techniques that have been developed, but I primarily find three methodologies particularly helpful: ‘asking the woman question’, feminist practical reasoning, and world travelling.

The first technique I apply in this thesis is Katharine Bartlett’s ‘asking the woman question’. This technique is concerned with identifying and challenging those elements of existing legal doctrine that exclude or disadvantage women. Bartlett writes:

In law, asking the woman question remains examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral [sic] in a general sense, but also ‘male’ in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.

It is much more than asking ‘where are the women?’ in a statistical sense. Rather, it is about asking why women are missing from mainstream human rights institutions as well as legal doctrine. The woman question asks about the gender implications of a social practice or legal rules. It explores why and how social standards silence or distort the concerns that are more typical of women than of men. Questions that will be posed throughout this thesis include: Have women been left out of consideration of international human rights law? If so, in what way? How might that omission be corrected?

100 Ibid., 837.
101 Ibid., 837. Bartlett draws upon the work of Heather Wishik who also suggests a series of questions that could be framed within the ‘woman question’ concept: (1) What have been and what are now all women’s experiences of the ‘Life Situation’ addressed by the doctrine, process, or area of law under examination? (2) What assumptions, descriptions, assertions and/or definitions of experience – male, female, or ostensibly gender neutral – does the law make in this area? (3) What is the area of mismatch, distortion, or denial created by the differences between women’s life experiences and the law’s assumptions or imposed structures? (4) What patriarchal interests are served by the mismatch? (5) What reforms have been proposed in this area of the law or women’s life situation? How will these reform proposals, if adopted, affect women both practically and ideologically? (6) In an ideal world, what would this woman’s life situation look like, and what relationship, if any, would the law have to this future life situation? and
A more modern rephrasing of ‘the woman question’ is Marysia Zalewski’s interrelated questions in relation to her work on women in Bosnia and Herzegovina: ‘What work is gender doing?’ and ‘What about women?’ \(^{102}\) Mostly, though, she is asking the woman question in her specific field of inquiry. In this context, she is asking about the role of social and cultural constructions of gender or the gender gaps in the legal systems at play, and how they affect women. Charlesworth’s approach of ‘searching for the silences’ in international law performs a similar function. Searching for silences questions the objectivity of the law by detecting its silences, partly through paying attention to the various dichotomies used in international law – male/female, public/private, legal/political, protector/protected, etc. \(^{103}\) Likewise, Rhonda Copelon speaks of ‘surfacing gender’. \(^{104}\)

Asking the woman question is uniquely geared towards finding the underlying causes of women’s exclusion and offers new insights into apparently gender-neutral social, cultural, and legal structures. Asking it can identify silences or gaps in international law. While the focus of this method is on women in particular, it is acknowledged that the approach may have significance for all disempowered persons. \(^{105}\) It has also been asserted that the approach may benefit men as well as women. \(^{106}\)

\(^{7}\) How do we get there from here?: H. Wisik, ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ (1985) 1 Berkeley Women’s L. J. 64, 72-77.


\(^{106}\) Ibid., 514.
In contrast to its virtues, the technique has also been criticised for the underlying assumptions that it makes about women. It assumes that it is possible to speak about women uniformly and with a single voice. In spite of the validity of some of the concerns of the anti-essentialist feminist movement, which are discussed further in Chapter 1, I believe that the woman question remains an effective technique and needs updating only slightly by contextualising the woman question to the political, social, cultural, and economic context at hand (in other words, 'asking the gender question'). Although many feminist scholars may disagree on solutions to these issues, very few disagree that starting from the experiences of real women is essential.\footnote{Cf. Nussbaum who argues that deprivation and intimidation can corrupt or distort experience, making it a very incomplete guide as to what ought to be done. See, M. Nussbaum, \textit{Sex and Social Justice} (Oxford: Oxford University Press, 1999), 55-80; M. Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (Cambridge: Cambridge University Press, 2000); M. Nussbaum, 'Capabilities and Human Rights' (1997) 66 \textit{Fordham L. Rev.} 273. See, also, S. Mullally, \textit{Gender, Culture and Human Rights: Reclaiming Universalism} (Oxford: Hart Publishing, 2006), 65, for her discussion of Nussbaum.}

The second technique that I use throughout this thesis, also drawn from Bartlett, is what Bartlett terms 'feminist practical reasoning'. This technique expands traditional notions of legal relevance to make legal decision-making more sensitive to the features of a case not already reflected in legal doctrine.\footnote{K.T. Bartlett, 'Feminist Legal Methods' (1990) 103 \textit{Harv. L. Rev.} 829, 836.} It is particularly relevant to the subject matter of this thesis because 'it builds upon the “practical” in its focus on the specific, real-life dilemmas posed by human conflict — dilemmas that more abstract forms of legal reasoning often tend to gloss over.'\footnote{\textit{Ibid.}, 850.} Practical reasoning approaches problems, not as dichotomies, but as having multiple perspectives, contradictions, and inconsistencies. New facts and new situations present opportunities for improved understandings.\footnote{\textit{Ibid.}, 851.} In other words, it is a contextualised analysis: what is essential is that women's experiences are included as relevant.\footnote{Contextual analysis has been endorsed by some domestic courts, such as the Canadian Supreme Court in its deliberations on the meaning of equality: K.E. Mahoney, 'Canadian Approaches to Equality Rights 33

\textbf{Introduction}
as I apply and interpret three fundamental human rights principles to a specific practical context of violence against women. Both these techniques take into account or make more facts/issues relevant than would non-feminist legal analyses.\textsuperscript{112}

The third method employed, albeit to a lesser extent, to excavate the landscape in this thesis is Isabel Gunning's method of 'world travelling'.\textsuperscript{113} This technique is based on an understanding that women are not a monolithic group and other techniques that engage in multicultural dialogue are useful, especially in so far as they highlight social and cultural differences in the construction of gender.\textsuperscript{114} It attempts to rid feminist methods of the 'arrogant perception' of 'us'/Western feminists versus 'them'/non-Western women or 'me' versus 'the other', as the arrogant perceiver falsifies and oversimplifies the 'distance' and difference between the two groups.\textsuperscript{115} "'Travelling" is the shift from being one person in one world to a different person in another world.'\textsuperscript{116} It is a two-way dialogue in which one is required not just to speak the language of the 'other' but to understand how one is constructed by the 'other'. This is, in part, to avoid the label of cultural imperialism or colonialism. It calls for cross-cultural understanding and the recognition of both independence and interconnectedness.\textsuperscript{117}

Gunning identifies three components of how to achieve 'world travelling': 1. To understand oneself and be clear about one's own cultural influences and pressures that

---

\textsuperscript{112} K.T. Bartlett, 'Feminist Legal Methods' (1990) 103 Harv. L. Rev. 829, 856.
\textsuperscript{116} Ibid., 203.
\textsuperscript{117} Ibid., 204.
are inextricably involved in one's own sense of self; 2. to understand one's historical relationship to the 'other' and to approach that understanding from the 'other's' perspective; and 3. to see the 'other' in the cultural context in which she sees herself.\footnote{Ibid., 204-205.} Gunning does not reject human rights law or norms; rather, she is interested in the process of how to transfer those human rights norms to 'other' communities without 'us' imposing these norms on 'others'. This technique could be seen as associated with ideas of intersectionality, which is discussed further in Chapter 1, or the process of considering the multiple dimensions of women’s lives. That is, it asks us to reflect upon how we construct ‘others’ within our own communities, as well as in ‘other’ countries.
Chapter 1

Feminist Theories on

International Law and Human Rights

A. INTRODUCTION

Animating feminist theories of the international legal system is the exclusion of women from mainstream\(^1\) human rights norms, processes, and institutions. 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. In this chapter, I explore four of the principal feminist critiques/themes of international law and international human rights law, setting out also some of the main internal contradictions and disagreements surrounding these themes within feminism. This chapter forms the theoretical framework for the remainder of the thesis, which is concerned with how international human rights law has responded to women’s concerns in the particular context of violence against women.

In this thesis, 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

\(^1\) ‘Mainstream’ is used in this thesis to refer to non-women-specific human rights instruments or processes.
the disadvantaged or subordinated element. Third, in opposing this subordination and in attempting to eradicate it, ‘feminism carries a brief for f’.

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.

The first feminist critique outlined in this chapter is the absence of women and women’s voices from most international law-making processes, including in the human rights field. The second critique explores how international human rights law privileges the realities of men’s lives and correspondingly ignores or marginalises the concerns of women. The third critique addresses the effect on women of the line drawn between public and private spheres of everyday life for the purposes of international legal rules. The public/private dichotomy privileges the public/male over the private/female and is manifest in the theory of state responsibility for human rights abuses. Although logically a sub-set of the second critique, owing to its significance within feminist discourse and its particular conceptualisation around the state-based system of international law, I examine it separately. The fourth critique details how the international human rights system has the effect of treating women as a collective group with a single gender identity, thus reducing women to a single ‘essence’. While I refer to this critique as a critique of international human rights law, it is also a criticism of some feminist approaches to international law.

---

There are many strands or schools of feminist legal thought – liberal/equality, cultural/difference, radical/structural bias, and post-modern/anti-essentialist. In this thesis, I am interested in identifying some fundamental feminist theories as they relate to international human rights law and am less interested in whether these theories fall into particular feminist ‘camps’ or ‘schools’. The critiques outlined in this chapter have been selected as being overarching themes of feminist inquiry, although it is acknowledged that there are other critiques than those detailed in this study. This material could also have been differently organised, such as by reference to the various schools of feminist thought. However, such labels become increasingly unhelpful as many international feminist legal scholars do not fit neatly into a single school or category, or they may have started in one and moved into another over time.

Even though I am concerned with key feminist themes rather than schools of thought, the four themes reviewed in this chapter could also be classified broadly as: liberal/equality feminism [under-representation of women – women are the same as men]; cultural/difference feminism [human rights do not reflect or satisfy women’s concerns – women are different to men]; radical/structural bias feminism [the public/private dichotomy – public and structural power is exercised by men over

---

4 See, e.g., Karen Engle has identified three stages in feminist theory: (1) Liberal Inclusion (1985-1990), Structural Bias (1987-1995), and Third World Feminist Critiques (since 1992). In many ways both her liberal inclusion and structural bias categories fall within my first deconstructionist phase (see below in the text), as both criticise international law for failing women – liberal inclusion for ignoring women and marginalising their participation; for structural bias feminists for failing to take account of women’s experiences and structural reasons for that failing. Engle’s third stage is also subsumed within my first stage as part of the internal critique of particular feminist ideas or perspectives: K. Engle, ‘International Human Rights and Feminisms: When Discourses Keep Meeting’, in D. Buss and A. Manji (eds.), International Law: Modern Feminist Approaches (Oxford: Hart Publishing, 2005) 47. Other writers have classified feminist scholarship according to feminist identities drawn from other feminism more broadly – such as Nicola Lacey’s division into Liberal Feminism, Radical Feminism, Marxist and Socialist Feminism, and Difference Feminism; see, N. Lacey, ‘Feminist Legal Theory and the Rights of Women’, in Karen Knop (ed.), Gender and Human Rights (Oxford: Oxford University Press, 2004) 13, 19-26. Charlesworth and Chinkin divide feminist theories of law into five categories: Liberal, Cultural, Radical, Post-Modern, and Third World: see, H. Charlesworth and C. Chinkin, The Boundaries of International Law: A Feminist Analysis (Manchester: Manchester University Press, 2000), Ch. 2.
women]; and post-modern/anti-essentialist feminism [rejection of notions of single truths and assertions that truths are multiple, provisional, and thus linked to individuals’ lived experiences]. By identifying points of commonality from the range of feminist views, rather than the schools to which they belong, I am able to engage in a deeper analysis of specific rights and contexts. As I am particularly interested in how women have fared in international human rights jurisprudence, I use, rather than endorse, some of the critiques outlined in this chapter as helpful tools to excavate the landscape and to dig deep into the layers of international human rights law.

B. FOUR STAGES IN FEMINIST THEORISING AND ACTIVISM ON WOMEN’S HUMAN RIGHTS

Before proceeding to the feminist critiques outlined below, I situate these critiques within four developmental stages of feminist theories and activism on international human rights law.

The first is a period of activism around women’s rights to equality in politics, marriage, and the economy of the post-war period. Women were active participants in the drafting sessions of the Universal Declaration of Human Rights 1948⁷ (UDHR), not least via the Commission on the Status of Women (CSW) and Eleanor Roosevelt’s involvement as chair of the Commission on Human Rights. In formulating their interventions, the CSW worked closely with women’s non-governmental organisations. Driven by domestic liberal feminist agendas, particularly in the United States and England, their advocacy centred on the rights to equality and non-discrimination on the basis of sex.

⁶ See, Introduction.
At the first session of the CSW, members agreed that their goal was to ‘elevate the equal rights and human rights status of women, irrespective of nationality, race, language, or religion, in order to achieve equality with men in all fields of human enterprise.’ This is reflected in the UN by the guarantees to sexual equality and non-discrimination on the basis of sex in the UDHR and importantly, the non-discrimination approach adopted in the *Convention on the Elimination of All Forms of Discrimination against Women*, adopted in 1979. These instruments formed the political framework of the UN and its work on women’s rights, and importantly moved beyond the protective orientation of earlier instruments of the League of Nations. But it is the next three stages that are of greater relevance today and to the themes of this thesis.

The second stage of feminist scholarship on international law could be described as a period of *deconstruction*, which began in the mid to late 1980s and continued through to the early to mid 1990s. During this stage, feminist scholars were engaged in deconstructing or critiquing international human rights norms (and other aspects of international law) in order to identify gaps or mischiefs in the law. The four feminist critiques of international law identified in this chapter fall into this stage but are also used as platforms for the rethinking of international human rights law under the next stage. The deconstructionist stage utilises a range of feminist methods of inquiry, as set out in the Introduction to this thesis, to identify the reasons for the persistence of

---


patriarchy (or the dominance of men over women) in the international human rights regime. These early deconstructionist approaches, however, rarely offered concrete proposals through which international human rights law could be developed or utilised to encompass the experiences of women. Nonetheless, they laid the foundations for subsequent theorising. Only later did some of these same theorists and scholars, and new ones, alongside women's rights activists, seek to embrace aspects of international law as an avenue for the pursuit of women's rights.

In parallel to, as well as building upon and learning from, the deconstructionist stage, a third stage can be identified during which proposals for women's inclusion within human rights doctrine were and continue to be put forward. From the mid 1990s, many feminist scholars and women's rights activists began advocating for women's inclusion within human rights norms and institutions. This period is very much shaped by the events in the former Yugoslavia in the early to mid 1990s. This period saw a renewed push for women's issues to be put on the human rights agenda, in particular that sexual violence perpetrated against women in armed conflict be recognised as violations of the laws of war. This was also the approach of the Vienna World Conference on Human Rights in 1993, in which it was stated that 'women's rights are

---

human rights', later reiterated in the Beijing Platform for Action in 1995. Feminist advocacy during this stage attempts not only to improve the system to the benefit of women, but frequently simply to engage it.

This third stage focuses less on criticising the system of international human rights law, and rejecting it, in part or entirely, as being irrelevant to women's lives, and more on reflecting upon the potential scope of human rights norms to be interpreted and applied in favour of women. It is a period of reconstruction, reconceptualisation and reinterpretation. It parallels the approaches of many women's rights activists and human rights advocates seeking to work within existing parameters of international law and to challenge the system from within; and very much plays to the 'women's rights-are-human-rights' or 'gender mainstreaming' agenda (see below). Much of this feminist scholarship argues for doctrinal inclusion and institutional expansion and has been tied to liberal feminism. However, this stage has also seen calls for internal structural reform, and fits, therefore, with the views of some structural bias feminists. For example, in the absence of an explicit international treaty right protecting women against violence, women's rights activists and feminist academics alike began to argue that some existing provisions could and should be revisited to better incorporate

---

12 World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, para. 18. The precise wording is as follows: 'The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.'


14 See, e.g., Amnesty International, Human Rights are Women's Rights, AI Index: 77/01/95.

women's experiences of violence. The issue for many feminist theorists writing in this stage has been a lack of enforcement rather than a lack of law.

Feminists writing during this third stage could also be called integrationist, as they attempt to work and support women's rights within existing institutions. Both stages have contributed to the UN policy and practice of 'gender mainstreaming' in so far as they seek to better understand and/or respond to the interplay between the lives of women and international law. The UN's gender mainstreaming policy is arguably one of the UN's responses to the inclusion or integration agenda. Gender mainstreaming is defined by the UN as:

the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.

The UN human rights treaty bodies also endorsed the 'gender mainstreaming' agenda, adopting a set of six recommendations which sought to integrate gender perspectives into their working methods. Not all feminist writers have gone on to embrace the

---

16 See, n. 11 above.
19 Human Rights Questions: Implementation of Human Rights Instruments, UN Doc. A/50/505, 4 Oct. 1995, paras. 34(a)-(f), which provide: (a) The treaty bodies shall fully integrate gender perspectives into their presessional and sessional working methods, including identification of issues and preparation of questions for country reviews, general comments, general recommendations, and concluding observations. In particular, the treaty bodies should consider the gender implications of each issue discussed under each of the articles of the respective instruments; (b) Guidelines for the preparation of reports by States parties should be amended to reflect the necessity of providing specific information on the human rights of women for consideration by the respective committees; (c) In undertaking investigative procedures, the treaty bodies should make special efforts to elicit information
integration stage fully, concluding instead that the existing system of international law is irreparable and unable to offer needed transformative outcomes to women, or concerned that it reinforces sexual differences (see further below under D. Essentialised Women). These feminists do not always explain what they mean by transformation or sketch what the reimagined system would look like.²⁰

From 2000, arguably a fourth stage of feminist analysis has emerged, with a few feminist scholars assessing the progress made and taking stock of the achievements of the feminist project and implementation strategies to date.²¹ These feminist scholars are in many ways testing the integration approach of the third stage and they ask questions about whether issues of gender have been mainstreamed within international law and the extent to which international law has responded to women’s lives. Drawing on the critiques of the deconstructionist stage to assess the strategies of inclusion of the reconstructionist phase, this thesis is situated within the fourth stage of examination, assessment and reflection on the feminist project.

²⁰ Cf. scholars like Martha Nussbaum who question the usefulness of the existing international human rights system, but set about to re-imagine it: M. Nussbaum, Sex and Social Justice (Oxford: Oxford University Press, 1999) and M. Nussbaum, Women and Human Development: The Capabilities Approach (Cambridge: Cambridge University Press, 2000).
C. FOUR FEMINIST CRITIQUES OF INTERNATIONAL LAW AND HUMAN RIGHTS NORMS

1. Absence of women and women's voices

The first feminist critique of relevance to international human rights law is the under-representation of women in international decision-making bodies. Although this critique has fallen into disfavour with many Western domestic legal feminists, the state of the international legal system as a site of over-representation of men makes this critique still important for international legal feminists. Women are still numerically under-represented in most international bodies and at all levels. At the level of law, very few human rights treaties, for example, contain express provisions that require states to ensure equal or balanced representation on the basis of sex, compared with extensive provisions relating to equitable geographic representation.\(^{22}\) In fact, those few provisions that exist are couched in discretionary language.

Feminist scholars argue that the absence of female voices is a direct consequence of 'male hegemony over public life and institutions'.\(^{23}\) The main reasons for reversing this trend is because women's participation in human rights processes and institutions is considered to directly affect the relevance of laws to women\(^{24}\) and because women are entitled to participate equally in all aspects of economic, social, cultural, civil, and

\(^{22}\) See, Ch. 2.
political life.\textsuperscript{25} Feminism argues that the extent to which women were (and continue to be) excluded from any meaningful participation in negotiating, developing, articulating, drafting, monitoring, implementing, and enforcing human rights norms has resulted in a rights-based system that fails to reflect fully, or ignores entirely, the rights, interests, concerns, needs, and desires of women.\textsuperscript{25} In fact, women did participate in the drafting of the early human rights instruments, as outlined above. Rather, the problem is that they were working from a fixed set of ideas about women and were operating within a particular socio-political-historical context, not least limited by a liberal feminist agenda of formal equality.

In the contexts of violence against women and sex discrimination, Hilary Charlesworth, Christine Chinkin, and Shelley Wright have stated:

Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored. The orthodox face of international law and politics would change dramatically if their institutions were truly human in composition.\textsuperscript{27}

There is now some evidence to suggest that the inclusion of women as decision-makers in domestic and international tribunals and courts can affect the reasoning and outcome

\textsuperscript{25} H. Charlesworth, 'The Gender of International Institutions' (1995) 89 ASIL Proceedings 84, who identifies two reasons for calling for the greater participation and representation of women in international organisations: 1. It is a question of equality and human rights; 2. Women offer different forms of decision-making.


of cases, although it provides no guarantees.\textsuperscript{28} Learning from the political context, it has been found that, although research suggests that women politicians develop different styles of political engagement, it also suggests that they are wary of speaking for women.\textsuperscript{29} Other research highlights that there may be a ‘numbers threshold’ at which women acquire the confidence to speak for their sex.\textsuperscript{30} Below this threshold, they refrain from asserting any sexual difference. Limited research has been conducted of the female members of the treaty bodies, although it has been argued that having only one female member renders her voice numerically insignificant and thus she is unable to have the same impact as would be achieved by the addition of even just a second female voice.\textsuperscript{31}

Catharine MacKinnon asserts: ‘When men sit in rooms, being states, they are largely being men.’\textsuperscript{32} Because of this, she would argue, men do not, and cannot, represent women’s interests. Put another way, Natalie Hevener Kaufman and Stefanie Lindquist claim that, when the interpretation of laws is undertaken by men (which, they note, it often is) or by women who have been socialised to accept the male elite’s norms and interests as their own, the approach to the law constructs women’s lives from a male-centred perspective.\textsuperscript{33} They argue that there is no such thing as an ‘objective’ application of law or, for that matter, ‘gender-neutral’ norms, as law-making is a ‘socially constructed enterprise’.\textsuperscript{34} Concepts such as ‘reasonableness’ and ‘objectivity’,

\textsuperscript{28} See, further, Ch.2.
\textsuperscript{31} See, further, Ch. 2.
\textsuperscript{34} \textit{Ibid.}
for example, as they are applied in law, are co-opted by men, consciously or otherwise, to apply to their experiences rather than to those of women.\textsuperscript{35} As a result, the search for equal rights may result in ‘distorted (from a woman’s perspective), yet logically consistent, case outcomes’.\textsuperscript{36}

However, men do not act for the advancement of male power and to the disadvantage of women at all times. We must reject such overgeneralisations that men cannot represent, understand, or sympathise with the position or concerns of women. To accept this is to accept old arguments that men, like women, are bound by their sex-determined (or socially constructed) fate. This has been an argument posited by men through the ages to keep women ‘in their place’, and must be rejected on that basis alone. In fact, there are a number of well-known male feministst whose work is referred to throughout this thesis.\textsuperscript{37} Theorists, such as Vanessa Munro, note that men are not incapable of adopting the perspectives of women, or at least of striving to understand them better. ‘It’s just that, for the most part, they have not done so [or been encouraged or socialised to do so].’\textsuperscript{38}

Although goals of formal equality have been generally replaced by those of substantive equality in feminist literature, formal equality remains an important and continuing objective for women in most areas of daily life. This is not least because to de-emphasise it is to play into the hands of those who advocate against the necessity or benefits of equal membership of women and men on public bodies, which contradicts

\textsuperscript{35} C.A. MacKinnon, ‘Sex and Violence: A Perspective’, in E. Hackett and S. Haslanger (eds.), \textit{Theorizing Feminisms: A Reader} (Oxford: Oxford University Press, 2006) 266, 267. For further discussion on reasonableness, see Ch. 3.


\textsuperscript{37} See, e.g., the work of Andrew Byrnes (see, Selected Bibliography).

equal rights protections between men and women guaranteed under international law.\textsuperscript{39} But in addition to the formal equal inclusion of women within international institutions, we need to look beyond it to substantive equality. Formal inclusion, while important, is not enough.

What is also relevant for international human rights institutions is the inclusion of delegates and decision-makers who are qualified in or have previous experience in women's human rights or feminist theory, whether they are women or men. This issue is taken up in Chapter 2. While the formal inclusion of women within mainstream human rights mechanisms has been shown from time to time to have a positive effect on the views expressed by such bodies, much more internalisation of women's rights and gender issues is needed. This is because, while female decision-makers may be able to use their own experiences to identify with and empathise with the situation of other women, it assumes that they share the same or similar experiences, or that women by virtue of their sex 'naturally' have an interest in women's human rights. Neither of these assumptions bears out in reality. A single focus on improving the representation of women on decision-making bodies can also lead to the situation where a (or the only) female member of a judicial body is unofficially expected to be responsible for women's issues, rather than women's issues being a concern of all decision-makers. Moreover, training, briefings, and procedural guarantees are among methods used to ensure that the ad hoc nature of gender-sensitive judicial decision-making is systematised, although, as Chapter 2 reveals, these measures are also inadequate without constant pressure and monitoring by women's rights organisations.

\textsuperscript{39} Rights to equality and non-discrimination on the basis of sex are discussed further in Ch. 3.
A further variation on this first feminist critique is that, if women’s voices are heard, they are heard loudly within women-specific forums, but only as muffled voices within the mainstream. This critique is linked to strategic debates about whether women are better protected by inclusion in mainstream mechanisms or by special procedures. Human rights law in particular has been charged with marginalising women’s concerns to the ‘ghetto’.

In the 1990s, for instance, UN women-specific structures were accused of having weaker implementation obligations and procedures and to be under-resourced. The Committee on the Elimination of All Forms of Discrimination against Women (the Women’s Committee) was considered the ‘poor cousin’ of its counterparts. Since this view was asserted, however, an Optional Protocol to the CEDAW, the principal women-specific treaty, has come into force, allowing women to bring individual complaints to the Women’s Committee as well as permitting the Committee to carry out fact-finding missions. Despite the recent advent of these new mechanisms, they largely mirror conventional methods attached to many of the mainstream treaties. These mechanisms are discussed further in Chapter 2.

Another change since such critiques were first made is that the Women’s Committee has relocated to Geneva and hence is no longer the only human rights treaty-monitoring

---


body located in New York, which had been in part the source of feminist critiques related to the marginalisation of women’s rights.\textsuperscript{44} But not all believe this to be a step in the right direction. Some of the members of the Women’s Committee objected to their transfer to Geneva, fearing that the good working relationship established within the UN in New York, coupled with extended meeting times, may be lost in any relocation.\textsuperscript{45} UN reform initiatives have reignited debate about whether women’s human rights are in better hands in mainstream or ‘sidestream’ (or specialist) mechanisms. In light of initiatives to reform the UN treaty bodies into a single unified committee,\textsuperscript{46} concerns have again been raised that women’s interests may be subsumed, but not prioritised, in any merger with other treaty bodies.\textsuperscript{47}

In spite of its early marginalisation to the ‘sidestream’ of human rights discourse, over time the work of the Women’s Committee has filtered into and been heavily influential in the work of the mainstream treaty bodies, as shown throughout this thesis.

A further aspect of the marginalisation argument is that women-specific treaties have attracted large numbers of reservations that have not been made to the more mainstream instruments, which is due in part because decisions to ratify the general human rights treaties do not appear to focus primarily on the implications of those treaties for the human rights of women.\textsuperscript{48} There is no doubt that these reservations serve to undermine

\textsuperscript{44} The relocation occurred in January 2008.
\textsuperscript{48} For more on reservations, see, e.g., S. Mullahly, Gender, Culture and Human Rights: Reclaiming Universalism (Oxford: Hart Publishing, 2006), Ch. 6; J.A. Mince, ‘An Analysis of Structural Weaknesses
human rights provisions themselves. The lack of any effective and systematic review of reservations to the CEDAW reinforces ideas that women are unworthy of international legal protection. It also undermines the universal character of international human rights law. The UN Human Rights Committee, the treaty body that oversees the International Covenant on Civil and Political Rights 1966\(^{49}\) (ICCPR), and the Women’s Committee have asserted their competence to test whether a reservation is legitimate under international law amid considerable controversy.\(^{50}\) In addition, many of the reservations to the CEDAW are to the central provisions relating to non-discrimination on the basis of sex, obligations to which many states parties are already bound by virtue of their ratification of other human rights treaties. The very fact of a women-specific instrument has, therefore, allowed states to register backdoor reservations that they have not otherwise made (or been permitted to make) to mainstream treaties. While this does not affect the obligations of states parties under these other treaties, and therefore many of the reservations to the CEDAW are effectively meaningless in law, they nonetheless serve to undermine the political significance of the CEDAW as an instrument for the advancement of women’s rights. Siobhán Mullally argues, for example, that reservations seek to limit the transformative potential of international human rights law.\(^{51}\) She also remarks that the reservations dialogue is highly gendered in so far as the divisions between the public and the private that the CEDAW seeks to overcome are

---


\(^{50}\) See HRC, General Comment No. 24: General Comment on Issues relating to Reservations made upon Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant (1994), UN Doc. CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994. Following the HRC’s adoption of this General Comment, the United States expressed its concern in a written communication to the Chairperson of the Committee, letter dated 28 Mar. 1995, UN Doc. A/50/40. The United Kingdom also objected, per letter dated 21 July 1995, UN Doc. A/50/40. See, also, CEDAW, General Recommendation No. 4: Reservations to the Convention (1987) (no UN Doc.); CEDAW, General Recommendation No 20: Reservations to the Convention (1992), 20 Sept. 1992 (no UN Doc.).

reasserted. In particular, states confer priority on religious or cultural traditions above gender equality, indicating that states define individuals first and foremost as group members. The latter concern sits at the juncture of the universalism/cultural relativism debate, which is discussed below in section 4 of this chapter, ‘Essentialised women’.

2. Human rights as ‘men’s rights’

A second general critique of international human rights law is that it privileges the realities of men’s lives while it ignores or marginalises those of women. Feminist scholars have argued that international human rights norms were initially articulated and continue to be interpreted and applied to reflect men’s experiences while overlooking harms that most commonly or disproportionately affect women. This results from structural rather than mere formal inequality. When I refer to structural issues within this thesis, I mean the underlying causes of women’s exclusion or marginalisation from human rights mechanisms and denial of the enjoyment of their rights, such as patriarchy, exclusion, and oppression combined with poverty, harmful or discriminatory cultural and religious practices, or political disenfranchisement. The liberal or numerical inclusion of women within mainstream institutions is considered an insufficient strategy for the demolition of patriarchy. In many ways, this second critique is a direct attack on the alleged short-sightedness of the liberal feminists of the first critique as regards their failure to deal with the structural causes of women’s exclusion. These two critiques are, however, interconnected to the extent that equal and fair representation of women within mainstream human rights mechanisms can, and has

---

52 Ibid., 102.
53 Ibid., 105.
been shown to, affect the interpretation and application of laws to women and, in this way, to deal with structural issues.

Broadly speaking, feminist scholars argue that international human rights law is conceived as a set of ‘male’ rights.56 By ‘male’ rights, feminists mean that rights are ‘defined by the criterion of what men fear will happen to them’;57 that the content of the rules of international law privilege men and fail to acknowledge, or otherwise marginalise or silence, women’s interests;58 and that the very choice and categorisation of subject matter deemed appropriate for international regulation reflects male priorities.59 In this way, the system of international law is said to be a ‘thoroughly gendered system’.60 As an example of this gendered discourse, feminist scholars routinely refer to the definition of ‘torture’ in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 198461 (UNCAT), which prioritises violence perpetrated within the context of state custody, a form of harm more typically meted out against men than women.62 Whether this is still a valid critique in relation to torture is explored in Chapter 4. Catharine MacKinnon sums up this view as


60 Ibid.


follows: ‘Human rights have not been women’s rights – not in theory or in reality, not legally or socially, not domestically or internationally.’

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. Meanwhile, governments accept and promote this perspective as the rule of law. It is clear that many apparently non-gender-specific (or so-called gender neutral) principles of human rights law are in fact quite specific in their relevance and application to men’s lives. Kathleen Mahoney asserts that male hegemony over public life and institutions meant that rights came to be defined by men. These arguments, while valid in many contexts, nevertheless rest on dichotomous gendered understandings of the roles of men and women respectively, overlook women who do not conform to those roles, and believe that it is possible to speak for and about women collectively. This is dealt with later, in section 4 of this chapter, ‘Essentialised women’.

---

These views provoke a series of questions, such as: What are women’s rights? What are women’s experiences, concerns, and interests? What do feminists mean when they refer to them?

Many feminists fail to respond to these basic questions or simply fail to identify concerns that are specific to women. Anne Gallagher argues that the ‘male’ conception of human rights law has led to the omission from mainstream human rights instruments of a number of fundamental rights relevant to women. She refers to underdevelopment, extreme poverty, illiteracy, gender segregation, and lack of reproductive choice as being missing from mainstream human rights instruments. 68 Other writers have argued that human rights law has ignored or belittled such violations as forced childbirth, sexual slavery, rape, genital mutilation, female infanticide, domestic violence, sexual harassment, gender-based violence, reproductive freedom, education, the right to vote, economic policies, and structural adjustment programmes. 69 Apparently neutral principles of international law, such as the principle of self-determination, have also been held to exacerbate the inferior position of women. 70 Even though many of these issues, such as underdevelopment, poverty, economic policies, education, and illiteracy, affect men as well as women, they remain of particular relevance to women in many societies worldwide as they experience these deprivations of rights in different ways, for different reasons, or to different degrees.

Since the introduction of the UN’s policy on gender mainstreaming, there has been a shift away from listing women’s concerns to applying gendered techniques to evaluate

71 See, e.g., K. Knop, Diversity and Self-Determination in International Law (Cambridge: Cambridge University Press, 2002).
the impact of particular policies and programmes on women and men respectively. This approach means that, if implemented, one should be able to determine the particular effect of all human rights laws, policies, and programmes on women and their communities – it is a shift away from formal to substantive equality, or from equality of opportunity to equality of result.

The lack of ability to conceptualise women’s rights in the mainstream is also levelled against women-specific instruments. According to Noreen Burrows, ‘women’s rights [as articulated in international human rights law] are not ... rights which are specific to women, but are rather universally recognised rights held by all people by virtue of their common humanity and regardless of their sex’.72 She states that it is misleading to speak of women’s rights, because there has been no attempt to define the exact sphere of women’s rights or to enumerate those rights that might be said to be peculiar to women.73 Andrew Byrnes finds that it is not always possible to distinguish between women’s rights and general human rights anyway,74 although he argues that the main model applied by the UN to define human rights has been ‘a largely androcentric one’.75 Even the CEDAW has faced criticism for not recognising or protecting rights that are specific to women’s ‘gendered experience and corporeality’.76 However, apart from rights relating to pregnancy, reproduction, and consequences of childbirth, which are

---

73 Ibid., 80.
included to some degree in mainstream as well as women-specific treaties, all other rights are relevant to both women and men, albeit to different degrees in different contexts. The real difficulty of defining the corpus of women’s rights is that issues of concern to women can broadly be linked to manifestations of unequal power relations or patriarchy, and to gender inequality, which can vary between societies, cultures, and over time. Thus, any attempt to list women’s rights is fraught with difficulties, including the real possibility of overlooking areas of disadvantage that have yet to be considered.

Feminist scholars have not only pointed to a number of omissions to argue that human rights law has failed women, but they further argue that existing provisions have neither been recognised as relevant to women nor interpreted to reflect women’s experiences. That is, they argue that the operation of human rights law, both in structure, process, and substantive content, excludes women’s concerns and experiences. One way this occurs is through a balancing of ‘competing’ rights by decision-making bodies, which reduces women’s power. At the level of international law, this is played out in the balancing between, for example, rights to equality before the law and freedom of religion, which is ultimately decided by men for women. Another example would include the competing rights to liberty versus privacy in the context of marital rape and domestic violence. Some regional human rights instruments, for example, assert the inviolability of the right to privacy, thus trumping privacy over

77 E.g. Art. 10(2), International Covenant on Economic, Social and Cultural Rights 1966, G.A. res. 2200A (XXI), 16 Dec. 1966, 993 UNTS 3; entered into force 3 Jan. 1976 (ICESCR) (provides for special protection for mothers during and after childbirth); Art. 12, CEDAW (non-discrimination in relation to health care, including access to family planning, etc.).

78 E.g., a right to nationality was included in the UDHR but it was not transferred to the ICCPR except in relation to a right to a nationality for children and this has caused many problems for women: see, International Law Association, Committee on Feminism and International Law, C. Chinkin and K. Knop, Final Report on Women’s Equality and Nationality in International Law (2000). Similarly, explicit mention of reproductive health is missing from the ICESCR.

women’s safety. Charlesworth, Chinkin, and Wright have argued that particular rights, such as the right to freedom of religion or to the protection of the family, can in fact justify the oppression of women. The proliferation of rights, which has occurred markedly at the level of international law, may further lead to increased competition, political divisiveness, and weaker rights claims.

Despite statements to the contrary by UN governing bodies, the human rights system is legally hierarchical in the sense that not all rights are of equal value. There are many layers of rights, from those that are non-derogable to those that are absolute, limited, accessory, or qualified. Charlesworth and Chinkin argue that in this hierarchy, women’s rights have not achieved the same level of protection or symbolic labelling as other rights. They have highlighted the very abstract and formal development of jus cogens as reflecting the prized ‘masculine’ form of reasoning. Jus cogens is seen as giving privileged status to specific norms, which in themselves largely reflect a male perspective. Ranking rights according to their importance is also at play in the idea of

83 See, particularly, World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, para. 5: ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’
86 Ibid., 67.
derogability in times of public emergency, the failure to recognise the justiciability of specific types of rights, and ideas of immediate versus progressive implementation.

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'. Noreen Burrows contends that human rights norms seek to place women in the same situation as men and that 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 that it does not allow space for the 'deep-seated reform required to realise substantive gender equality' but instead accepts the existing system as legitimate. Issues of equality and non-discrimination on the basis of sex are dealt with in more detail in Chapter 3.

87 These issues are further discussed in relation to specific rights in later chapters of this thesis.
88 The initial failure to agree an Optional Protocol to the ICESCR, for example, was based on the belief that economic, social, and cultural rights are non-justiciable. For more, see Ch. 2.
89 Early views of states parties and the treaty bodies that ICCPR rights are 'immediately enforceable' and ICESCR rights are 'to be realised progressively'. It is now clear that some rights of the ICESCR are immediately enforceable (e.g. non-discrimination): see, CESC, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 3.
Some scholars support the view long held by the UN, particularly from the 1970s to the mid 1990s, that a programme of special rights, such as women-specific treaties, would solve the problem of women’s inequality.\textsuperscript{93} Ann Scales, in contrast, cautions against accepting the addition of special rights to the pre-existing system, because it ‘presumes we can whip the problem of social inequality by adding yet another prong to the already multi-pronged legal tests’.\textsuperscript{94} The UN has now changed its view to the extent that a dual track is pursued that includes women inside mainstream institutions (i.e. gender mainstreaming, as outlined above) as well as maintaining women-specific institutions and programmes. In the 2000s, however, UN reform proposals in relation to the treaty bodies have recommended uniting all the bodies together.\textsuperscript{95}

A further way in which human rights are conceived as ‘men’s rights’ is through the double standards of international human rights law. Rachael Johnstone asserts that, in practice, gender discrimination is tolerated by the international community in ways that simply would not be accepted if the distinctions were made on grounds of race.\textsuperscript{96} Race relations in many countries have been historically fought on male terms, and rights achieved by black men, for example, have not always been extended to women – whether white or black. Racial factors were prominent, if not a defining element, in the slavery context,\textsuperscript{97} while the gender dimension of the phenomenon was largely absent. In fact, some defenders of slavery, in seeking to justify it, analogised it to the position of


\textsuperscript{95} UN reform of the treaty bodies is dealt with in Ch. 2.


women and children. In critiquing the development of equality guarantees under international law, Charlesworth, too, argues that international law has developed a hierarchy of forms of discrimination in which race discrimination is considered more serious than other forms.

Likewise, cultural relativity arguments that justify cultural practices that conflict with universal human rights standards are frequently asserted by governments in relation to women’s rights, when these same arguments would not be tolerated against non-gender-specific rights. This is partly explained by the view that women’s rights (and women) are seen as the preserve of patriarchal cultures. ‘Women are the bearers of culture not just in the clichéd senses that they socialize children or embody the gentler aspiration of each civilization, but in the more fundamental sense that groups define their identities – what makes them different – in large part through the statuses and roles they ascribe to women.’ The question of culture has come to dominate feminist discourse in the late 1990s to the 2000s, with one effect being a number of direct challenges to many foundational feminist principles, such as shared oppression and patriarchy. This is dealt with further in section 4 of this chapter, ‘Essentialised women’.


International human rights law is further criticised for not always being able to take account of structural explanations for the universal subordination of women, owing to its focus on individual rights.\textsuperscript{102} Elizabeth Gross argues that ‘rights discourse overly simplifies complex power relations and their promise is constantly thwarted by structural inequalities in power’.\textsuperscript{103} Along these same lines, Anne Orford argues that human rights institutions have refused to acknowledge the links, for example, between women’s human rights and militarism, economic liberalisation, and globalisation;\textsuperscript{104} while Chinkin identifies economic restructuring and poverty as related, yet forgotten, links to women’s rights.\textsuperscript{105} In favour of the collective over the individual, some feminist scholars theorise that ‘in one sense rape [and other forms of violence against women] is never truly individual but is an integral part of the system of ensuring the maintenance of the subordination of women’.\textsuperscript{106} Nonetheless, although power inequality may account for a climate in which rape is perpetrated and for impunity for it in law, victims feel individually aggrieved and are in need of individual redress.\textsuperscript{107} Pursuing collective forms of redress overlooks gendered power relations within those collective systems as well as questions of who is making the decisions and on whose behalf.

Part of this wider critique of the irrelevance of human rights norms to women is the primacy that the international community bestows on civil and political rights over economic, social, and cultural rights. This is said to operate to the disadvantage of


\textsuperscript{105} C. Chinkin, ‘Feminist Interventions into International Law’ (1997) 19 \textit{Adel. L. R.} 13.


women. In part this is because the dominance of civil and political rights has entailed a preoccupation with constraints on the power of the state rather than an emphasis on its affirmative duties to ensure rights.\(^{108}\) This division, with its origins rooted in historical power struggles between the East and the West\(^ {109}\) rather than in gender divisions,\(^ {110}\) is nonetheless said to reinforce a gendered discourse on human rights.\(^ {111}\) While feminist writers generally acknowledge that the civil and political rights of women should be fully protected, they argue that these are not the harms from which women most need protection.\(^ {112}\) In other words, many of the violations perpetrated against women are bound up with the disadvantages they suffer in the economic and social fields.\(^ {113}\) A more hardline stance is that of Charlesworth, Chinkin, and Wright, who wrote in their 1991 article that civil and political rights 'may have very little to offer women

---


generally’ as the ‘major forms of oppression of women operate within the economic, social and cultural realms’.\footnote{H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’ (1991) 85 Amer. J. Int’l L. 613, 635.}

Furthermore, some feminists argue that the extent to which the debate on violence against women is located within the civil and political rights paradigm and outside the economic, social, and cultural rights framework limits possibilities for transformation.\footnote{C. Chinkin, ‘Feminist Interventions into International Law’ (1997) 19 Adel. L. R. 13.} In fact, the distinction between these two categories or ‘generations’ of rights makes it difficult to develop comprehensive solutions. If violence against women, for example, is viewed in isolation of its underlying causes, such as women’s economic or educational disadvantage, then a rights-based approach will have limited effect. On the other hand, broad policy solutions do not remove the need or desire of individual victims of violence to be able to assert their rights within an international judicial system that outlaws individual crimes and offers individual means of redress.

For the purpose of individual litigation, tracing the cause of violence to economic inequality is a far more difficult proposition than asserting that the violence caused physical, sexual, or psychological harm to the woman. In fact, as this thesis attests in later chapters, requiring female litigants to link the harm they suffer to structural causes of inequality adds an additional layer to their claims, one that is not applied to men, and thus is to treat women unequally under international law. This is not to suggest in any way that root causes are not critical, but rather that both the collective and the individual routes to change ought to be pursued. Moreover, general conceptions of equality have not adequately or regularly challenged underlying social, political, and economic
institutions that reproduce gender hierarchies. Violence against women, like all human rights violations, has two constituent parts: the specific human rights violation (the act or threat of violence perpetrated against one or more individuals) and the causes of that violence, such as inequality, poverty, armed conflict, lawlessness, or underdevelopment. Both these aspects of violence against women need to be addressed by human rights law *writ large*, and, increasingly, international human rights institutions are doing so, as is shown in the remainder of this thesis. Addressing the root causes of violence will lead to a reduction in or eradication of acts of violence against women, but in the meantime, this should not mean the human rights system should abandon its litigious arm or its focus on individual human rights violations. Renewed importance to economic development will not address the specific grievances of an individual woman who has been beaten by her husband or raped by armed militias. Even in countries in which women enjoy economic independence, they are still the targets and victims of many forms of violence, including in the very workplaces where they attain and assert their independence and equality. Ignoring the individual face of women is to treat women as a collective and as insignificant in their own right, and this has to be resisted.

Others note that women’s enjoyment of public civil rights is restricted in many ways. Amartya Sen argues that political rights are important because they can fulfil needs as

---

well as the formulation of what those needs are. Under this analysis, the CEDAW is bound to fail in societies without democratic government as women are not ‘truly free’. In the context of violence against women, the realm of civil and political rights – in which rights such as freedom from torture are located – remains an important space for women to raise their grievances and challenge existing paradigms.

The exclusion of women from human rights norms is further said to be linked to the choice of language within international instruments and discourse. Feminists commonly see language as supporting the exclusion of women from the scope of protection offered by human rights law. The constant use of masculine vocabulary, it is argued, operates at both a direct and subtle level to exclude women. Of the eight core human rights treaties in force, only four utilise the feminine pronoun (including the CEDAW). In addition, such language is said to ‘reinforce hierarchies based on sex and gender, even if it is intended to be generic’. Dale Spender argues that both language and material resources have been used by the dominant group to structure women’s oppression. In particular, feminists point to the use of the masculine pronoun throughout international human rights instruments as creating a situation in which ‘[a] man is sure that he is

---

included; a woman is uncertain'. But while masculine terminology in mainstream human rights treaties is problematic and can play into the exclusionary framework, it should not be overstated. Such language is surrounded by provisions on non-discrimination on the basis of sex and equality of rights between women and men (notably with their own set of challenges as outlined above and in Chapter 3). The problem has been one of implementation rather than language per se. Apart from the masculine pronoun, much of the language is gender-neutral: everybody, every human being, all persons.

More problematic than the prevalence of the masculine pronoun is the meaning given to substantive norms such as torture or the right to life. In relation to torture under the UNCAT, the use of the masculine pronoun alone in the definition of proscribed behaviour has been criticised for giving an immediate impression of a male, rather than a truly human, right. Its equivalent in Article 7 of the ICCPR similarly uses the male pronoun in its second sentence. Additionally, it is the socially and culturally constructed meanings that are given to these terms which play into the exclusionary process and reinforce traditional views of male/female difference, which relegate women to the private. Chapters 3 to 5 of this thesis consider the extent to which these traditional meanings hinder women’s inclusion within mainstream mechanisms.

More conservative feminists assert that rights language is ‘fundamentally adversarial and negative’, whereas ‘[f]eminists seek a framework that emphasizes positive values such as helping, cooperating and acting out of love, friendship or relatedness, as well as

---

fairness'. In addition, legal institutions themselves are viewed as hierarchical, adversarial, and exclusionary. Rachel West criticises the individual as the subject of international human rights law as alienating women whose experiences and concerns are 'not easily translated into the narrow, individualistic, language of rights'. Carol Gilligan, writing from a psycho-social perspective, asserts that the search for universal, abstract, hierarchical standards is often associated with masculine, rather than feminine, modes of thinking. Her work influenced feminism to celebrate differences between women and men. Feminists then asserted that women's so-called 'ethic of care' identified by Gilligan should be added to men's 'ethic of justice' in order to bring about substantial reforms. Munro points out that this view does not prepare for the possibility of women's voices being modified or distorted in the process of this collaboration. MacKinnon asserts that '[a] key mechanism for the institutionalisation of this male power is the law's claim to gender-neutrality and objectivity, epitomised in the appeal to abstract rights'. Scales cautions that '[w]e should be especially wary when we hear lawyers, addicted to cognitive objectivity as they are, assert that women's voices have a place in the existing system'.

---

At the national level, legal actors are viewed as abstract and socially detached entities, and the legal system is seen as decontextualised, generalised, and conflict-driven.\textsuperscript{134} As a second-tier legal system, international law becomes an even more abstract and remote form of justice, with access being granted only after the exhaustion of domestic remedies and a panoply of other criteria.\textsuperscript{135} But the international human rights system, with its range of legal, quasi-legal, and non-legal mechanisms, holds out greater promise of being able to take account of particularity, cooperation, and context than many domestic legal systems that are very much centred on litigious processes. At the international level, there have been many attempts at new and innovative approaches to questions of justice, especially in the aftermath of armed conflict, in which truth and reconciliation commissions have replaced, or at least operated alongside, traditional legal redress mechanisms.\textsuperscript{136} It is not clear, though, that such mechanisms have satisfied victims’ calls for justice in all contexts, including those of women.\textsuperscript{137} Moreover, the abstraction of rights is not simply a woman question but affects all disempowered persons. A further component of this criticism is that rights have historically been represented by residual liberties protected by negative freedom rather than the positive definition of rights and interests.\textsuperscript{138}

While acknowledging that there has been some broader use of women-inclusive language in international instruments more recently, in particular through ‘gender mainstreaming’ efforts, Chinkin does not consider such language to be transformative, as she finds that little has changed on the ground. She argues that ‘[a]ll this activity has

\textsuperscript{135} For an overview of these criteria see, Ch. 2.
\textsuperscript{137} \textit{Ibid.}
not really challenged the gendered assumptions about the structures of global political and economic power, nor [sic] of the construction of knowledge in the rapidly changing environment of international law.\(^{139}\) The best that has been achieved is an ‘add women and stir’ approach that does not demand any radical rethinking of programmes or gender awareness.\(^{140}\) In a similar way, Charlesworth is sceptical of the UN’s efforts at gender mainstreaming.\(^{141}\) Nonetheless, in spite of these and other reservations, both Charlesworth and Chinkin concede that rights discourse offers a ‘recognised vocabulary to frame political and social wrongs’, ‘an empowering function’ to women, and a ‘focus for international feminism that can translate into action’.\(^{142}\) Despite criticisms of human rights, most feminists agree that rights language ought not to be abandoned entirely.\(^{143}\)

3. The public/private dichotomy

A third major feminist critique of the international system is the distinction drawn between the public and private spheres of everyday life for the purposes of international legal rules. The argument is that international law privileges the public sphere of life and thereby refuses to recognise the ‘specificity of the female life in the private sphere’.\(^{144}\) The public sphere has been consistently represented as the sphere of ‘rationality, culture and intellectual endeavour’, as compared with the domestic sphere.


being one of 'nature, nurture, and non-rationality'. Margaret Thornton puts it this way: 'The public sphere, mediated through law, has enabled benchmark men to construct normativity, like God, in their own image.' 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. The boundaries between the 'public' and the 'private' and the allocation of men and women thereto, are 'deeply political and inherently constructed'. Ursula O'Hare refers to this as the 'gendered fault-line'.

Given the historical state-based nature of international law, the main subject of international law has been the state. International human rights law, despite its inclusion of individual human beings, has also focused on state action directed against individuals rather than on so-called 'private' attacks against women in their homes or in other private settings. In fact, some argue that the framework of civil and political rights is structured so as to safeguard activities in the private sphere (e.g. through the right to privacy) or that accepting statehood and sovereignty as fundamental components of the international legal order 'narrows our imaginative universe and the possibilities for

146 Ibid., 13.

73 Ch. 1: Feminist Theories
reconstruction'. Furthermore, the male-gendered conception of the public world as ‘superior’ to the private creates a ‘hierarchy of oppressions’ in which men fear oppression from the state whereas women fear oppression by men in the private world. Because of this dichotomy, Rhonda Copelon speaks of the ‘persistent trivialisation of violations against women’.  

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. Excluding sex discrimination and violence against women from the human rights agenda arises from a failure to see the oppression of women as political. 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. Many violent acts committed against women at the hands of men occur prior to or without direct state involvement. At the domestic level, for example, women have trouble convincing law enforcement officials that violent acts within the home are criminal. 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. Kenneth Roth associates such difficulties with an early view of human rights guarantees, especially those under the ICCPR, that they applied to victims only of politically motivated abuse, and even then only if the abuse was at the hands of government agents. Bunch has stated that ‘[f]emale subordination runs so deep that it is still viewed as inevitable or natural rather than as a politically constructed reality maintained by patriarchal interests, ideology, and institutions’. She identifies the physical territory of this political struggle as being women’s bodies.

MacKinnon finds that the legal concept of privacy has preserved male supremacy over women by ‘shiel ding] the place of battery, marital rape, and women’s exploited labour’. Economic rights include remuneration for production outside the home, but not for reproduction or housework. The interpretation of torture has been, for the most part, strictly confined to state-sanctioned custodial-type scenarios, whereas women are much more likely to suffer violations by ‘private’ actors in ‘private’ settings. In fact, the public/private divide is said to be nowhere as pronounced as in relation to the issue of violence against women.

161 Ibid., 15.
There are several feminist theories that attempt to explain why the public/private dichotomy is maintained in international law. Gayle Binion, for example, asserts three main reasons. First, it may be in the interests of the state to retain its pre-eminent position in international law. In this way, states are able to shield various institutions from external investigation. Second, allowing a deconstruction of the patriarchal nature of family (or private) life may lead to improved understanding of the patriarchal and hierarchical structures of the society by citizens, who may then attempt to reconstruct them. Other actors may also benefit from the current division of power, such as religious institutions, corporate organisations, international agencies, non-governmental organisations, rebel groups, mercenaries, terrorist cells, and husbands. Third, even some human rights theorists and activist groups fear a dilution of human rights principles if they are expanded beyond their traditional canons. Some feminist theorists argue for only a very limited reconceptualisation of human rights.

Not all feminists, however, conceptualise the public/private dichotomy in the same way. A few feminists have questioned whether the public/private divide might not be a ‘false dichotomy’ to the extent that the ‘private’ is subject to ‘legal regulation and outside scrutiny’. For example, the ‘family’, as the ultimate symbol of the ‘private’ sphere, is subject to international legal supervision, at least in relation to rights regarding

---

169 See, e.g., D.Q. Thomas and M.E. Beasley, ‘Domestic Violence as a Human Rights Issue’ (1993) 15 HRQ 36, 43 (arguing that a link to the state is still needed).
marriage, consent to marriage, and child-rearing. In addition, express provisions were inserted into the CEDAW that incorporate discrimination against women in both public and private areas of life. Riane Eisler argues that, even though human rights law has attempted to regulate the private sphere, it has simply failed to do so in respect of issues that particularly touch women’s lives. In contrast, Karen Engle, despite theorising the public/private dichotomy, cautions against overemphasising it, arguing that doing so may exclude important parts of women’s experiences, that is, those within the ‘public’ sphere. She also argues that such arguments assume that ‘private’ is bad for women, whereas it has some benefits for women. Engle analyses the public/private distinction as taking one of two forms: either the ‘private’ – a sphere in which women operate – is excluded from the scope of international law, so the law cannot be said to be universal; or, alternatively, international law does not really exclude the private, but rather uses the public/private divide as a ‘convenient screen’ to avoid addressing women’s issues.

Liberal feminists such as Martha Nussbaum, too, challenge dimensions of the public/private divide, arguing that the liberal tradition of equality must be extended to relations between women and men within the family. Jacqueline Greatbatch, writing in relation to international refugee law, similarly reveals that the public/private dichotomy ‘roots women’s oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the inter-connections of the public and private spheres’.

---

172 See, Art. 23, ICCPR and Art. 10, ICESCR.
173 Art. 2(e), CEDAW. See, further, Ch. 3.
176 Ibid.
In a similar way, other feminists object to the way in which the labels ‘public’ and ‘private’ have been applied. Rachel Johnstone argues that the dichotomy is itself questionable, ‘because all activities have both public and private natures’.[179] She asserts that ‘political decisions to allocate certain activities to the private sphere have been used to justify states’ abdication of responsibility for that activity’.[180] Michael Heyman, writing in relation to domestic violence as a ground for claiming asylum under international refugee law, argues that ‘it is senseless to view domestic violence as purely private conduct’.[181] He argues that perceiving the perpetrator of domestic violence as a private actor is ‘ambiguous, even incoherent’ as it either means that the non-state actor operates in a private domain (that is, ‘in a virtual vacuum’, which Heyman argues is not the case)[182] or that he acts remote from public view.[183] In other words, the decision to leave issues to the private sphere is itself an exercise of political choice.[184]

In relation to violence against women specifically, Charlesworth and Chinkin argue for a reconceptualisation of how it is viewed. If it is understood not just as aberrant behaviour but as part of the structure of the universal subordination of women, it cannot be considered a purely ‘private’ act.[185] Bunch has stated that such violence is caused by the structural relationships of power, domination, and privilege between men and women in society. Violence against women, she asserts, is central to maintaining those

[180] Ibid.
[182] Ibid., 739.
[183] Ibid., 740.

Overall, the public/private dichotomy has been a useful feminist lens through which to highlight the bias in international law in favour of state rather than non-state actions or omissions. The effect of this dichotomy has been that particular concerns of women, such as violence within the home, are not generally considered issues either for domestic or international regulation. The public/private dichotomy thus remains a helpful starting point for discovering the gender gaps in international law and, as such, is applied as a means of analysis throughout this thesis, including reviewing recent efforts of the human rights treaty bodies to incorporate the harmful actions of non-state actors as human rights violations. However, it should not be relied upon too rigidly.

The criticism of the public/private dichotomy in international law is itself value-laden and based on stereotypes and assumptions concerning women’s lives. It overlooks the
fact that while men dominate the public sphere of the state, they also dominate the private. Most so-called private issues do have public dimensions, either because they are subject to regulation under law (the problem is often the way they have been regulated rather than the lack of regulation) or because they are grounded in public systems of oppression, patriarchy, or gendered international relations. Additionally, the reliance of international feminist theory on the public/private dichotomy as a means of explaining the exclusion of women from mainstream human rights mechanisms carries its own gendered entrenchment – it keeps women in the private and ignores their roles and participation in public spaces. Moreover, the private has been shown to be sometimes useful for women, such as in the context of women’s rights to sexual freedom, reproductive health, and abortion; and therefore a total collapsing of the public/private may not be always in the best interests of women.

4. Essentialised women

The fourth feminist critique of the international human rights system is that it relies on and reinforces a collective female identity. The ‘gendered’ interpretations of human rights norms assume that women share a common experience and identity. This is played out by the human rights treaty bodies in their treatment of issues such as violence against women, as shown in later chapters of this thesis. The desire to include equal representation of women on law-making bodies, for example, assumes that women speak with one voice, a voice that differs from that of the male. Of course, an alternative view is simply that for reasons of equality women should have a place at the political table. The feminist classification that human rights are ‘men’s rights’ relies on a central dichotomy between the lives of men and women. Meanwhile, women are collectively located in the private sphere in feminist literature, with limited, if any,
regard to women operating in the public realm. As women’s rights activists and human rights non-governmental organisations have sought to put women’s rights on the international human rights agenda, they too have engaged in and encouraged an essentialist discourse. This same critique is levelled against feminism itself. In addition, essentialising women results in the essentialising of men, who are perceived as the binary opposite of women.

Dianne Otto, for example, sees the text of the ICCPR as constructing ‘woman’ in ‘procreative and heterosexual terms as mother and wife and as inevitably subject to and dependent on “men” in their various forms: individually as fathers and husbands and collectively as the State, the military, and the emergent United Nations’. She points out that some of this emphasis is due to the endorsement of ‘protective’ or paternalistic instruments by the women’s movement, such as early instruments on women’s employment, international trafficking of white women for the purpose of prostitution, and armed conflict. Early anti-trafficking instruments have been particularly criticised by some feminist scholars who argue that narratives of ‘white

---


slavery’ or ‘trafficking in women’ function as ‘cultural myths’, ‘grounded in the perceived need to regulate female sexuality under the guise of protecting women’.  

Alain Corbin states:

[It was] the martyrdom of virginity … not the fact of women being sold but the idea of the virgin being ravished that aroused its rather salacious disapproval.

Similarly, Ngaire Naffine argues that essentialism is a problem with law generally (and international law in particular) as women cannot be both women and legal subjects, since law offers only ‘the old story of sex differentiation: the strong man, the weak woman; the male subject, the female object’.

A further feminist critique is that the family-related provisions in international human rights law have overemphasised the woman as ‘homemaker’. Such discourse fails to recognise woman as an autonomous human being and relegates her into a single figure of mother and wife in the private sphere. However, not all feminist scholars agree that the balance struck between the competing, or at least the myriad, identities that women possess is fair or useful. Rebecca Hillock has criticised, for example, the approach of the Women’s Committee as ‘continually degrad[ing] the status of motherhood’.

Similarly, Radhika Coomaraswamy has queried the assumption within rights discourse

---

of ‘a free, independent, individual woman’, whereas this image, she asserts, may be less powerful in protecting women’s rights than other ideologies such as ‘women as mothers’. Motherhood has been identified as one of several areas of disagreement between First World and Third World feminisms.

From a Third World feminist perspective, the criticism is not only that women individually and as a group are generally excluded from the protection of human rights law, but also that non-Western women and non-Western values and experiences are largely absent from the whole debate. Berta Hernández-Truyol anatomises the norm of human rights law as ‘white, Western/Northern European, Judeo-Christian, heterosexual, propertied, educated, male’. Third World feminists likewise criticise Western feminists for ‘essentialising’ women in their own image as white, Western/Northern European, Judeo-Christian, heterosexual, propertied, educated, women – in a similar way that feminists in general criticise the foundations of international law as ‘normalising’ maleness. A primary critique levelled against

---


Western feminism is that the world is seen through white middle-class glasses. The construction of a category of ‘women’ without regard to other identity-based characteristics that shape and influence their lives – whether in law, policy, or feminist discourse itself – has now been widely criticised by feminist scholars, as have the difficulties of claiming a common experience of all women in all cultural contexts.

Where Third World women do feature in international law or feminist theory, Ratna Kapur has criticised the reliance on what she calls the ‘authentic victim subject’, namely that ‘the image that is produced is that of a truncated Third World woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate, and poor’. This same critique can be asserted against international human rights legal exchanges that have largely ignored women as agents of change; instead they have been portrayed as victims of culturally deprived or ‘primitive’ or ‘backward’ harms. There is much evidence to show, however, that the image of Third World women as victims and not agents is a creation of a lack of awareness and limited documentation of Third World activism. Women’s groups in parts of Africa, for example, have grown in numbers

---


and sophistication since the Nairobi Conference and have been active participants at, *inter alia*, UN world conferences on women and at local levels.\(^{209}\)

The heavy focus on rape and sexual violence in international jurisprudence also plays into this essentialist discourse.\(^{210}\) The focus by feminists and later by international courts on widespread rape during and after the conflicts in the former Yugoslavia in the 1990s has come under scrutiny. Engle argues that all this attention to sexual violence classed or identified all women as victims of rape, even when women denied that this had occurred to them.\(^{211}\) Although it is imperative that such violence is brought to international attention and condemned, it is equally important that the manner in which women are portrayed does not downplay the actual extent of other forms of violence that women suffer during conflict or render them into stereotyped categories of ‘helpless victims’.

Western feminists and international human rights institutions have been accused of oversensationalising practices such as female genital mutilation, veiling, and dowry murders.\(^{212}\) As this thesis shows, the majority of references to violence against women within the jurisprudence of the treaty bodies targets particular forms of violence that are primarily found in developing countries, especially those linked to cultural practices or religious norms. Concern has been raised that the international human rights regime

---


\(^{211}\) K. Engle, ‘Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina’ (2005) 99 *Am. J. Int’l L.* 779, 794: ‘At some level, all Bosnian Muslim women were imagined to have been raped.’

articulates a particular cultural system, one rooted in 'a secular transnational modernity'\textsuperscript{213}, in which cultural difference, whatever its form, is condemned. Culture is seen as a problem rather than a resource.\textsuperscript{214} However, it is not every form of cultural difference that is at issue under the universal human rights system. Rather for women's rights, it is those practices directed at reinforcing their inferior position.\textsuperscript{215} International human rights law does not dismiss culture or religion (it in fact protects them within certain limits\textsuperscript{216}), but it rejects those which are harmful to equal relations or to the physical and sexual security of women. At the same time, the treaty bodies tend to downplay or overlook old and new forms of violence perpetrated against women in First World countries, which are also built on stereotypes and cultural norms that reflect the inferiority of women to men.

Relying on a single 'essence' of women is further said to fail to recognise the intersection of sex/gender and other identity-based factors such as race, ethnicity, class, poverty, colonial oppression, religion, or sexuality.\textsuperscript{217} The interrelationship between sexual and racial prejudice has been widely studied and confirmed. Elizabeth Spelman argues that one cannot correct the problem of 'white solipsism'\textsuperscript{218} merely by adding an analysis of the race issue to the gender issue, because race changes how women

\begin{footnotesize}
\begin{itemize}
\item[214] Ibid., 947.
\item[215] See, Art. 5(a), CEDAW.
\item[216] See, e.g., Art. 27, ICCPR; Art. 15, ICESCR.
\end{itemize}
\end{footnotesize}
experience gender. Spelman argues that race is a different basis for oppression that involves different forms of subordination and requires different forms of liberation. Similarly, Chandra Mohanty has pointed out that ‘[w]omen are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not “women” – a coherent group – solely on the basis of a particular economic system or policy. Vanessa Munro argues that the effort to speak with a single voice ‘obscure[s] the question of whether all women are subordinate to all men in the same way or to the same degree. Thus, it risk[s] purchasing powerful rhetoric and conceptual neatness at the cost of recognising intersectionality between gender and other axes of social stratification.

MacKinnon has argued that genocidal rape is not just about women’s identity as women, for example, but equally importantly about women’s identity in a particular racial group. Jasmina Kalajdzic states:

The overemphasis on gender to the exclusion of all other possible motivating factors can obscure other characteristics of a woman’s identity that determine which women are raped. Sexism and racism, therefore, operate in conjunction to determine which women are raped. Indeed, rape survivors are women and members of a given national, political, or religious group. Their identities as women cannot be separated from their membership in a particular race or religion.

---

220 Ibid., 125.
The human rights treaty bodies have rarely analysed in detail the interrelationship of sex/gender and other identity-based characteristics, as evidenced in later chapters of this thesis.  

A further consequence of essentialism in UN strategies of prioritising women-specific or gender-related violence is that other, equally serious, harms perpetrated against women that do not conform to these stereotypes are not widely acknowledged or publicised, either by the UN, international law, or feminist scholars themselves. MacKinnon sums this up as follows:

When what happens to women also happens to men, like being beaten and disappearing and being tortured to death, the fact that those it happened to are women is not registered in the record of human atrocity.  

Although a few feminist writers acknowledge that women also suffer harm that falls within the traditional constructs of human rights norms, such as torture within state custody, they argue that even in these circumstances the international provisions do not fully reflect the nature and extent of violations faced by women in the public sphere.  

Chapter 4 of this thesis reveals, as an example, that women were the first users of the human rights individual communications system of the UNCAT, contrary to feminist scholars’ assertions that torture as understood in that instrument does not apply to women. Tracy Higgins points out that this is what makes ‘woman’ a ‘troublesome term’ in feminism and in law.  

---

225 See, Chs. 3, 4 and 5. Note, however, that the Women’s Committee has regularly made mention of double or multiple discrimination: see, e.g., CEDAW, Annual Report 2008, UN Doc. A/63/38 (2008).


In fact, essentialism affects all women. It also affects men. As MacKinnon rightly points out, it is unknown what traits women would exhibit if they were not in a patriarchal society.²²⁹ The issue, then, is not whether women are all the same or that they all experience violence in the same way. The issue for international human rights law is whether it is able to accommodate the diversity of women and women's lives without compromising its strength that lies in its appeal to universality and the promotion of gender equality.

While noting differences in women’s experiences on account of, *inter alia*, class, race, or nationality, and accepting that these factors can give rise to differing power relations *between* women (and between women and men), Charlesworth believes that ‘patriarchy and the devaluing of women, although manifested differently within different societies, are almost universal’.²³⁰ She argues that ‘we can speak “as women” in an international context. It is possible to describe women as having “a collective social history of disempowerment, exploitation and subordination extending to the present”’.²³¹ Adopting a controversial position to many anti-essentialist theorists, African scholar Sylvia Tamale recounts that ‘[t]he issues for women are in fact issues that concern all world citizens’.²³² She further asserts that cultural, religious, and economic fundamentalisms ‘threaten to roll back †feminist achievement and to silence [women] into total patriarchal submission’.²³³

Many of the gains achieved by women in international human rights law have been secured by such strategies of speaking with one voice.\textsuperscript{234} The increasingly dominant approach of international treaty bodies to violence against women, for example, is to perceive of it as 'widely pervasive and structural.'\textsuperscript{235} How that violence is played out may vary between cultures, but it is seen as having shared underlying roots in oppression, patriarchy, and discrimination. Solidarity in numbers has been powerful in raising awareness to issues that transcend national borders. As a pragmatic strategy, therefore, it has allowed women's rights activists as well as international lawyers to search for the sources of international and national power and to attempt to gain access to that power. For these reasons, rejecting common 'essences' causes consternation among feminism and women's rights activism and, in turn, poses uncertainties for international human rights institutions in dealing with 'women's rights' and 'women's issues'.

The ultimate cost for women, feminism, and the women's movement of rejecting a collective identity, or at least some fundamental commonalities shared by women, is potentially the end of feminism as a theory or method with an identifiable subject matter.\textsuperscript{236} For international human rights institutions, it risks diluting the dominant rhetoric of absolutism or universality, and it reopens cultural relativity debates in favour of recalcitrant governments that over-state difference in order to evade human rights


\textsuperscript{236} N. Naffine, 'In Praise of Legal Feminism' (2002) 22 Legal Stud. 71, 72.

90 Ch. 1: Feminist Theories
obligations. Why is it that culture is always paraded out in relation to women’s issues, but not those affecting men?237

The failure of international law to intervene in instances of violence against women before the 1990s can be attributed to the fact that such violence was perceived as ‘a matter of unwanted behaviour of some men and/or a matter of some backward or primitive cultures.’238 Resolution of the culture-gender equality clash has in many ways moved on from this imperially-driven myth. The CEDAW, for example, expressly recognises the ‘culture clash’239 and contains provisions to safeguard against any prejudice regarding women’s equality.240 Frances Raday points to several important international decisions that either expressly or impliedly reject cultural or religious practices as legitimate justifications for discrimination against women.241 Thus, in any ‘clash between cultural practices or religious norms and the right to gender equality, it is the right to gender equality that must have normative hegemony.’242 This confirms the position adopted by the Human Rights Committee that:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. ... States parties should ensure that traditional, historic or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights ...

237 S. Tamale, When Hens Being to Crow: Gender and Parliamentary Politics in Uganda (Kampala, Uganda: Fountain Publishers, 1999), Conclusion.
240 See, Art. 5(a) and 2(f), CEDAW. See, further, F. Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’, in H.B. Schöpp-Schilling and C. Flinterman (eds.), Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women (New York: Feminist Press, 2007) 68, 69.
241 She refers to, for example, Sandra Lovelace v. Canada, Sandra Lovelace v. Canada, HRC 24/1977; Aumeesuddi-Ceffra et al. v. Mauritius, (1981): Selected Decisions HRC 67; Leyla Sahin v. Turkey, Appl. 44774, ECHR 2004 and 2005; Refah Partisi [Welfare Party] and Others v. Turkey, Appls. 41340/98, 41343/98, and 41344/98, ECHR 2003, as referred to in ibid. Some of these cases are dealt with further in Ch. 3.
242 Ibid., 81.
The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to equal enjoyment of any Covenant rights, including the right to equal protection of the law.\footnote{HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, paras. 5 and 32.}

Nonetheless, there has been as yet no clear elaboration of the extent of a state’s obligations to alter cultural and traditional practices in order to secure women’s rights.\footnote{See, further, R. Holmström, ‘Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention’, in C. Benninger-Budel (ed.), Due Diligence and its Application to Protect Women from Violence (Leiden and Boston: Martinus Nijhoff Publishers, 2008) 63.} For women’s rights activists, rejecting an essential image of womanhood would mean the end to powerful and effective campaigns that benefit from speaking on behalf of 50 per cent of the world’s population, even with its attendant negatives. Nancy Hartsock argues that anti-essentialism sits uncomfortably with feminist politics that has relied on a united female front,\footnote{N. Harstock, ‘Foucault on Power – A Theory for Women’, in L. Nicholson (ed.), Feminism/Postmodernism (New York: Routledge, 1999) 157.} while Munro notes that multiple voices ‘threaten[-] feminist political paralysis’.\footnote{V. Munro, Law and Politics at the Perimeter: Re-Evaluating Key Feminist Debates in Feminist Theory (Oxford: Hart Publishing, 2007), 114.} Very effective feminist techniques, such as ‘asking the woman question’ or ‘consciousness-raising’, rely, for instance, on foundations of commonality.\footnote{Ibid., referring to the techniques of Bartlett, in K.T. Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv. L. Rev. 829, as outlined in the Introduction.}

According to MacKinnon, anti-essentialism, as a ‘wholly abstract theory’, is incapable of grasping the realities of the social world and is fundamentally incompatible with a meaningful practice of women’s rights let alone a women’s movement.\footnote{C. MacKinnon, ‘Symposium on Unfinished Feminist Business: Some Points against Postmodernism’ (2000) 75 Chicago-Kent L. Rev. 687.} Offering a compromise, Gayatari Spivak has proposed what she calls ‘strategic essentialism’. In recognising that there is no shared or essential reality, feminism (and, by analogy, human rights institutions) should not reject the rhetoric and ideology of women
altogether. That is, while recognising that claims about ‘women’ and ‘women’s situations’ are generalisations, they are made with the intention to attain specific political outcomes rather than to be statements about ‘apolitical depictions of reality’.

There is also a sense that the implementation of such legal obligations as Article 5(a) of the CEDAW, which requires states to alter negative cultural and traditional stereotypes concerning women and men, requires a different implementation strategy that limits the charges of cultural hegemony or imperialism. Calls have been made for a non-abolitionist strategy, one of ‘internal discourse and cross-cultural dialogue’. That is, reforms need to be rooted in existing practices and religious systems if they are to be accepted.

In my view, shared oppression is still the underlying unifying force of feminism and the women’s rights movement, as is the exclusion of women from any meaningful participation or doctrinal purchase in respect of municipal systems and at the level of international human rights law. Women may experience oppression differently or be subjected to different types of violence in different societies, communities, or cultures, but nowhere have women attained gender equality with men on women’s terms, and nowhere are women free from violence, including in ‘northern’ locations. If one studies

---


the manifestations of violence across communities, the experiences are marked by their similarities rather than their differences. Kapur concedes that ‘[t]he perception that women are victims and objects in need of rescue continues to inform contemporary feminist politics both “here” and “there”’. Even as oppression subsides and patriarchy is dismantled in some societies, women share a historical experience of oppression, and violence against women appears to be without end.

Like Charlesworth, I believe that we are able to speak with one voice (and at times we need to), that we are capable of finding united commonalities while, at the same time, respecting our differences within feminism and within international human rights law. For international human rights institutions, it is critical that they continue to identify and embrace a core corpus of women’s rights and that gender equality trump other competing rights, such as those based on culture or religion, which serve to negate women’s full membership in society. Without this core, international human rights law risks being rendered irrelevant and undermined by state-driven cultural relativity agendas. Like Sally Engle Merry, I believe it is possible to embrace the international human rights system (despite its shortcomings) ‘precisely because it differs from many prevailing practices and it is internationally legitimate.’ It can offer oppressed women and others a language in which to base and frame their grievances and arguments for change. At the same time, one must recognise that in a given situation, local knowledge, local religions, and local customs may themselves offer the better hopes of change. At a minimum, they need to be engaged. However, it

256 S.E. Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (Chicago, IL: University of Chicago Press, 2006), 90.
is also important to acknowledge that appeal to existing religions and cultures may not always be fruitful as they may be unable to accommodate women’s rights as envisaged by the human rights system and that some beliefs about the role and value of women are intractably entrenched in those systems.\textsuperscript{257}

Moreover, this approach does not reject the truth that women are multidimensional human beings who experience different forms of violence in different ways, often in very personal ways. Rather, it is to recognise shared experiences of gender inequality. I have yet to meet a woman, whatever her background, who has rejected a desire for the right to participate in decision-making that regulates her life, to be free from violence, or to attain economic security. Any differences that exist between women tend to be overstated and tend to focus on the violation (e.g. genital mutilation) rather than the goal (e.g. gender equality).\textsuperscript{258} This equates with the view that the rejection of rights is the ‘luxury’ of the privileged few.\textsuperscript{259} Writing in relation to the liberation movement of African Americans in the United States, Patricia Williams argues instead that ‘politically effective action has occurred mainly in connection with asserting or extending rights’.\textsuperscript{260} She points out that ‘[the US’s] worst historical moments have not been attributable to rights-assertion, but to a failure of rights-commitment’.\textsuperscript{261}

\textsuperscript{257} See, also, F. Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’, in H.B. Schöpp-Schilling and C. Flinterman (eds.), Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women (New York: Feminist Press, 2007) 68.

\textsuperscript{258} See, e.g., L. Gunning, ‘Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries’ (1991-92) 23 Columbia Hum. Rts. L. Rev. 189 (the focus of the debates surrounding female genital mutilation tended to focus on the act itself, rather than what women hoped for their lives).


\textsuperscript{261} Ibid., 61.
For the purposes of individual human rights litigation (as opposed to strategic feminist activism), concepts such as intersectionality and multiple discrimination can be useful analytical tools and must be utilised more effectively, as they allow an individualised assessment and, therefore, a more accurate account. Part of that assessment would include gender factors. These concepts further serve to reject standard gendered assumptions about how women should behave or respond to harm.\textsuperscript{262} At the same time, in endorsing intersectionality, advocates and decision-makers must stay attuned to the potential for old gender-based stereotypes to be simply replaced by new victim categories or stereotypes such as those based on sex/race, sex/class, or sex/sexuality.\textsuperscript{263}

Despite the difficulties that this fourth critique presents for both feminist theory as well as international human rights law, we should not reject feminist discourse or its techniques, especially in the nascent human rights system that is only just beginning to develop jurisprudence on women’s equality and issues such as violence against women.\textsuperscript{264} At a minimum, it is necessary to be conscious of how human rights discourse plays into the ways in which women are presented as victims, rendered only as mothers, or as the ‘Exotic Other Female’.\textsuperscript{265} This does not, however, mean a rejection of human rights law or feminist views of oppression, but instead it calls for a rebalancing of the emphasis of international human rights law on all facets of women’s lives from all geographic, socio-economic, racial, and political backgrounds. In many ways, international jurisprudence, as outlined above, is on its way along this path.

\textsuperscript{264} Cf. J. Halley, Split Decisions: How and Why to Take a Break from Feminism (Princeton, NJ: Princeton University Press, 2006) (who suggests we take a break from feminism to explore other theories, but she does not however suggest a rejection of feminism altogether).
Feminist methods such as those outlined in the Introduction to this thesis, too, need a degree of updating, such as a more socially constructed understanding of gender, a heightened focus on women and women’s lives rather than becoming bogged down in distinctions between sex and gender, as well as a shift from asking the woman question to a contextualised woman question that positions her within their own social, cultural, or economic contexts.

Rarely is feminist theory or human rights law, for example, concerned with women as human rights defenders or political activists, as humanitarian workers, as child soldiers, as peacekeepers or international police officers, as presidents, as politicians, and as policymakers. The current image of women – whether from First or Third World countries – is a distorted one. Once there is more balance in the images of women within human rights law, including by the treaty bodies, it is possible that the system can be transformed to take account of and to understand the very different lives of women within and across communities in many parts of the world, including the intersectionality of gender with a range of other identity-based characteristics, as well as personal experiences that transcend these categories.

267 See, Introduction.
269 N. Lacey, ‘Feminist Legal Theory and the Rights of Women’, in K. Knop (ed.), Gender and Human Rights (Oxford: Oxford University Press, 2004) 13, 51. Lacey, for example, believes that this is possible under the CEDAW as a framework embracing both universalism and particularism, and she argues that it is ‘probably the best and perhaps the only available legal strategy for escaping this kind of rights-based essentialism.’
Underlying all of these efforts must be a renewed focus on women as legal subjects or rights claimants under international law, and an acceptance that women do share common attributes and experiences with other women as well as differences. Just because an individual does not fit within the same socio-economic, political, or racial group does not mean she cannot empathise with other women, or that she does not share experiences – do you have to be raped to fear it, to feel oppressed by the possibility, or to want to fight to rid other women’s lives of it? To accept otherwise would be to reject the basic human rights foundations of humanity, universality, and shared dignity, and to give way to ideas of cultural relativity, dominance, and perpetual oppression.

D. CONCLUSION

This chapter has outlined four principal feminist critiques (or themes) of the international human rights system. It has shown the complexity as well as the depth of feminist engagement with international law. It has confirmed that the lack of women in positions of authority within the UN system remains a major stumbling block to reform and women’s inclusion within that system. Many examples have been given as to how the system of international human rights law operates to privilege men and to exclude, marginalise, or silence women. Nonetheless, the way forward is not to reject international human rights law altogether but to work with it to ensure that women’s experiences are recognised. The conundrum is that the international human rights system may never fully accommodate the range of experiences of women, and thus it is crucial to keep checks on how women are included within it. That is, it is essential that the dominant strategy of inclusion is continually evaluated. This thesis is part of that process. As the later chapters in this thesis reveal, there has been some real progress in
terms of incorporating women’s experiences of violence within existing provisions, although how the process reached this stage is rather arbitrary and unpredictable, reliant on creative interpretations than universal consensus. At the same time, the process of interpretative inclusion has had the negative effect of doubling the burdens on women by requiring them to meet additional legal criteria. This is explained in later chapters.

Furthermore, the further collapsing of the public/private dichotomy is essential to ensure women’s full inclusion within international law. At the same time, the dichotomy operates as a useful technique for exploring the ‘gendered’ lawyers of international law, and at times, the private has had positive benefits for women. Finally, awareness of how women are ‘essentialised’ in international human rights law, as it has been influenced by feminism, remains an ongoing challenge. This is particularly important with respect to individual litigation where an individualised assessment is vital to overcome stereotyped understandings about women and their experiences of violence. At the same time, however, using the language of ‘women’ must not be rejected as a political strategy. As the women’s movement has long known, speaking about commonalities and with one voice can be both powerful and transformative. What is needed, though, is a rebalancing of the image of women within international human rights law and policy in order to give voice to women from both the global North and global South, and to recognise that, while women are mothers, wives, and victims, they are also autonomous actors and agents of change.

In my exploration in the next few chapters of how women have fared within the international human rights jurisprudence, especially in the context of violence against women, these four themes will be revisited and reflected upon as to their continuing relevance and applicability to the existing international legal order. The following
chapters will discuss the extent to which women's lives and women's voices are now reflected within the jurisprudence of the international human rights treaty bodies; the extent to which the public remains prioritised over the private in the international human rights system to the disadvantage of women; and the extent to which human rights bodies engage with the multiple identities and the intersectionality of women's lives. A range of questions guide the analysis in the following chapters: Are international institutions still dominated by men? What has been the impact of this domination on human rights norms? How are women's rights affected by the state-based nature of international law? How have human rights norms been initially drafted and later interpreted and applied? Do human rights norms apply to women?
Chapter 2

The UN Human Rights Treaty Bodies: Practice and Procedure

A. INTRODUCTION

The focus of this thesis is the jurisprudence of the UN human rights treaty bodies with respect to violence against women. This chapter outlines the mandates, procedural rules, and composition of these bodies. By way of context, I highlight a number of general problems and concerns with their mandates and functions, as well as the particular consequences they have for women. The point is made that the system is already flawed in many respects, and this in turn impacts upon women’s participation within it. This analysis addresses the first feminist critique outlined in Chapter 1 – that the institutions, structures, and processes established to implement human rights norms exclude women from equal or meaningful participation or power-sharing. Do the rules of the treaty bodies governing membership, working methods, and admissibility criteria prioritise men and the male experience? Do women have equal access to these mechanisms and their benefits? Where are the women?

I argue that the obstacles preventing women’s equal participation in the work of the treaty bodies are multiple and frequently subtle, supporting feminist claims that the

---

1 This thesis deals with only one part of the general human rights protection system and does not, for instance, deal with Charter-based bodies or special procedures: see, e.g., N. Rodley, "United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition?" (2003) 25 HRQ 882.
international human rights system operates to marginalise, exclude, or silence women. As a result of some of these concerns, there have been calls by states parties for treaty body reform. Because the future vision of the treaty bodies might be quite different to their current format, I set out the main proposal put forward by the Office of the High Commissioner for Human Rights (OHCHR) of a single unified treaty body and ask what such a development would mean for the inclusion of women within the treaty body system.

B. MANDATES

International supervision of the implementation by states parties of most of their international human rights treaty obligations is carried out by independent committees or treaty bodies. As at October 2008, the UN human rights treaty body system consisted of eight international treaty bodies that oversee the implementation of eight human rights treaties. These are:

- the Human Rights Committee (HRC), monitoring the _International Covenant on Civil and Political Rights 1966_ (ICCPR);^3

- the Committee on Economic, Social and Cultural Rights (CESCR), monitoring the _International Covenant on Economic, Social and Cultural Rights 1966_ (ICESCR);^4

---


• the Committee on the Elimination of Racial Discrimination (CERD), monitoring the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD);\(^5\)

• the Committee on the Elimination of Discrimination against Women (the Women’s Committee), monitoring the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW);\(^6\)

• the Committee against Torture (CAT), monitoring the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT);\(^7\)

• the Committee on the Rights of the Child (the Children’s Committee), monitoring the Convention on the Rights of the Child 1989 (CRC);\(^8\)

• the Committee on the Rights of Migrant Workers (MWC), monitoring the International Convention on the Rights of All Migrant Workers and Members of their Families 1990 (IMWC);\(^9\)

• the Committee on the Rights of Persons with Disabilities (CRPD), monitoring the Convention on the Rights of Persons with Disabilities 2006 (ICRPD).\(^{10}\) (As the CRPD had not yet commenced work during the finalisation stages of this thesis, this is not considered in this chapter.)

---


\(^7\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, G.A. res. 39/46, 10 Dec. 1984, 1465 UNTS 85; entered into force 26 June 1987 (UNCAT).


I am particularly interested in those treaty bodies that have mandates over the three rights under review in this thesis: the principles of equality and non-discrimination on the basis of sex, the prohibition against torture, and the right to life.

The treaty bodies are established pursuant to the treaty they monitor or by other UN resolutions. The committees sit on a part-time basis and meet two or three times per year for periods of two to three weeks per session, with some committees also meeting in pre-sessional working groups. Their combined meeting time is 57 weeks each year.

A further committee, the Committee on Enforced Disappearances, overseeing the *International Convention for the Protection of All Persons from Enforced Disappearances 2006 (ICED)*, is due to commence work as soon as 20 ratifications have been received. In addition, a Sub-Committee on the Prevention of Torture (SPT) was established in 2006 under the *Optional Protocol to the Convention against Torture*

---

11 HRC (Art. 8, ICCPR); CESC (ECOSOC res. 1985/17, 28 May 1985); CERD (Part III, ICERD); Women’s Committee (Part V, CEDAW); CAT (Part II, UNCAT); Children’s Committee (Part II, CRC); MWC (Part VII, IMWC); CRPD (Art. 34, ICRPD).

12 HRC (normally three sessions per year of three weeks’ duration, with Working Group on Communications meeting prior to that); CERD (two sessions per year for three weeks and one week pre-sessional working group); CERD (two sessions per year of three weeks); Women’s Committee (Art. 20, CEDAW originally envisaged ‘not more than 2 weeks annually’, but now meets for three sessions per year of three weeks); CAT (two sessions per year, one of two weeks, one of three weeks, plus one week pre-sessional working group); Children’s Committee (Art. 43, CRC provides ‘normally annually’ but the Children’s Committee actually meets for three sessions per year of three weeks plus one week pre-sessional working group. In 2006, the Children’s Committee sat in two separate chambers of nine members in order to clear the backlog, as an exceptional and temporary measure.); MWC (Art. 75, IMWC provides that the MWC should ‘normally’ meet annually and as at Oct. 2008, the Committee meets annually).


15 Art. 39, ICED.
and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OPCAT)\textsuperscript{16} to carry out inspection visits to places of detention.

The functions of the treaty bodies are fourfold. First, the treaty bodies receive and examine reports submitted by states parties on a periodic basis.\textsuperscript{17} 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).\textsuperscript{18} Third, some of the treaty bodies have jurisdiction to receive and consider inter-state communications relating to any dispute between two states parties,\textsuperscript{19} although no such communications have ever been lodged. Fourth, half 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’).\textsuperscript{20}

In addition, some of the committees have mechanisms to conduct fact-finding.


\textsuperscript{17} HRC (Art. 40, ICCPR); CESCt (Art. 17, ICESCR); CERD (Art. 9, ICERD); Women’s Committee (Art. 18, CEDAW); CAT (Art. 19, UNCAT); Children’s Committee (Art. 44, CRC); MWC (Art. 73, IMWC).

\textsuperscript{18} General Comments or General Recommendations are not explicitly provided for in the treaties themselves, but have 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 . . .’

\textsuperscript{19} HRC (Art. 41, ICCPR – on an optional basis – subject to declaration accepting the jurisdiction of the HRC); CERD (Art. 11, ICERD – automatic jurisdiction upon ratification of the ICERD); CAT (Art. 21, UNCAT – on an optional basis – subject to declaration accepting jurisdiction of the CAT); MWC (Art. 76, IMWC – on an optional basis – subject to declaration accepting jurisdiction of the MWC, but it has yet to enter into force). On 18 June 2008, a resolution agreeing the draft Optional Protocol to the ICCESCR was adopted by the UN Human Rights Council (UNHRC), in which individual and inter-state communications are catered for: UNHRC res. 8/2, 18 June 2008. As at Oct. 2008, it is pending before the General Assembly for confirmation.

inquiries\textsuperscript{21} or have developed early-warning procedures.\textsuperscript{22} These functions are outlined in more detail below under their respective headings. First, however, I turn to the composition and expertise of the various committees.

C. MEMBERSHIP AND EXPERTISE OF THE TREATY BODIES

1. Membership and expertise criteria

The size of the eight treaty bodies varies from 10 to 23 members.\textsuperscript{23} With the exception of the members of the CESCR, who are elected by the UN Economic and Social Council (ECOSOC),\textsuperscript{24} members are nominated by their own governments and elected by states parties to the treaty in question.\textsuperscript{25} They are elected by secret ballot from a list of persons possessing the requisite qualifications. Members sit in their personal capacity

\textsuperscript{21} OPECDAW provides an optional procedure to allow the Women’s Committee to respond when it receives reliable information indicating grave or systematic violations of human rights, which may include carrying out country visits (Art. 8-10, OPECDAW). The CAT operates a confidential inquiry and urgent reporting procedure when it receives reliable information about well-founded indications of torture that is being systematically practiced, which may include visits to the territory in cooperation with the state party (Art. 20, UNCAT). In addition, the OPCAT establishes an international inspection body with the capacity to make unannounced visits to places of detention in order to reduce the occurrence of torture or cruel, inhuman or degrading treatment or punishment. On the OPCAT, see M.D. Evans, ‘Getting to Grips with Torture’ (2002) 51 ICLQ 365; M. Evans and C. Haenmi-Dale, ‘Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture’ (2004) 4 Hum. Rs. L. Rev. 19; M. Nowak and E. McArthur, The United Nations Convention against Torture: A Commentary (Oxford: Oxford University Press, 2008), 879-1191.

\textsuperscript{22} The CEDAW 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: UN Doc. A/48/18, paras. 15-19 and Annex 3.

\textsuperscript{23} HRC (18 members) (Art. 28, ICCPR); CESCR (18 members) (para. (b), ECOSOC res. 1985/17, 28 May 1985); CERD (18 members) (Art. 8, ICERD); Women’s Committee (23 members) (Art. 17, CEDAW); CAT (18 members) (Art. 17, UNCAT); Children’s Committee (18 members) (Art. 43, CRC); MWC (10 members) (Art. 72, IMWC). Note that the IMWC provides for an additional four members after the 45\textsuperscript{th} ratification.

\textsuperscript{24} CESCR (para. (c), ECOSOC res. 1985/17, 28 May 1985 and Arts. 16-17, ICESCR). ECOSOC is a UN body established under the UN Charter (Arts. 61-71) to deal with international economic, social, cultural, educational, health and related matters. It consists of 54 members who are elected by the General Assembly.

\textsuperscript{25} HRC (Art. 29, ICCPR); CERD (Art. 8, ICERD); Women’s Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children’s Committee (Art. 43, CRC); MWC (Art. 72, IMWC).
and not as government representatives. Almost all of the committees report annually to the General Assembly. Members are elected for four-year terms and may be re-elected if renominated. The new treaty bodies limit the possibility of re-election to two terms. Elections are organised so that half of the members of each committee are elected at intervals. States parties may not normally nominate more than one national of the same state for a committee position.

Members of the treaty bodies are expected to be of ‘high moral character and recognized competence in the field of human rights’, and consideration is given to those with legal experience, though this is not a prerequisite to nomination and/or election. The UNCAT refers, in particular, to the ‘usefulness’ of HRC members serving simultaneously on the CAT, although this has not occurred in practice. The ICCPR, the ICERD, and the IMWC, meanwhile, refer expressly to ‘impartiality’. The expenses and subsistence allowances of sitting members are allocated in the UN budget, but the positions are otherwise unpaid. The various treaties and resolutions provide

---

26 HRC (Art. 28 and 38, ICCPR); CESC (para. b), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women’s Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children’s Committee (Art. 43, CRC); MWC (Art. 72, IMWC).
27 HRC (Art. 40, ICCPR – may also transmit reports to ECOSOC); CERD (Art. 9, ICERD); Women’s Committee (Art. 21, CEDAW – Secretary-General to transmit reports also to Commission on the Status of Women); CAT (Art. 24, UNCAT); Children’s Committee (Art. 45, CRC, provides for biannual reporting); MWC (Art. 74, IMWC). The exception is the CESC, which was established by ECOSOC, and it is elected by and reports to ECOSOC, per para. (f), ECOSOC res. 1985/17, 28 May 1985.
28 HRC (Art. 32, ICCPR); CESC (para. (c), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women’s Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children’s Committee (Art. 43, CRC); MWC (Art. 72, IMWC).
29 E.g., Art. 9, OPCAT; Art. 34(7), ICRPD (available for re-election once).
30 HRC (Art. 32, ICCPR); CESC (para. (c), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women’s Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children’s Committee (Art. 43, CRC); MWC (Art. 72, IMWC).
31 Art. 8(1), ICERD; Art. 17, CEDAW; Art. 17, UNCAT; Art. 43, CRC; Art. 72, IMWC. The exception is the nomination process for the HRC that allows no more than two nominations per state party (Art. 29, ICCPR). No mention is made in the ECOSOC res. 1985/17 in relation to the CESC.
32 HRC (Art. 28, ICCPR); CESC (para. (b), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women’s Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children’s Committee (Art. 43, CRC); MWC (Art. 72, IMWC).
33 Art. 17, UNCAT.
34 Art. 38, ICCPR (to serve on the Committee ‘impartially and conscientiously’); Art. 8, ICERD; Art. 72(2)(l), IMWC.
35 A token $1 USD is paid to each of the treaty body members per annum. HRC (Art. 35, ICCPR); CESC (para. (e), ECOSOC res. 1985/17, 28 May 1985); CERD (the original Art. 8(6), ICERD,
that consideration shall be given to 'equitable geographical distribution' and, variously, to representation of 'the different forms of civilization' and of the 'principal legal systems'.

No formal system is, however, in place to ensure that such a balanced geographical or other distribution is attained, and in fact, the modern workability of the UN's geographic blocs has been questioned. Informally, however, it appears that the geographical representation requirement is internalised within the trading of positions between states parties, leading to a relatively balanced representation across the treaty bodies.

In comparison, none of the first seven treaties in force contain provisions calling for equal representation on the basis of sex. Treaties adopted since 2006 call for 'balanced gender [read: sex] representation' in the make-up of the bodies they establish. Early data on the Sub-Committee on the Prevention of Torture, which has two women members out of ten, suggests, however, that such provisions have made little difference to the composition of these bodies. It has been asserted that the low numbers of women on the OPCAT resulted from the lack of strategic nominations by some regional blocs. Women have not (yet) become the bargaining ground for states in the same way as geographic representation has.

---

36 HRC (Art. 28, ICCPR); CESC (para. (b), ECOSOC res. 1985/17, 28 May 1985); CERD (Art. 8, ICERD); Women's Committee (Art. 17, CEDAW); CAT (Art. 17, UNCAT); Children's Committee (Art. 43, CRC); MWC (Art. 72, IMWC).


38 Art. 34(4), ICRPD; Art. 5(4), OPCAT. See, also, Art. 26, ICED.

39 Interview with senior official of the OHCHR, 16 June 2008.
2. General problems

The primary problem relating to how the membership of the treaty bodies is secured is that the nomination and election processes are politicised, which results in a lack of genuine interest in the qualifications and expertise of those nominated and elected. In fact, it has been asserted by one senior official of the OHCHR that expertise is simply irrelevant to election.\(^{40}\) Although members of all of the committees are expected to act in a personal capacity and do not therefore sit as government representatives, states are unlikely to nominate members who are radical or who are outwardly opposed to their policies.\(^{41}\) Because of the part-time nature of the committees and the lack of remuneration, a minority continue to hold government posts. These two factors also limit those available for nomination to individuals who are individually wealthy, hold academic positions, or who are former or current public or government servants. Anne Bayefsky found that in 2000 an average of 50 per cent of all those persons elected to the treaty bodies were employed in some capacity by their governments.\(^{42}\)

The nomination and election processes were created as a compromise to give states a sense of influence over the direction of the committees.\(^{43}\) There is no guidance offered to states parties on who should be nominated as committee members (apart from general character and qualifications criteria, listed above) or how to do so.\(^{44}\) In fact, the procedures in most countries are not transparent and are far from democratic, and rarely

---

\(^{40}\) Interview with senior official of the OHCHR, 16 June 2008. This does not suggest however that there are no qualified candidates or members as that is not the case.


\(^{44}\) Art. 28(1), ICCPR; para. (b), UN Doc. ECOSOC res. 1985/17, 28 May 1985; Art. 17(1), UNCAT; Art. 8(1), CERD: Art. 17(1), CEDAW; Art. 43(2), CRC; Art. 72(1)(b), IMWC.
subject to public scrutiny. Many governments reward public servants or political allies with offers of prestigious UN postings. Other governments show interest in simply ensuring that a national of their own country wins international office.\textsuperscript{45} It is unsurprising, then, that, when domestic political and judicial institutions are dominated by men, this translates into a repeated pattern of male dominance at the international level. For example, in Sweden, where female participation in government is 45 per cent in lower or single chambers of parliament,\textsuperscript{46} the highest in the industrialised world, it has consistently nominated women to international positions.

Despite the listing of qualifications for the posts of treaty body members, the subsequent election process is characterised by political bargaining, trading, and manipulation. James Crawford has said that the electoral system (like most such processes of the UN) is ‘haphazard and takes limited account of qualifications’.\textsuperscript{47} He has further stated that ‘[v]ote trading between unrelated UN bodies is so common [as] to be unremarked’.\textsuperscript{48} Similarly, Andrew Clapham has criticised the treaty body election process for failing to ensure genuine expertise.\textsuperscript{49} Deals are done between states, which ultimately affect the ability of women to attain office.\textsuperscript{50}

\textsuperscript{45} E.g. in 2005, the then Australian Liberal Government supported the nomination of Gareth Evans, former Minister for Foreign Affairs of the former opposition Labor Government, to the position of UN High Commissioner for Refugees. He was ultimately unsuccessful. See, ‘Former Portuguese Premier Chosen to Lead U.N. Refugee Agency’, \textit{New York Times}, 25 May 2005.


\textsuperscript{48} \textit{Ibid.}, 9.


3. Where are the women?

The UN Charter specifically provides that there shall be 'no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs'. The Women's Committee has twice issued General Recommendations calling on governments to ensure that women, 'on equal terms with men and without any discrimination', enjoy the opportunities to represent their countries at the international level and to participate in the work of international organisations. In addition, the most recent human rights treaties contain provisions calling on states parties 'to consider' 'balanced gender representation', along with balanced geographical representation and other factors. In spite of these efforts, no system of appointments of women to positions of power is included in the UN system. Although the language in the newest treaties is a positive step, the language is discretionary rather than obligatory, and, as noted above, it has not (yet) given rise to any improved participation of women.

Women make up less than 50 per cent of the membership of the treaty bodies and are concentrated in specialist committees dealing with the rights of women and children. A major study on the work of four of the treaty bodies in 2000 found that less than 20 per cent of the membership was female. As at October 2008, women made up approximately 42 per cent of the membership of the seven functioning treaty bodies.

---

51 Art. 8, UN Charter.
52 CEDAW General Recommendation No. 8 (1988); CEDAW General Recommendation No. 10 (1989), para. 3.
53 See, above n. 38 of this chapter.
55 The four committees studied were the CERD, the CESC, the HRC, and the CAT. See, A.F. Bayefsky, The UN Human Rights Treaty System: Universality at the Crossroads (Apr. 2001), 110.
56 As at October 2008, total number of women members was 48 out of 115 places (or 42 per cent).
Excluding the Women’s Committee and the Children’s Committee, however, the figure dropped to around 20 per cent.\(^57\)

Of the 18 members of the Human Rights Committee in 2008, there were only five women members (equivalent to 28 per cent). This is equal to the five women members who sat on the 1996 Committee, being the highest number ever achieved. The CESCR had only four women members in 2008 out of a total of 18 members (equivalent to 22 per cent). For the first time since its inception, the CAT in 2007 had more than one woman member,\(^58\) with three women members out of ten members (equivalent to 30 per cent). This increased to four women members following the 2008 elections (equivalent to 40 per cent). The CERD in 2008 had the lowest percentage of women members of any of the committees, with a single woman member out of a total of 18 members (equivalent to less than 6 per cent). The MWC had three women members out of ten (30 per cent). Despite a treaty provision calling for balanced gender representation for the Sub-Committee on the Prevention of Torture established under the OPCAT, it managed to secure only two female members out of ten members (20 per cent).

Any improvements in women’s representation appear to be random rather than permanent. There is no evidence of increased participation of women over the history of the treaty bodies. Instead, there is periodic minor increased participation of women on some committees (and decreased participation on others).

As noted above, women are concentrated in committees that deal with women and children. Of the 18-member Children’s Committee, 9 of the members were women in 2008 (exactly 50 per cent), and it is the only committee that has achieved equal numbers

---

\(^{57}\) As at October 2008, there were 17 women members out of 74 members in total of the HRC, the CESCR, the CERD, the CAT, and the MWC (or 23 per cent).

\(^{58}\) At April 2005, the CAT had only one woman member.
of men and women. Of the 23-member Women’s Committee, all but one member was female in the same year. In its 25-year history, the Women’s Committee has only ever had three male members. In 1991, Charlesworth, Chinkin, and Wright criticised the fact that the Women’s Committee had faced pressure to increase male representation, whereas no ‘male dominated’ committees at that time had faced criticism for having too few women.

4. Where is the expertise in women’s rights and gender?

In a review of the curricula vitae of nominated individuals to the HRC and the CAT, very few appeared to have gender or women’s rights expertise, or, alternatively, they had not indicated such expertise on their curricula vitae. For example, of the 16 candidates (14 men, 2 women (both from the former Yugoslav Republic of Macedonia)) nominated for election to the nine vacant seats on the HRC in 2000, only 2 indicated on their curricula vitae any expertise in women’s rights. Both were men, and neither was subsequently elected. In 2002, the situation was similar. Of the 14 candidates (11 men, 3 women) nominated for election to the HRC, 4 (3 men, 1 woman) indicated on their curricula vitae that they had any expertise in women’s human rights. Of these, three were elected. The elections in 2004 of the HRC saw 12 candidates nominated (10 men, 2 women) and 1 woman elected. The elected member was Ms Margareta Wadstein, who died prior to taking up her position. A by-election was held in which Ms Elizabeth

---

59 For up-to-date information on membership of the committees, see: http://www.ohchr.org/english/bodies/crc/members.htm (last accessed 25 Oct. 2008).
63 UN, ‘Election to the Human Rights Committee’, UN Doc. CCPR/SP/58, 5 July 2002.
64 UN, ‘Election to the Human Rights Committee’, UN Doc. CCPR/SP/58, 5 July 2002.
Palm, also from Sweden, was elected. The other female candidate, Ms Amina Moussou Traore from Burkina Faso, withdrew from the primary election. Of the 12, only 3 referred to women’s rights as being specific aspects of their former work or qualifications. Two of these three were elected (one man, one woman); the third withdrew.65

The situation was similar with the nominations to the CAT. The 2003 elections for five vacant positions saw nine nominations (seven men, two women). Of these nominees, four indicated expertise in women’s rights or sex crimes (two men, two women). Of these four, two were elected (one woman, one man). Even though a small number of women candidates are nominated, even fewer refer specifically to having any particular expertise in women’s human rights.66 These figures raise concerns regarding the absence of stated expertise on curricula vitae. Taking the curricula vitae at face value, they suggest that the committees lack general competence in respect of women’s human rights, gender mainstreaming, or feminist analytical techniques, whether the members are men or women. Alternatively, making reference to expertise or experience with women’s issues may be thought of as prejudicing one’s chances of nomination and/or election, resulting in candidates omitting such information. One committee member reported that government bureaucrats also have a hand in editing the curricula vitae of nominees, which may result in the removal of specific expertise.67

---

65 UN, ‘Election to the Human Rights Committee’, UN Doc. CCPR/SP/62, 24 May 2004. At the time of writing, these were the only CVs publicly available.
66 UN, ‘Election of five members of the Committee against Torture’, UN Doc. CAT/SP/26, 9 Oct. 2003. At the time of writing, no other curricula vitae were available on the internet.
67 Interview with former member of the CRC, dated 19 June 2008.
5. Why argue for more women? What are the consequences of more women for decision-making?

Calls for greater parity of women in politics have been made in four main ways. First, it is presented as a question of justice and fits alongside feminist challenges to sexual exclusion or segregation wherever it occurs. A second argument that is sometimes made is that women would bring to politics (and, in this case, to decision-making) a different set of values, experiences, and expertise. Third, it is argued that any system that consistently excludes the voices of women is not just unfair; 'it does not begin to count as representation'. A fourth argument is that women judges or decision-makers act as role models for women, which 'helps to shatter stereotypes about the role of women in society that are held by male judges and lawyers, as well as by litigants, jurors and witnesses'. Each of these perspectives is relevant to the participation of women within the human rights treaty body system.

First, the under-representation of women on the treaty bodies is a matter of basic human rights principles, in particular that of equality. The 'distorted distribution' in decision-making bodies (political as well as judicial) is evidence of intentional or structural discrimination. In other words, the under-representation of women on international bodies constitutes a violation of women's right to equality. Equality is used in this

---


69 Ibid.

70 Ibid.


context to refer to formal (or liberal) equality, that is, parity in numbers of men and women in positions of power, but it can likewise be seen as equality as tackling oppression by requiring women to fill power positions. To achieve this balancing, however, equality of access to the nomination and election process is necessary; which in turn requires strategies to overcome structural inequality and causes of women’s exclusion from such processes.\textsuperscript{74} As an international system reliant on municipal participation and systems, many of the changes would need to occur at the municipal level. As long as disproportionately more men are nominated to committee positions, they will continue to be elected in disproportionate numbers. The Women’s Committee stated in 1988 that it is not within its remit to tell states parties how and who to nominate to international office.\textsuperscript{75} However, as noted above, the same Committee has on at least two prior occasions called on states parties to ensure women have the opportunities to represent their countries and to work for international organisations.\textsuperscript{76} It seems to me to be entirely legitimate for the treaty bodies to inquire into all areas of inequality, including those within their own bodies. Municipal systems should be open, transparent, and democratic. Consideration could be given to a rotating nomination process, that is, if a state party nominates and has elected a male member to a particular committee, a woman should be put forward for any other bodies to which the state party is considering nominating, and also put forward once the male member’s two terms have expired. After the woman member’s two terms expire, it would then return to a

\textsuperscript{74} For more on the meaning of equality and non-discrimination on the basis of sex, see Ch. 3.
\textsuperscript{75} See, A. Byrnes, ‘The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women’ (1989) 14 Yale J. Int’l L. 1, 9, n. 27, in which he refers to a rejected proposal in 1988 for a General Recommendation to states parties that they nominate men for election to the Women’s Committee. It was rejected for two reasons: that the Women’s Committee should not presume to tell states parties how to exercise the prerogative to nominate persons to the Women’s Committee; and it could lead to the loss of the only human rights treaty body in which a clear majority of the members were women.
\textsuperscript{76} See above n. 52 of this chapter.
male nominee. If all states parties adopted a similar system, it would numerically increase the number of women nominated and (hopefully) ultimately elected.

The second argument in favour of more women on decision-making bodies is a belief that they bring to the task different modes of thinking, rationalising, and reasoning. That is, equal participation requires both quantitative and qualitative equality. Byrnes notes that, where novel claims or arguments that draw heavily on women’s experiences are presented, the male domination of a body may reduce the chances of the acceptance and ultimate success of such arguments. His analysis does not take account of other research that shows that women, in politics at least, are wary of speaking for women, or that there is a numerical threshold at which women will feel comfortable raising issues of sex. According to British constitutional lawyer, J.A.G. Griffith, social attributes such as class, religion, place and nature of education, and ethnicity, have considerable effects on the nature and content of judgments. Relying on the work of Carol Gilligan in particular, some feminist scholars assert that it follows that sex/gender could be one of these characteristics.

In terms of judging, the argument is made that as women have such different characteristics, more women judges will lead to a radically different law and

---

77 The suggestion of gender rotation was put forward by Kim Rubenstein in her address on the Australian constitutional arrangement and the position of head of state that had not been filled by a woman in its 107 years: see, K. Rubenstein, ‘From Suffrage to Citizenship: A Republic of Equality’, 2008 Dymphna Clark Lecture, Canberra, March 2008. Note that in 2008, Australia appointed its first female Governor-General.
80 See, Ch. 1.
82 See, Ch. 1.

Ch. 2: The UN Human Rights Treaty Bodies
legal system, as women use their skills and perspectives to interpret the law in a
different manner to men. Thus, some have argued that: women lawyers are more
likely to seek to mediate disputes than litigate them; women lawyers are more
concerned with public service; women judges are more likely to emphasise
context and de-emphasise general principles; and, women judges are more
compassionate.84

Despite the methodological difficulties in proving or disproving such assertions, some
research is available to suggest that women judges may adopt more so-called ‘feminine’
modes of decision-making.85 Women judges themselves have argued that women tend
to make more liberal decisions to uphold individual rights.86 At the same time,
arguments that women bring feminist reasoning to the judiciary have been used to keep
women out of the ‘male’, ‘rational’, and ‘objective’ world of the bench. Margaret
Thornton writes, for example, that the selection criterion of ‘merit’ is a pseudonym for
power reinforced by the abstractness of the term and the lack of transparency in judicial
appointment processes.87 At the international level, the UN has noted that women tend
to support peace initiatives, protection of the environment, and the creation and
maintenance of social services to a greater extent than men. It further found that women
tend to favour more inclusive and less polarising forms of decision-making.88
Equivalent studies in the context of the decision-making of the treaty bodies have not
been undertaken, perhaps because of the difficulty in distinguishing the views of female
and male members under a largely consensual decision-making approach (see
discussion below).

---

84 Ibid.
85 See, e.g., S. Sherry, ‘Civil Virtue and the Feminine Voice of Constitutional Adjudication’ (1986) 72
Vanderbilt L. Rev. 543, 593; Cf. J. Aliotta, ‘Justice O’Connor and the Equal Protection Clause: A
86 Justice Atkinson of the Supreme Court of Queensland, Australia, quoted in N. Rose, ‘International Bar
Association Conference: Top Judge Calls for More Women on the Bench to Uphold Individual Rights’
88 UN, Women in Decision-Making (1992), 107, referred to in H. Charlesworth, ‘The Gender of
Almost all of the treaty bodies have adopted informal divisions of labour, in which members put forward their interest in a particular subject matter or article of the relevant treaty. This, too, appears to divide along gender lines. On the Women’s Committee, for instance, the only three male members in the history of the Committee indicated interest in issues such as reservations rather than in any substantive rights. On the CRC, the informal division of labour, even though aligned with professional expertise, interestingly still tends to see women members take up the issues of education, health, and disability, while male members typically focus on juvenile justice. On the CESCR, the debate over the appropriate venue in which to discuss women’s issues has stalled progress, with some members reluctant to deal with women’s issues because they feel that such issues should be raised in the specialist treaties. Some NGOs note that the presence of a single female member on the CAT, for example, led to the frequent raising of women’s interests. Meanwhile, they worry that such issues may disappear entirely without female members. It is advocated here that the treaty bodies should operate internal procedural rules that ensure balanced gender representation in key committee functions, such as rotating chairpersons and rapporteurs. The situation of women’s rights is ‘fragile’ to the extent that, if a treaty body loses a member dedicated to women’s issues, that expertise is lost. It has been asserted that the presence of the Women’s Committee eventually influenced the work of the other treaty bodies to take up issues of gender. Likewise, it has been argued that the increased

89 Interview with member of the Women’s Committee, 19 June 2008.
90 Interview with former member of the CRC, 19 June 2008.
91 Interview with member of the CESC, 18 June 2008.
92 Interviews conducted with officials of five international non-governmental organisations during the course of 2006-2008.
93 Ibid.
94 It is noted that rotating the chairperson and rapporteur positions may cause difficulties in committees with few women and this could result in the few women becoming over-burdened with responsibilities. However, for those committees in which over 30 per cent membership is women, any burden could be shared between them. Moreover, rotating positions may encourage states to nominate more women to committee positions if they know that their male nominees are only half as likely to attain important positions in the committees than women members.
95 Interview with senior official of the OCHR, 15 June 2008.
96 Interview with former members of the Women’s Committee and the HRC, 10 June 2006.
participation of women in the European Parliament in 1979 coincided with an increased attention to issues of sexual equality. Nonetheless, where women members are the only member or one of few women members, there is a period of convincing the members of the treaty bodies [read: male members] of their worthiness to be on the committees at all, especially if they choose to take up a gender agenda.

There is some evidence at the international level to support claims that women add a new dimension to decision-making. For example, the first historic, and so far only, international decision that found rape to be an act of torture and genocide, which was delivered by the International Criminal Tribunal for Rwanda (ICTR), emerged only after serious lobbying by women’s groups that the indictment be amended to include rape. Akayesu, a town mayor, was not initially charged with any crimes against women, but as the trial developed, evidence emerged through testimony of the large number of such crimes. An amendment to the charges and permission to admit such evidence was allowed by the only female judge on the case, Judge Pillay. The Chief Prosecutor at the time, however, was also female and had not prioritised cases of gender or sexual

---

98 Interview with senior official of the OHCHR, 16 June 2008.
99 While rape has been raised as a crime in a number of decisions before the International Criminal Tribunal for the former Yugoslavia (ICTY), it has not (yet) been tried as genocide: see, e.g., Prosecutor v. Delalic, Mucic, Delic and Landzo (Celebic), Case No. IT-96-21-I (21 Mar. 1996) (ICTY found rape and sexual assault of camp detainees constituted grave breaches of the Geneva Conventions and violations of the laws and customs of war); Prosecutor v. Anto Furundzic, Case No. IT-95-17/1-T, 10 Dec. 1998 (convicted of two counts of violating the laws or customs of war, as a co-perpetrator of torture and as an aider and abettor of outrages upon personal dignity, including rape); Kunarac, Kovac and Vukovic, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001; upheld on appeal, Case No. IT-96-23 and IT-96-23/1, 12 June 2002 (found rape to constitute torture).
100 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T (Judgment, 2 Sept. 1998); Case No. ICTR-96-4-T (Appeal Court) (Judgment, 1 June 2001).
violence.\textsuperscript{102} In other jurisdictions, though, such as the European Court of Human Rights, a feminist dissent has not been apparent.\textsuperscript{103}

Although the presence of women on treaty bodies may contribute to an improved reflection of gender or women within the interpretations of existing provisions, many groundbreaking human rights decisions that carry positive ramifications for women have developed in cases that involved men and/or no apparent gender dimensions. The due diligence concept, which allows the actions of non-state or 'private' actors to be brought within the purview of international law, for example, developed initially before the Inter-American Court of Human Rights and involved no analysis of gender.\textsuperscript{104}

Similarly, the first decisions in the context of international refugee law that held that gender-related persecution is a ground for asylum did not involve women.\textsuperscript{105}

This supports the view that there is no guarantee that women members will be more attuned to issues affecting women than their male counterparts or that men are incapable of reaching such decisions. As stated in Chapter 1, arguments that suggest that women are 'naturally' inclined to adopt different techniques to men 'recall the old myths [women] have struggled to put behind [them]'\textsuperscript{106} These old myths must be rejected as

\textsuperscript{102} The Chief Prosecutor at the time was Ms. Louise Arbour, who then went on to become the UN High Commissioner for Human Rights from 1 July 2004 to September 2008. She was appointed to the position of Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1996 and served until 1999, when she was replaced by Ms. Carla Del Ponte. Interestingly, Justice Pillay has now gone on to take up the position of UN High Commissioner for Human Rights from Sept. 2008.


\textsuperscript{104} Velásquez Rodríguez \textit{v.} Honduras, IACHR Ser. C, No. 4, judgment 29 July 1988. See, also, Godina-Cruz \textit{v.} Honduras, IACHR Ser. C, No. 5, 20 Jan. 1989. These cases are discussed further in Chapter 4.


wedding women to biology and reinforcing social stereotypes. They also play into assumptions that women and women's decision-making are exceptions to the norm.107

Furthermore, to accept the argument that women are needed on judicial or quasi-judicial bodies to ensure that decision-making reflects and takes account of gender (rather than simply their right to participate equally with men) often leads to the situation in which one of the female committee members (or the only female member) becomes informally identified as the member responsible for bringing attention to women's concerns.108 Rather, it must be the responsibility of each and every member of the committee. In addition, there are theorists who point out that women may not always be willing to advocate for women's rights.109

Although the third argument posited in favour of women's equal representation in politics is that democracy requires it, it is also relevant to the UN system, which is based on inter alia on the principle of universality. Just as geographic representation is valued in the UN system, so too must sexual equality be valued when women make up 50 per cent of the world's population. Closely tied to equality arguments, the framing of arguments for women's participation within the broader concept of universality can lead to 'a more ambitious programme of dispersing power'.110 As Karen Knop argues, women should be able to decide international cases, not because they will make better or even different decisions, but 'because they as a group ... should be able to make


108 Interviews conducted with officials of five international non-governmental organisations during the course of 2006-2008.

109 See, Ch. 1.

decisions that affect their lives.\textsuperscript{111} Similarly, Sandra Day O’Connor, the first woman appointed to the US Supreme Court in 1981, has stated in response to questions about whether women bring different ways of reasoning to the Court by virtue of being women:

There is simply no empirical evidence that gender differences lead to discernible differences in rendering decisions.\textsuperscript{112}

She has also said that having women on the bench and in positions of prominence is significant, in part because of the role-model function it serves for young women that women are not cast in fixed roles.\textsuperscript{113}

All of the above are also closely linked to the ‘role model’ arguments for women’s participation and representation. The male-dominated composition of some of the treaty bodies has been asserted as a reason for women’s reluctance to utilise the individual complaint procedures.\textsuperscript{114} In other words, there is a correlation between women as judges and women as litigants. The issue of women’s litigation is dealt with further below.

Ultimately, the strongest arguments for women’s equal representation and participation in the work of the treaty bodies are those based on equality and universality. In addition, while there is some evidence to suggest that women bring to the table or bench different life experiences, which may filter into their decision-making, there is also evidence to suggest that positive decision-making for women’s rights can be made in their absence.

\textsuperscript{113} Ibid., 187.
D. STATE PARTY REPORTS

1. General overview

The receipt and consideration of periodic state party reports, common to all the committees, is the primary means of monitoring the implementation of human rights treaty obligations under the treaty body system.\(^{115}\) The idea of monitoring human rights through a review of reports originated in a 1956 ECOSOC resolution that requested member states to submit periodic reports on progress made in the advancement of human rights.\(^{116}\) This model was then replicated in all the treaties adopted thereafter. Treaty body reporting is aimed at establishing a dialogue between the state party and the committee in the hope of assisting governments to better implement their human rights treaty obligations.

Initial reports are due one or two years after ratification, with follow-up reports due between two, four, or five years after the initial report, or whenever the treaty body so requests.\(^{117}\) The state party is expected to report on the steps taken to implement their obligations, including legislative, judicial, administrative, and other measures that have been adopted, and any difficulties that have been experienced in meeting treaty...


\(^{117}\) Art. 40, ICCPR (initial report 1 year and then 'usually every 4 years'); Part IV, ICESCR (initial report 2 years after ratification and then every 5 years); Art. 9, ICERD (initial report 1 year after ratification and then every 2 years or whenever requested); Art. 18, CEDAW (initial report after 1 year and then every 4 years or whenever requested); Art. 19, UNCAT (initial report after 1 year and then every 4 years or whenever requested); Art. 44, CRC (initial report after 2 years and then every 5 years, no spontaneous requests); Art. 73(1)(a), IMWC (1 year after ratification, then every 5 years or upon request).
obligations.\textsuperscript{118} In order to ensure that reports supply adequate information for the treaty bodies to do their work, each body issues guidelines on the form and content of state reports,\textsuperscript{119} although there is considerable variation in the form in which reports are presented.\textsuperscript{120} In 2005, the states parties agreed on harmonised reporting guidelines, which are discussed below. According to the High Commissioner for Human Rights, the reporting process should 'encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and programmes, and constructive engagement with civil society'.\textsuperscript{121} Some states incorporate comments and criticism from NGOs in their reports; others submit their reports to parliamentary scrutiny before submission.\textsuperscript{122} Some other states, of course, do neither. Still others have opted to hire consultants to draft and prepare their reports, which ultimately defeats the purpose of self-evaluation, review, and 'constructive dialogue'.

Once submitted, the report is scheduled for consideration by the committee at one of its regular sessions. Reports are then examined by the relevant treaty body in the presence of representatives of the state party. In advance of that face-to-face meeting, the committee draws up a list of issues and questions, which it submits to the state party. This allows the committee to request additional information that may have been omitted or that members consider necessary to be able to assess the degree of implementation of the treaty in the country under review. Sometimes, the state party may submit written responses to the list of issues and questions, which form a supplement to the report. The OHCHR believes that this pre-review question and response system facilitates dialogue

\textsuperscript{118} Art. 40, ICCPR; Art. 17, ICESCR; Art. 9, ICERD; Art. 18, CEDAW; Art. 19, UNCAT; Art. 44, CRC; Art. 73, IMWC.
\textsuperscript{119} See, e.g., UN, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev.2/Add.1, 6 May 2005.
\textsuperscript{120} Office of the High Commissioner for Human Rights (OHCHR), The Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies, Fact Sheet No. 30 (undated), 28.
\textsuperscript{121} Ibid., 27.
\textsuperscript{122} Ibid., 27.
between the committees and the state party, particularly in light of delays (see below). At least in the one case of the CAT, the list of issues and the state party’s responses have been adopted as the state party report, without the state party needing to furnish a separate report. The CAT sees this as a shift towards ‘customised’ reporting.

In addition to the information furnished by the state party, the treaty bodies may receive information on a country’s human rights situation from other sources, including UN agencies, other intergovernmental organisations, NGOs, academic institutions, and the press. Most committees allocate specific plenary time to hearing submissions from UN agencies and NGOs. Depending upon when the information is received, related questions may be added to the list of issues submitted to the state party in advance of the session. Increasingly, UN country teams have prepared confidential reports submitted to the relevant committee. Some UN agencies also become involved in the drafting process, but this can undermine the process of states preparing their own reports.

All treaty bodies invite states parties to send a delegation to attend the session at which the committee considers their report, although some may consider the report in their absence. States parties are able to respond to members’ questions and provide additional information on their implementation of treaty obligations. The OHCHR stresses that

---

123 Ibid., 29.
125 OHCHR, The Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies, Fact Sheet No. 30 (undated), 30. Some treaties provide explicitly for the receipt of such information, see Art. 18 and 19, ICESCR; Art. 22, CEDAW; Art. 45, CRC; Art. 74, IMWC.
126 Interview with senior official of the OHCHR, 16 June 2008.
this process is not adversarial or judicial but dialogic, with the aim being to assist
governments in their efforts to implement the treaty.\textsuperscript{127}

At the conclusion of the examination, the committees adopt ‘concluding observations’
(or ‘concluding comments’), which are submitted to the state in question and in which
positive steps taken by the state party are acknowledged and areas where more needs to
be done are identified. These ‘concluding observations’ are then used as the starting
point for subsequent reviews. Annual reports with summaries of state party reports are
provided to the states parties concerned and to either the ECOSOC or the General
Assembly.\textsuperscript{128} Annual reports may also be submitted to specialised agencies.\textsuperscript{129}

2. General problems

There are a number of general problems with state party reporting; some of these are
outlined here. First of all, all the treaty bodies suffer from a large number of overdue
reports,\textsuperscript{130} and at the same time, there are substantial delays, owing to human and
financial constraints, in dealing with those reports that are submitted on time.\textsuperscript{131}

According to the OHCHR, states that have ratified all seven treaties (now eight) and
their optional protocols place themselves under a legal obligation to produce, over a ten-

\textsuperscript{127} OHCHR, \textit{The Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and
the Treaty Bodies}, Fact Sheet No. 30 (undated), 31.
\textsuperscript{128} Art. 40, ICCPR (to states parties and ECOSOC); Art. 9(2), ICERD (to states parties and General
Assembly); Art. 21, CEDAW (to General Assembly; Secretary-General further transmits the report to the
Commission on the Status of Women); Art. 24, UNCAT (to states parties and GA); Art. 45, CRC (to
GA); Art. 74, IMWC (to GA).
\textsuperscript{129} See, Arts. 19 and 22, ICESCR (for technical follow-up); Art. 74, IMWC (state party reports to be
submitted to the International Labour Organization).
\textsuperscript{130} At end May 2007, the number of overdue reports was: ICCPR (90); ICESCR (213); CEDAW (247);
UNCAT (170); CERD (483); CRC (103); CRC Optional Protocol on the Sale of Children, Child
Pornography and Child Prostitution (72); CRC Optional Protocol on Children in Armed Conflict (65);
\textsuperscript{131} OHCHR, \textit{Monitoring Implementation of the International Human Rights Instruments: An Overview of
the Current Treaty Body System}, Background Conference Document for the Fifth Session of the Ad Hoc
Committee on a Comprehensive and Integral International Convention on Protection and Promotion of
year period, 22 reports to the various treaty bodies, an average of one every five and a
half months.\textsuperscript{132} As ratifications increase, the pressure on the treaty bodies also increases,
and this has led to several discussion papers on reform of the treaty body system,
discussed further at I. Treaty body reform below.\textsuperscript{133} Meeting times are inadequate to
deal with the large volume of reports, resulting in minimal time spent considering each
report.\textsuperscript{134} Some of the committees have introduced a system of amalgamating reports
into a ‘combined report’ when a particular state party has not met the deadlines for
submission or where the committee has not scheduled a session before a subsequent
report has fallen due.\textsuperscript{135} Reports vary in quality and substance.\textsuperscript{136}

In 1993, Philip Alston observed that state reports are ‘quintessentially government
reports.’\textsuperscript{137} As they are prepared and compiled by state officials, they reflect a degree of
government propaganda, and governments commonly avoid controversial areas of
policy or practice, which can include women’s rights.\textsuperscript{138} Otherwise, some of the most
culpable states parties claim that all their treaty obligations are satisfied.\textsuperscript{139}

\textsuperscript{132} ibid., para. 23.
\textsuperscript{133} See, e.g., OHCHR, Plan of Action submitted by the UN High Commissioner for Human Rights, Annex
to Report of the UN Secretary-General, In Larger Freedom: Towards Development, Security and Human
Rights for All, UN Doc. A/59/2005/Add. 3, 26 May 2005; OHCHR, Concept Paper on High
Commissioner’s Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2, 22 Mar. 2006,
\textsuperscript{134} A.F. Bayefsky, ‘Making the Human Rights Treaties Work’, in L. Henkin and J.L. Hargrove (eds.),
Human Rights: An Agenda for the Next Century (American Society of International Law, Studies in
Transnational Legal Studies No. 26, 1994) 229, 234.
\textsuperscript{135} E.g. the Women’s Committee and the CAT: A.F. Bayefsky, ‘Making the Human Rights Treaties
\textsuperscript{136} J. Morijn, UN Human Rights Treaty Body Reform: Toward a Permanent Unified Treaty Body
\textsuperscript{137} Independent Expert, Interim Report on Updated Study by Mr Philip Alston, UN Doc.
\textsuperscript{138} A. Byrnes, ‘The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination
\textsuperscript{139} A.F. Bayefsky, ‘Making the Human Rights Treaties Work’, in L. Henkin and J.L. Hargrove (eds.),
Human Rights: An Agenda for the Next Century (American Society of International Law, Studies in

128 Ch. 2: The UN Human Rights Treaty Bodies
Some governments accept the input of NGOs, although this is the exception rather than
the rule. The effectiveness of the reporting process relies on transparency and public
reporting, but owing to a lack of understanding among the general population, limited
information provided to citizens in many countries, and the proliferation of treaties and
reporting requirements,\textsuperscript{140} meaningful participation in the process is increasingly
elusive. Some studies have argued that the process is ‘essentially catalytic and
secondary’\textsuperscript{141} and that the benefits of state reporting lie more in the process of report
preparation than in the actual output.\textsuperscript{142} Others have noted that the state party reporting
process, and especially the concluding observations of the committees, has had
‘significant influence’ in giving meaning to human rights standards, including their use
as interpretative guidance in domestic courts.\textsuperscript{143}

However, in many countries, reports are not translated into local languages, and high
levels of illiteracy, especially among women, mean that access to such information or
participation in its collection is limited. Bayefsky argues that the preparation of these
reports is mostly seen as ‘a bureaucratic exercise or diplomatic chore and not as an
opportunity for self-analysis and the amendment of national laws or practices’.\textsuperscript{144} She
finds that the ‘so-called “constructive dialogue” with such states is a hoax’ and,
furthermore, that the system of state reporting should be dismantled and replaced with

\textsuperscript{140} On the issue of UN reform of the treaty bodies and the proliferation of treaties, see M. O’Flaherty and
Rev. 141. See, also, UN Report of the Secretary-General, \textit{Strengthening the United Nations: An Agenda
\textsuperscript{141} Independent Expert, \textit{Interim Report of Update Study by Mr Philip Alston}, UN Doc.
\textsuperscript{142} OHCHR, \textit{Report of the Chairpersons of the Human Rights Treaty Bodies on their Sixteenth Meeting,
\textsuperscript{143} C. Heyns and F. Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic
\textsuperscript{144} A.F. Bayefsky, ‘Making the Human Rights Treaties Work’, in L. Henkin and J. Lawrence Hargrove
(eds.), \textit{Human Rights: An Agenda for the Next Century} (American Society of International Law, Studies
country rapporteurs or treaty-monitoring bodies with fact-finding mandates.\textsuperscript{145} Crawford notes that such problems are inherent in a system based on self-criticism and good faith.\textsuperscript{146}

In addition, the overlap in mandates over specific norms has been criticised as duplicating efforts\textsuperscript{147} and is exacerbated by limited knowledge of or cross-referencing to each committee’s outputs.\textsuperscript{148}

3. What about women?

The above general problems hinder the effective monitoring of human rights obligations, whether they apply to women and/or men. However, the system also has a particular impact on women. The lack or absence of women in relevant government positions in most countries is said to influence the extent to which women’s issues are taken up during the preparation of state party reports. For example, experts in women’s affairs are not necessarily experts in human rights reporting, and experts in human rights reporting may lack knowledge of women’s affairs.\textsuperscript{149} Although the treaty bodies have developed mechanisms to deal with these gaps, such as lists of issues (outlined above), they can also lead to a state party confining references to women to the context of the particular question rather than integrating women’s issues throughout the report.

\textsuperscript{145} Ibid., 264.
as a whole. In practice, responses by states parties can amount to little more than form over substance, or state reporting may simply ‘add women and stir’. At a minimum, the treaty bodies seek sex-disaggregated statistics.

The fact that few countries involve civil society in the preparation of their reports, including the exclusion of women’s organisations, can skew results in favour of ‘official’ records rather than reality. Even in countries that admit NGO comments on draft state party reports or the participation of NGOs in their delegations, the resource-intensive nature of research and report writing means that ‘shadow’ or ‘alternative’ reporting is an ad hoc process. The ability to prepare shadow reports is reliant on previously collated research, which can be hindered by a denial of the right to visit by the country in question. Another issue is that even large international NGOs in periods of funding or staff shortages tend to deprioritise women’s issues. Women’s groups operating at national and local levels are often more affected by lack of resources, limited access to reliable information, or poor organisation to be able to engage fully. Nonetheless, if they are able to supply information to the committees, it can bring ‘democratic space’ that may not otherwise be available at home.

In light of the myriad problems of state party reporting, the UN has held discussions about reform. In response to the Secretary-General’s report in 2002 that raised concern

150 See, Ch. 1.
152 It is well known that organisations such as Amnesty International have been denied visas to enter particular countries to carry out their work.
153 Interviews conducted with officials of five international non-governmental organisations during the course of 2006-2008. As one example, an international NGO informed its staff that monitoring the Women’s Committee would not be carried out until further notice due to staff and resource shortages, whereas the HRC and the CAT would continue to be monitored as usual. For a positive example of NGO input into state party reports, see: C. Benninger-Budel and L. O’Hanlon, Violence against Women: 10 Reports/Year 2003 (World Organization against Torture (OMCT), 2004).
154 Interview with senior official at the OHCHR, 16 June 2008.
over the proliferation of treaties and state party reporting obligations. Draft Harmonized Guidelines were prepared in 2005 to provide uniform guidance to states on the form and content of their periodic reports. A single report to span across treaties was rejected at a consultation meeting, but an expanded 'common core document' was accepted, which is to be produced alongside specialist treaty reports. The expanded core common document is to include statistical data (disaggregated by sex and other population groups), an overview of the general framework for the protection and promotion of human rights in the country, and information on the implementation of congruent provisions (that is, substantive provisions that are shared across treaties). Non-discrimination on the basis of sex and equality between women and men were identified, _inter alia_, as 'congruent' provisions. For women, there are both positive and negative possible consequences of this initiative.

On the positive side, requiring states parties to supply information on non-discrimination and equality in an expanded core document is likely to highlight the cross-cutting nature of these issues. It confirms that sex discrimination is relevant to all treaty bodies, not just reporting under the CEDAW. In addition, the core document will place sex discrimination and equality within the ambit of deliberations of even those treaties that do not contain such provisions. The new harmonised guidelines also ask...
states parties to describe the process of reporting and to provide information about constituent groups that participated in the process, such as women.\textsuperscript{161}

However, a foreseeable problem with an expanded core document is that states parties may treat it as a static document and only superficially update it while they concentrate on the treaty-specific report at hand. After all, the idea behind the consolidated core report was to reduce the workload on states parties, not to increase it by requiring a larger core document to be reviewed regularly.\textsuperscript{162} With non-discrimination on the basis of sex and equality identified as congruent provisions and thereby falling into the core report, issues of equality could be downplayed or even sidelined. Moreover, the intersectional nature of non-discrimination and equality guarantees may be lost if they are isolated in a core document and not interwoven into the treaty-specific reports. A preferred approach might be the submission of a single report that spans the state party’s treaty obligations under each of the treaties to a single treaty body. The idea of a single treaty body has been recommended by the OHCHR;\textsuperscript{163} however, it has faced some resistance, including from members of the Women’s Committee. Because of the prominence of treaty body reform in the work of the UN in the 2000s, it is dealt with in Section I of this chapter (see below).

\textsuperscript{161} Fourth Inter-Committee Meeting, Revised Draft Harmonized Guidelines for Reporting under the International Human Rights Treaties including Guidelines for a Common Core Document and Treaty-Specific Targeted Documents, UN Doc. HRI/MC/2005/3, 1 June 2005, para. 50(d).
\textsuperscript{162} The Revised Draft Harmonized Guidelines note that the core document will need to be updated for each submission: Fourth Inter-Committee Meeting, Revised Draft Harmonized Guidelines for Reporting under the International Human Rights Treaties including Guidelines for a Common Core Document and Treaty-Specific Targeted Documents, UN Doc. HRI/MC/2005/3, 1 June 2005, para. 23.
E. GENERAL COMMENTS

Each of the committees has adopted the practice of issuing General Comments or General Recommendations. These documents began as guidance to states parties on how to prepare and formulate their periodic reports and have developed over time into authoritative statements as to the interpretation of particular provisions. They thus form a hybrid function. They vary in quality and length (from a single paragraph to ten or so pages). Not all the treaty bodies have embraced to the same extent this way of communicating to states parties.

The subject matter for a new General Comment is normally adopted by a particular committee member, with drafts prepared by themselves or the Secretariat, but they are increasingly being drafted by academics or other independent consultants, and feedback from NGOs is increasingly being sought. The OHCHR now has a policy of putting up draft General Comments on their website, but not all committees do this. Although they have improved in terms of quality – from brief statements to more detailed exposés – many remain general statements as to the meaning of particular terms or rights without explaining fully the background to, or reasons for, such an interpretation.

In terms of the representation of women’s concerns within General Comments, women are largely missing from specific mention in the early documents. Since the UN’s

---

164 The HRC, the CESC, the CAT, and the Children’s Committee use the term ‘General Comments’, while the CERD and the Women’s Committee use the term ‘General Recommendations’. There are some efforts underway to harmonise language to General Comment.


166 E.g. the CAT has only issued two General Comments (General Comment No. 1: Implementation of Article 3 (1996). UN Doc. A/53/44 and General Comment No. 2: Implementation of Article 2 by States Parties (2008), UN Doc. CAT/C/GC/2, 24 Jan. 2008), whereas the Women’s Committee has issued 25 General Recommendations and the HRC has issued 31 (as at May 2008).
gender mainstreaming policy was adopted in 1997, there have been various efforts to issue women-specific General Comments. For example, both the HRC and the CESCRR have issued specific General Comments on the equal rights of men and women to enjoyment of human rights.\textsuperscript{167} Like other UN practices, women’s issues tend to be located in women-specific documents and have yet to be fully mainstreamed. Only the Children’s Committee has adopted a holistic approach to General Comments, which they find has been possible because of the thematic rather than article-by-article approach they adopt.\textsuperscript{168} Further analysis of some of these General Comments is undertaken in relation to the three rights studied in this thesis (see Chapters 3–5).

F. INTER-STATE COMMUNICATIONS

Exactly half of the core human rights treaties contain inter-state dispute mechanisms (with the Optional Protocol to the ICESCR awaiting confirmation from the General Assembly), in which one state may lodge a written communication regarding the non-compliance of another state with their treaty obligations.\textsuperscript{169} Originally, the more mainstream treaties included the procedure (the ICCPR, the ICERD, and the UNCAT), while the specialist treaties (the CEDAW and the CRC) as well as the ICESCR did not contain such a provision. In most cases, the dispute procedure requires states parties to make separate declarations recognising the competence of the treaty body to hear any such complaints.\textsuperscript{170} Only the ICERD does not require an additional jurisdictional declaration,\textsuperscript{171} although reservations may be entered against the relevant provision.\textsuperscript{172}


\textsuperscript{168} Interview with former member of the Children’s Committee, 18 June 2008.

\textsuperscript{169} There are no inter-state complaints mechanisms under the OPCEDAW and the CRC.

\textsuperscript{170} See, e.g., Art. 41, ICCPR; Art. 21, UNCAT; Art. 76, IMWC.

\textsuperscript{171} Art. 11, ICERD.

\textsuperscript{172} Art. 20, ICERD.
Although the inter-state dispute mechanism has never been activated under any of the treaties,\(^{173}\) it is mentioned here because of the symbolic significance of this procedure in allowing one state party to bring a complaint against another state party for alleged violations of human rights.\(^{174}\) It is also worth noting that this procedure, although never having been formally activated, has been used strategically in diplomatic disputes. The threat of another state bringing a public action before one or more of the human rights treaty bodies can act as a stick to resolving a dispute.\(^{175}\) The omission of an inter-state communications procedure from the CEDAW,\(^{176}\) and later from the Optional Protocol to the CEDAW (OPCEDAW),\(^{177}\) is therefore symbolic and potentially significant. One of the primary aims of the OPCEDAW was finally to treat women’s rights as being of equal worth to other human rights.\(^{178}\) As shown in Chapter 1, until the introduction of the Optional Protocol, the CEDAW had been criticised for its weaker implementation mechanisms. But the failure to include an inter-state complaints mechanism in the OPCEDAW reinforces the different and unequal treatment of women’s rights compared

---


\(^{175}\) Communication with former senior government/diplomatic official who was aware of at least two occasions in which the threat of inter-state communications was used to resolve a dispute: confidential email dated 14 Aug. 2008 (on file with the author). It is not though clear how often this takes place because it occurs without or with virtually no publicity.

\(^{176}\) A number of states during the drafting process called for inter-state and individual communications mechanisms, including because of the precedent set by the ICERD, see L.A. Rehof, Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (Dordrecht: Martinus Nijhoff Publishers, 1993), 238-239.

\(^{177}\) The OPCEDAW was negotiated in informal meetings so there is no travaux préparatoires for the OPCEDAW. It is therefore difficult to determine why it was excluded. There seems to be no explanation for its omission except that the draft under discussion did not contain such a procedure and the meeting decided it was not worthwhile: see, confidential email from senior official at OHCHR who attended the drafting meetings, 15 Sept. 2008 (on file with the author).

with other rights. The fact that subsequent optional protocols, for example to the ICESCR, have included provision for it – also reveals bias. Above all, its omission from the OPCEDAW sends a sombre message to women that states parties could not imagine even a single situation in which one state party would bring an action against another state party, no matter how egregious or widespread the violations against women.\footnote{Interpretative or application disputes, however, may be resolved by recourse to the International Court of Justice: Art. 29(1), CEDAW. There are a large number of reservations to this article.} Neither, therefore, can the state party be threatened with such action.

G. INDIVIDUAL COMMUNICATIONS

1. General procedures

Over half of the treaty bodies receive and consider communications from individuals (also known as complaints or petitions) alleging the violation of their rights by a state party.\footnote{See, above n. 20 of this chapter.} Not unlike the inter-state communications procedure (see above), the individual communications procedure was initially attached to the more mainstream treaties (the ICCPR, the ICERD, and the UNCAT). With the increasing acceptance of such a procedure as an effective enforcement mechanism, most of the treaties have now been amended or are in the process of being amended to include such a procedure (the CEDAW, the IMWC, the ICESCR (in process), and the ICRPD). The CRC appears the most resistant to change.\footnote{This is largely owing to concerns about how children would exercise their rights to petition.} According to the OHCHR, ‘[i]t is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person’s real-life situation, the standards
contained in international human rights treaties find their most direct application.\textsuperscript{182} The committees may hear complaints relating only to a state party that has accepted the jurisdiction of the committee to do so, either by a declaration under the relevant treaty provision\textsuperscript{183} or by accepting the relevant optional protocol.\textsuperscript{184} That is, the procedure is optional for states parties. Most of the treaties allow communications from individuals, but not all allow groups of individuals to lodge communications (i.e. collective or group actions).\textsuperscript{185}

There are several procedural steps before consideration of the merits, which are generally shared across the treaty bodies. First, a communication will be registered by the Secretariat of the OHCHR if it provides minimal information, such as the complainant’s name, nationality, and date of birth; the state party against which the complaint is made; and a statement of the facts, in chronological order, on which the claim is based.\textsuperscript{186} Apart from a provision that the communication must not be anonymous, there are no other criteria listed in the treaties themselves. A complainant does not need a lawyer nor to be familiar with legal and technical language; nor does the complainant need to articulate which treaty provision has been violated. However, the OHCHR encourages both, and the records show that decisions tend to be more favourably decided when legal representation on behalf of the complainant is engaged,\textsuperscript{187} as well as when the relevant provisions are specifically identified by the complainant. No legal aid funded by the UN is available, and very few, if any, governments provide it. Claims may be brought on one’s own behalf, or on behalf of another person as long as proof of their consent is supplied or, if unavailable, reasons

\textsuperscript{182} OHCHR, *Complaints Procedures*, Fact Sheet No. 7/Rev.1 (undated), 2.
\textsuperscript{183} Art. 22, UNCAT; Art. 14, ICERD; Art. 76, IMWC.
\textsuperscript{184} OP ICCPR; OP CEDAW.
\textsuperscript{185} E.g., Art. 14, ICERD and Art. 2, OPCEDAW provide for group complaints.
\textsuperscript{186} OHCHR, *Complaints Procedures*, Fact Sheet No. 7/Rev.1 (undated), 3-4.
\textsuperscript{187} Ibid., 4.
are given for the failure to supply that consent. The communications need to be submitted in one of the six working languages of the UN, and the OHCHR advises that the processing of claims are accelerated if any documents in another language are already translated upon submission.\textsuperscript{188}

After registration, the communication is transmitted to the state party. Within three to six months of receipt, the state party must submit written explanations or statements clarifying the matter, including admissibility issues and the remedy, if any, that has been taken.\textsuperscript{189} After the state party replies, the complainant is given another opportunity to comment, usually within six weeks. If the state party does not reply, reminders are sent, and if there is still no response, the committee will consider the case on the basis of the original complaint. If a state party objects to the admissibility of the communication when it first receives it without considering the merits, the treaty body will forward the state party's comments to the complainant and subsequently make a decision on admissibility. If the communication is considered admissible, the state party is then forwarded the communication again for comments on its substance.

In order to examine the communication, the committee holds closed meetings and examines the written record.\textsuperscript{190} Although some of the treaty bodies can hold oral hearings as per their rules of procedure, none have been held. The communication is generally considered in two stages: the admissibility stage and the substance/merits stage.

\textsuperscript{188} Ibid., 4.
\textsuperscript{189} Art. 4, OP ICCPR (6 months); Art. 14(6), I CERD (3 months); Art. 6, OPCEDAW (6 months); Art. 22(3), UNCAT (6 months); Art. 77(4), IMWC (6 months).
\textsuperscript{190} Art. 5(3), OP ICCPR; Art. 14, I CERD (no mention of closed meetings, but the assessment of the claims is confidential); Art. 7, OPCEDAW; Art. 22(6), UNCAT; Art. 77(6), IMWC.
In order for a complaint to be considered on the merits, an individual must first satisfy all of the admissibility criteria, which are largely identical across the five treaties.\textsuperscript{191} In summary, the admissibility criteria are:

1. Is the complainant an individual (or group of individuals in the case of the ICERD and the CEDAW) subject to the jurisdiction of a state party?

2. Is the complainant a victim of a violation(s) of any of the rights in the treaty?

3. Has the complainant exhausted domestic remedies?

4. Is the communication anonymous, or an abuse of the right of submission, or incompatible with the provisions of the treaty?

5. Has the communication been heard, or is it being heard, by another international dispute or settlement procedure?\textsuperscript{192}

6. Does the communication relate to an event that occurred after the relevant state party ratified the treaty?

If the committee considers the claim to be inadmissible, it issues a decision to that effect. If all of the admissibility criteria are satisfied, the committee will go on to review the case on the merits. Each committee has the facility to take urgent action (or interim measures), either incorporated expressly or implied into the treaty, to avoid irreparable harm being done to the complainant if the communication was heard in the usual course.\textsuperscript{193} The committee issues non-binding decisions or ‘views’ on the

\textsuperscript{191} See, e.g., Art. 14, ICERD; OP-ICCPR, GA res. 2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976; Art. 22, UNCAT; Art. OPCEDAW; Art. 77, IMWC.

\textsuperscript{192} E.g., the HRC has concluded that studies into the same or similar facts by international organisations, such as Inter-American Human Rights Commission or UN Special Rapporteurs do not count for the purposes of this admissibility criterion: Baboeram et al. v. Suriname, HRC Nos. 146, 148-154/83. It has also held that the Human Rights Council’s 1503 procedure is not a procedure for admissibility purposes: A v. S, HRC 1/76.

communication, which are forwarded to the state party and the individual concerned.\(^4\) These views usually indicate an appropriate remedy, such as payment of compensation, release from detention, or a stay of execution or deportation. The Women's Committee has adopted the practice of issuing not only findings in relation to the individual communication in question, but also outlining more general recommendations. These general recommendations tend to be a list of steps or measures that ought to be taken by the state party that broadly address the concerns raised in the communication. It is unclear whether these constitute proposed remedies or are to be considered separately.\(^5\)

Although decisions are non-binding and none of the treaty bodies have enforcement powers, the committees do follow up with the state party by requesting updates on steps taken to remedy the situation, normally within three to six months of transmitting the decision.\(^6\) A summary of activities are included in each committee's annual reports, and decisions are accessible via the website of the OHCHR.

2. General weaknesses

The individual communications system suffers from a number of general weaknesses. It has been said that the procedure can do little to protect individual rights because "[i]t starts too late, takes too much time, does not lead to binding results and lacks any

\(^{4}\) Art. 5(3), OP ICCPR: Art. 14(7)(b), ICERD, Art. 22(7), UNCAT; Art. 7, OPCEDAW (it does not provide for simultaneous delivery but it does state that recommendations shall be distributed to both parties).

\(^{5}\) See, e.g., A.T. v. Hungary, CEDAW 2/2003, in which a number of general recommendations are listed in the context of a domestic violence complaint, such as to take all necessary measures to ensure that the national strategy for prevention and effective treatment of violence within the family is promptly implemented and evaluated.

\(^{6}\) Some of the committees then have additional follow-up measures, such as by referral to a committee member tasked with following up with the state party: see, OHCHR, Fact Sheet No.7/Rev.1: Complaints Procedures (undated).
effective enforcement. The procedures have faced criticism for being of a voluntary character, courses of last resort, and without effective remedies. Like state party reporting, the procedure has been criticised for its slowness, especially as domestic remedies must first be exhausted before access is granted. Best estimates suggest that it may take several years to achieve a legal remedy. Unsuccessful claims can also function as a 'ceiling for human rights protection' at the national level, impeding political and legal change. One technique adopted by some regional human rights bodies that has filtered into the human rights treaty system is deference to decisions of national authorities under the doctrine of a margin of appreciation, which can have the effect of watering down the universal character of human rights.

The nature of the decision-making process of the treaty bodies is, in most cases, consensual, although it has provision for individual opinions to be expressed. The advantage of this general approach is that it can avoid the 'factional battles' that

---


199 Exceptions have emerged in relation to this criterion where the domestic remedy is ineffective (see below).


142 Ch. 2: The UN Human Rights Treaty Bodies
dominate the other human rights bodies. Nonetheless, its main disadvantage is that it can easily lead to a compromise to the lowest common denominator or a decision with little or no supporting reasoning. Since 2000, it is possible to see a marked increase in the number of minority or dissenting opinions, although it is not clear what has led to this change.

Decisions often do not resolve all the alleged violations listed by the claimant but settle instead upon the least difficult. If the original complaint does not identify the articles at issue, the Secretariat, it seems, opts for the most obvious rather than all possibilities. As noted above, committee members are increasingly issuing separate opinions, which may have a positive effect on finding meaning within the committee’s ‘views’. Decisions are typically short, around ten pages. Prepared by the Secretariat, they read as templates rather than judicial decisions and are not binding on states parties. On a positive note, their length makes them more accessible to the general public. However, as each often contains no more than blanket statements on whether a particular provision has or has not been violated, it is not always clear why a particular decision was reached, or what factors counted in making the final determination.

3. What about female complainants?

So what about women? Women continue to be under-represented in bringing complaints before the treaty bodies. Of petitions lodged by women, their cases tend to

---

revolve around rights relating to equality and non-discrimination, marriage and family, or privacy. In terms of substance, Byrnes acknowledges that the committees have had some success in dealing with straightforward claims of differential treatment on the basis of sex, but they experience considerably more difficulty in responding to claims that challenge the distinction between public and private and that seek to attribute responsibility to a state for violations committed by private individuals.\(^{206}\) To some extent, this has improved because of the development of the concepts of due diligence.\(^{207}\) These mechanisms are also not well geared towards complaints arising from two or more states, such as trafficking of women and children across national boundaries or sex tourism.\(^{208}\) They also do not address systematic patterns or trends of human rights violations, although there are other, albeit political rather than judicial, mechanisms available to do so.\(^{209}\)

In the context of violence against women, the number of petitions from women is even lower. There have been no individual cases brought before the HRC, for example, relating to slavery, servitude, or trafficking; or decided under the right-to-life provision in the context of violence against women. In contrast, there are more communications brought under the torture prohibition claiming non-gender-specific torture. Women were in fact among the first applicants before the HRC relating to Article 7 of the ICCPR, either on behalf of themselves or other persons, including other women.\(^{210}\) These cases tended to involve so-called traditional [read: ‘male’] claims of physical


\(^{207}\) See, Chs. 3-5.


\(^{209}\) See, e.g., 1503 procedure of the UN Human Rights Council, see www.unhchr.ch.

abuse, poor prison conditions, or disappearances, and they dispute feminist claims that human rights law, as initially conceived, does not apply to women. This is taken up further in Chapter 4. None of the treaty bodies compiles any sex-disaggregated statistics on communications received, even though the committees, without exception, call upon states to disaggregate statistics within the context of the reporting process, discussed above. Much has been written by feminist scholars about why women are excluded or under-represented in judicial or quasi-judicial processes. Some of this material is also relevant in relation to the UN system of individual complaints as the quasi-litigious arm of the treaty bodies, and is dealt with here.

First of all, as already noted, not all of the treaty bodies permit the bringing of individual communications. The initial failure of both the ICESCR and the CEDAW to allow individual communications supports feminist critiques about the ‘gendered’ nature of international law and the exclusion of women’s concerns, especially in the economic, social, and cultural rights fields, as outlined in Chapter 1. In respect of the CEDAW, this has now been rectified by the agreement of an optional individual petitions system for the CEDAW in 2000. No reservations are allowed to the individual communications component of the OPCEDAW. However, as any individual communications must relate to rights located in the CEDAW, reservations to the parent treaty will still have effect. For the ICESCR, a draft optional protocol has been

---

212 See, Ch. 1.
214 See, e.g., UN, Compilation of Guidelines on the Form and Contents of Reports to be submitted by States Parties to the International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev.1 (2001), Ch. VII. See, also, CEDAW, General Comment No. 9: Statistical Data concerning the Situation of Women (1989) (no UN doc.).
215 The CRC and the ICESCR do not provide for individual communications. For pending changes to the ICESCR see below at n. 217 of this chapter.
216 Art. 17, OPCEDAW.
agreed by the UN Human Rights Council and is awaiting confirmation from the UN General Assembly. In lieu of a separate complaints system attached to the ICESCR, the HRC has exercised jurisdiction over rights of equal access to economic, social, and cultural rights under Article 26 of the ICCPR.

Second, feminist theorists speculate that litigation-style processes do not serve women. Drawing on the psycho-social research of Gilligan already mentioned in Chapter 1, some feminist scholars argue that the assertion of rights is a very male trait. Writing on international law, Chinkin questions whether adjudicative or quasi-adjudicative processes that emphasise individual behaviour or misbehaviour can be effective where there is a systematic power imbalance and disadvantage to women. A similar point is made by Smart in arguing that adversarial processes that position the rights holder against the infringer may not be appropriate where they are set against the reality of women’s economic and social dependence on men. Although the power imbalance between an individual and the state is without question an inhibiting factor to bringing forward claims, the procedure is mostly carried out through written correspondence, which can minimise the adversarial or confrontational nature of the proceedings. It does not, however, reduce the power of the state to intimidate or harass the complainant.

---

218 Initial supervision arrangements under the ICESCR were weak, requiring only that states submit reports to the UN Security-General who shall transmit them to the ECOSOC. In 1985, by virtue of an ECOSOC resolution a committee was established to carry out the monitoring roles previously held by ECOSOC (UN Doc. ECOSOC res. 1985/17, 28 May 1985). But the ICESCR has never contained provision for an individual petition system, largely due to a sense that economic, social, and cultural rights are non-justiciable, although on 18 June 2008, a resolution agreeing the draft Optional Protocol to the ICESCR was adopted by the UN Human Rights Council (UNHRC): UNHRC res. 8/2, 18 June 2008. For background see: Report of the Open-Ended Working Group to Consider Options regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Ms. Catarina de Albuquerque, UN Doc. E/CN.4/2004/44, 15 Mar. 2004.

219 See, Ch. 3.


222 C. Smart, Feminism and the Power of Law (London: Routledge, 1989), 139.
beyond the view of the treaty bodies. The early usage of the treaty bodies by women also questions the foundations of alienation theories.

Third, other scholars argue that litigation is not an effective guarantor of human rights in any event, whether for men or for women.223 This point is borne out by Bayefsky’s study mentioned above, in which she found that individuals have generally made little use of the petition system in the UN context.224 She calculates that annually there are 3000 pieces of correspondence, fewer than 100 registered cases, fewer than 100 decisions taken, and approximately 30 final decisions.225 Beyond a certain point, both mainstream and women-specific human rights mechanisms may not be effective, and recourse to ‘other sources of moral, political, or other normative authority’ may be necessary.226 For example, litigation has been seen as problematic when the system requires revolutionary change in a conservative community that is ready for, at most, evolutionary change.227 Moreover, litigation can be short-sighted, as ‘sexism is not a mere legal error’.228

In the context of the individual petitions system, the admissibility criteria outlined above act as the first line of rejection for women’s claims. These criteria reflect ‘male’

225 Notably, the number of potential claimants has increased since Bayefsky’s study with the constant accession to the core human rights treaties. Bayefsky identified a number of issues discouraging the submission of communications to the treaty bodies, including (a) the practice of streaming complaints to other UN mechanisms; (b) lack of media interest; (c) failure to produce remedies; (d) lack of follow-up; (e) link of committee members to governments; (f) overlap and lack of coordination; (g) language problems; or (h) personnel and infrastructure problems: A.F. Bayefsky, ‘Direct Petition in the UN Human Rights Treaty System’ (2001) 95 ASIL Proceedings 71.
standards of access and do not take account of the particular situation of women, although there have been some advances. One concern with the admissibility criteria is that most of the treaty bodies, with the exception of the CERD and the Women's Committee, do not allow groups of individuals to lodge group or collective complaints for violations of their human rights. The mechanism for group or collective complaints allows women who may hold shared experiences, such as widespread rape or sexual violence during armed conflict, to benefit from collective representation. In addition, collective complaints by women may be better placed to address structural causes of violence and inequality. States' concern with the wider scope of such actions has meant that such provisions have attracted a large number of interpretative statements, which may operate in effect as reservations. These procedures allow NGOs to lodge complaints on behalf of others.

Another concern about the treaty body procedures is that their individual nature presupposes that women are in a position to bring communications on their own behalf. In the words of Radhika Coomaraswamy, human rights mechanisms assume that women are 'free, independent and individual'. While many women are in a position to bring individual communications, and frequently do so, including on behalf of other persons, it does not address the myriad reasons preventing more women from accessing these mechanisms. Such factors might include the debilitating effect of trauma arising

229 Art. 14(2), ICERD and Art. 2, OPCEDAW. The OPCEDAW specifically allows communications to be submitted on behalf of individuals or groups of individuals with their consent, or where it can be explained why consent has not been obtained: Art. 2, OPCEDAW. In a similar way, the African Court of Human and Peoples' Rights operates to permit NGOs with observer status before the African Commission on Human and Peoples' Rights or individuals to institute cases directly with the Court, although this is at the discretion of the Court: Art. 5(3), Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights 1998, adopted on 9 June 1998, OAU Doc. OAUL/LEG/EXP/AFCHPR/PR(III); entered into force 1 Jan. 2004.


from violence, the shame they may feel, which perpetuates their silence, or a fear of reprisals if they were to take such action. At least in relation to the last point, the committees now include safeguards (interim measures) against ill-treatment or intimidation against complainants, and all the committees allow names to be removed from the public written records. However, the latter does not keep the identity of the victim secret from the state party, not least because admissibility criteria disallow anonymous submissions, but also because to do so would prevent the state party responding to the particular facts at hand. The lack of a binding decision or effective or suitable remedies at the end of the process may further discourage women applicants.

A lack of resources, high levels of female illiteracy in many countries, and a lack of access to legal aid or to information on the procedures generally or in a language they can read and understand are all factors that contribute to the difficulties that women face in using these mechanisms. Legal systems often discriminate against persons living in poverty who are unable to afford legal advice, are illiterate, and are powerless to change

---

234 See, above n. 193 of this chapter.
235 See admissibility criteria outlined above in the text.
237 Amnesty International, The Optional Protocol to the Women’s Convention, AI Index: IOR 51/04/97, Dec. 1997, 10. See, further, UN Statistics Division, Table 4c, Illiteracy, at http://unstats.un.org/unsd/demographic/products/indwm/ww2005/tab4c.htm (last accessed 28 Oct. 2008). Even in areas of high illiteracy generally, women’s levels are generally higher: see, e.g., Benin where 41.8% of men are illiterate between the ages of 15 – 24, 67.5% of women of the same age are illiterate; Burkina Faso: 74.5% men: 86% women; Bangladesh 42.2% men: 58.9% women.
legislative processes. In its experience, Amnesty International has found that those most in need of redress are often the least able to come forward.

Furthermore, the gendered nature of the rights contained in the human rights treaties and their interpretation as ‘men’s rights’ can prevent women recognising their experiences within human rights law. Women may not, for instance, equate the domestic violence they have suffered with torture. Moreover, as the remainder of this thesis shows, the committee members may also regard the abuses in question as falling outside the terms of the treaties. Recourse to international law is also remote from view and outside everyday experience. In this way, it is rightly charged with being abstract.

A further inhibiting factor is that the admissibility criteria address past abuses, practices, or events, rather than preventive action, which may have limited utility for some women. In other words, the petition system deals with the symptoms of human rights violations, not the underlying causes. The admissibility requirement to be a ‘victim of a violation’ prohibits actions being brought challenging a particular law,

---


241 See, Ch. I.


243 The HRC explained in Aumeeruddy-Caiffra v. Mauritius (the Mauritian Women case) what it means by ‘victim’ within the sense of Article 1 of the Optional Protocol to the ICCPR: ‘A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an actio popularis, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim’s risk of being affected is more than a theoretical possibility.’ (1981) 1 Selected Decisions HRC 67, para. 9.2. In this case, women whose husbands were at risk of deportation because their residence permits might be withdrawn at any time were considered ‘victims’, but unmarried women were not.
policy, or practice, even where domestic remedies have failed to take account of any compatibility with human rights. Women who face threats to their life from domestic violence or who face irreversible genital mutilation may have little use for the individual petitions system, although the OPCEDAW has introduced a mechanism of contacting the state party in question to take urgent steps while a decision is pending, in order to prevent an alleged victim or victims from suffering ‘irreparable harm’. The provision is not, however, of an enforceable character, and its emphasis on ‘irreparable harm’ rather than harm per se portends a strict and high standard (and is therefore of limited value).

This ‘victim’ criterion is also linked to the need to first exhaust domestic remedies. Initially a high hurdle for many women and others who lack general access to domestic legal systems, the committees have now adopted reasonably broad interpretations of this provision. The IIRC, for example, allows cases where the remedies available offer no reasonable prospect of redress or where they are considered inadequate or ineffective, such as by reason of indigence and lack of legal aid. The OPCEDAW expressly provides that the criterion of exhaustion of domestic remedies is waived where such remedies are ‘unreasonably prolonged or unlikely to bring effective relief’. Nonetheless, the Women’s Committee has shown unwillingness to render communications admissible where sex discrimination has not been raised as an issue in

---

244 Art. 5, OPCEDAW.
245 See, e.g., Páiz v. Panama, HRC 437/1990, para. 5.2.
246 See, e.g., Vincente et al. v. Colombia, HRC 521/1995, para. 5.2; Dermot Barbato v. Uruguay, HRC 84/1981; Henry v. Jamaica, HRC 230/1988; Douglas v. Jamaica, HRC 352/1989. The latter two cases stated that failure to access domestic remedies as a result of indigence and correlative lack of legal aid was sufficient to establish exhaustion of domestic remedies. In a similar manner, the American Court on Human Rights has advised that this admissibility requirement is fulfilled if a complainant is ‘unable’ to access a remedy, such as by reasons of poverty or generalised fear such that lawyers refuse to represent him or her: Advisory Opinion No. 11, Exceptions to Exhaustion of Domestic Remedies, IA Crt H.R. (Ser. A) 11.
247 Art. 4(1), OPCEDAW.
domestic proceedings.\textsuperscript{248} It has however ruled that a constitutional challenge ‘could not be regarded as a remedy ... which was likely to bring effective relief to a woman whose life was under a criminal dangerous threat’.\textsuperscript{249} Additionally, the Human Rights Committee has found that where ‘there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period’, the remedies are taken to have been exhausted.\textsuperscript{250}

A further fundamental criterion that raises concern for women complainants is that they must establish a violation of a treaty right by \textit{a state party}. That is, the human rights petition system is not supplementary to failing national criminal laws or civil proceedings that allow victims to face, or bring actions directly against, their perpetrators.\textsuperscript{251} The individual petitions system does not operate as a court of law in which the perpetrator is on trial. Rather, the system is positioned within the public/private divide between international and national laws, and between official and private violations.\textsuperscript{252} That is, it recognises only vertical applications of human rights (state–individual), not horizontal (individual–individual). Even under the CEDAW, which specifically prohibits discrimination by ‘any person, group or enterprise’,\textsuperscript{253} a complainant must link that discrimination to the state. In order to introduce ‘private’, or horizontal, violations, a woman must establish that the state has failed to act to prevent

\begin{footnotesize}
\textsuperscript{248} See, \textit{e.g., Kayhan v. Turkey}, CEDAW 8/2005 (in all the complainant’s domestic proceedings in relation to her dismissal for wearing the headscarf, she had not argued that it was sex discrimination so the Women’s Committee held that she had not exhausted domestic remedies); \textit{N.S.F. v. United Kingdom}, CEDAW 10/2005 (in which sex discrimination had not been raised directly in appeals against a negative asylum determination and other decisions that did not recognise the complainant’s right to remain in the UK).


\textsuperscript{251} Although the criminal justice system must also be subject to scrutiny as it is the state that brings a prosecution on behalf of the victim/public against the alleged perpetrators.

\textsuperscript{252} See, Ch. 1.

\textsuperscript{253} Art. 2(e), CEDAW.
\end{footnotesize}
the harm or to properly investigate, prosecute, or punish alleged offenders under national laws. As will be shown in later chapters of this thesis, women must mount two hurdles before gaining redress under international law for ‘private’ violations. They need to establish, first, that they have been subjected to or threatened with violent conduct by a non-state actor, and second, that the state is responsible under international law for that act by reason of its failure to act with due diligence to prevent or prosecute it.

Nevertheless, despite these problems, women’s use of the individual communications system must be strengthened, not abandoned. This is because the individual petitions system is one of few effective ways to develop principles and rules under international law. The alternative routes, through the UN Security Council or General Assembly or other diplomatic/political bodies, are even more cumbersome and arguably more biased in favour of the reflection of ‘male’ views. These latter mechanisms do not seek to be independent and impartial (the principles that govern the work of the treaty bodies) but are firmly entrenched in state/political interests. The individual petitions system must be further strengthened because ‘a claim of right can be an assertion of one’s self-worth and an affirmation of one’s moral value and entitlement’.254 At the same time, rights claims represent a collective selfhood, giving women a sense of group identity and pride.255 Many studies now confirm that, in seeking justice for violence perpetrated against them, women want their day in court.256 Judicial processes are no longer only about developing winners and losers; they are also about recovery, reconciliation, and reparation.257

255 Ibid., 40.
256 See, studies on reparations and transitional justice mentioned at n. 236 above of this chapter.
257 Ibid.
Successful rights claims also give women’s rights activists and NGOs a sense of progress being made that would otherwise be difficult to measure. Case law can represent a stepping stone towards the ultimate destination of women’s equality. Of course, this is partially undermined by the failure of the international human rights treaty body system to issue binding judgments, which creates a loophole available to states to reject or ignore their findings.

As Patricia Williams states, ‘For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity....’258 Likewise, Rebecca Cook argues that cases can indicate trends and show that human rights abuses represent policies rather than merely individual aberrations. She argues further that an individual case ‘raised to popular consciousness through the victim’s name, illuminates transcending oppression and injustice’.259 At the same time as endorsing the value in individual litigation, I accept that it must be part of a wider process of reform. Although claiming legal rights holds out ‘the promise of greater power on members of the subordinate group’, it (paradoxically) simultaneously reaffirms basic elements of the existing legal order, including legal constructs that oppress such groups.260 There is no denying that, by utilising a system of male privilege and male rights, the system itself can be strengthened, legitimised, or even emboldened to reinforce those privileges and rights.

In the absence of an alternative system, however, women are left with very few practical choices. Either they engage with the existing international legal system and try to reform the system from within, or they sit on the sidelines and hope someone is listening. In fact, there have been several innovative approaches adopted by the treaty bodies that encourage women to utilise more frequently the complaints mechanisms. For example, the HRC and the Women’s Committee have held that, if the effects of past abuse are felt beyond the date at which a state party ratified the relevant treaty, then they can still be admitted, as they constitute ‘continuing violations’. This opens up possibilities for women to bring claims relating to ongoing psychological trauma or permanent physical disfigurement from past violent and other events.\footnote{See, e.g., Lovelace v Canada, HRC 24/1977; J.L. v Australia, HRC 491/1992; A.T. v Hungary, CEDAW 2/2003 (serious physical domestic violence were considered to be part of a ‘clear continuum of regular domestic violence’ and because of lack of action by the state, the complainant’s life was considered to still be in danger from her husband); Šejarto v Hungary, CEDAW 4/2004 (coerced sterilisation carried out against a Hungarian woman of Roma ethnicity prior to the entry into force of the CEDAW for Hungary was held to be admissible as it was considered to be permanent and irreversible and, therefore, of a continuous nature extending after the date of entry into force); Kayhan v Turkey, CEDAW 8/2005 (Although this case was ultimately ruled to be inadmissible on other grounds, the Committee noted that the decision to dismiss the complainant from her teaching position due to her wearing a headscarf was taken prior to the entry into force of the CEDAW for Turkey, nonetheless the consequence was the loss of status as a civil servant. The effects of this loss were considered to continue after the date of entry into force. Such effects included her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant, and her health insurance.) A similar view has been taken in the context of international refugee status determination. The US Court of Appeals has held that female genital mutilation is a ‘continuing violation’ because it ‘permanently disfigures a women, causes long term health problems, and deprives her of a normal and fulfilling sexual life.’ See, Khadija Mohammed v A-G, US Court of Appeals of Ninth Circuit, 10 Mar. 2005. The Women’s Committee has been criticised however for being inconsistent in its treatment of ‘continuing’ versus ‘completed’ violations; see, A. Byrnes and E. Bath, ‘Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments’ (2008) 8 Hum. Rts. L. Rev. 517, 532, in which they argue that the finalisation of a divorce on what was claimed to be a discriminatory basis and the continuing economic loss resulting from this in the case of B.J. v Germany, CEDAW 1/2003 (a communication that was declared inadmissible) could be analysed within the same way as the above cases, but it was not.} Women (and others) also benefit from the position of the HRC in stating that the onus of proof does not rest solely on the complainant but must be shared with the state party, given their access to particular information, thereby balancing the power between the two parties.\footnote{Bleier v Uruguay, HRC (1982) 1 Selected Decisions 109, para. 13.3.}
Despite their flaws, the individual communications procedures are an important component of the wider international human rights system, and they are particularly relevant to rights assertion within the context of violence against women and the interpretation and application of norms in that context. These procedures are not, however, the only tools available for women and women's rights activists to address human rights violations, and strategic choices must be made. Other mechanisms that are available but not dealt with in this thesis include monitoring, fact-finding, periodic reporting, negotiating, and discourse.\textsuperscript{263}

H. INQUIRY OR FACT-FINDING PROCEDURES

Half of the treaty bodies have some kind of fact-finding or inquiry procedure.\textsuperscript{264} The CAT operates a confidential inquiry and urgent reporting procedure when it receives reliable information about well-founded indications that torture is being systematically practised, which may include visits to the territory in cooperation with the state party.\textsuperscript{265} The Optional Protocol to the UNCAT establishes an international inspection body, complementing national prevention mechanisms, with the capacity to make unannounced visits to places of detention in order to reduce the occurrence of torture or cruel, inhuman, or degrading treatment or punishment. In addition, the ICERD, OPCEDAW, IMWC, ICRPD, and draft Optional Protocol to the ICESCR contain similar procedures, although not all have yet taken effect.\textsuperscript{266} This section of the thesis pays particular interest to the new procedure under the OPCEDAW.

\textsuperscript{264} See, above n. 21 of this chapter.
\textsuperscript{265} Art. 20, UNCAT.
\textsuperscript{266} See, above n. 21 of this chapter.
The OPCEDAW includes a provision allowing the Women’s Committee to undertake confidential inquiries when it receives reliable information of grave or systematic violations.\footnote{Art. 8, OPCEDAW.} If the Committee receives reliable information, the state party in question will be asked to cooperate in the examination of the material. One or more members of the Committee are then designated to conduct an inquiry and to report urgently to the Committee. Where warranted, the inquiry may include a visit to the territory of the state party, with the latter’s consent.\footnote{Art. 8, OPCEDAW.} The OPCEDAW allows states parties to opt out of these procedures.\footnote{Art. 10, OPCEDAW.} Proposals to require states to ‘opt in’ rather than ‘opt out’ were rejected.\footnote{F.G. Isa, ‘The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women’s Human Rights’ (2003) 20 Artiz. J. Int’l & Comp. L. 291, 317 (on the negotiations to the Optional Protocol).} Given the effect of the large number of reservations to the parent treaty,\footnote{See, R.J. Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 30 Va. J. Int’l L. 643.} states agreed that no reservations be allowed to the Optional Protocol.\footnote{Art. 17, OPCEDAW.} For the inquiry procedure to be activated, the information must relate to multiple violations by virtue of the use of the plural form in the relevant provision. Such violations do not, however, necessarily need to be systematic (in the sense of being entrenched or widespread) if they are grave. The language of ‘serious’, which was in the initial draft, was replaced by the higher standard of ‘grave’ during the drafting process.\footnote{CEDAW, Report of the Committee on the Elimination of Discrimination against Women, UN Doc. A/50/38 (1996), para. 17.} The information may derive from any source, provided it is reliable. The procedure has been widely welcomed, in spite of its reliance on state cooperation and its confidential nature.\footnote{Art. 8(5), OPCEDAW.} However, to date, it has been underutilised. As at May 2008, the Women’s Committee
had conducted only one inquiry. Likewise, the CAT had conducted only seven fact-finding missions.

These fact-finding or confidential inquiries offer an alternative form of monitoring, which allows the committees to gather and assess the human rights situation first-hand rather than rely on state party reports and information from UN agencies and NGOs. Nonetheless, the process is not fast and has been underutilised. It takes approximately eight months between an initial proposal for a visit and the Secretariat arranging it, with follow-up taking several more months. Delays may undermine the purpose of any visit, particularly in the context of grave violations. Moreover, any benefit gained from the threat of carrying out a fact-finding visit does not hold up to the same extent as the inter-state dispute mechanism, because the fact-finding mission is entirely dependent on the consent of the state party.

I. TREATY BODY REFORM

Since the first treaty body began work in 1969 (CERD), there has been an incremental growth in treaties, treaty bodies, and mandates, with some likelihood that this is set to continue. If one counts the existing seven treaty bodies and adds together the Subcommittee on the Prevention of Torture and the soon to be established Committee on the Rights of Persons with Disabilities, it equates to a new treaty body being established

---

276 As at mid-2008, inquiries had been completed for Brazil, Egypt, Mexico, Peru, Sri Lanka, Turkey, and Yugoslavia (Serbia and Montenegro). There was some discussion in 2006 for additional inquiries to be held, but they were not held: Colombia, Guatemala, Nepal, Togo and Uzbekistan, see UN Doc. CAT/C/37/2 (2006).
277 Interview with senior official of the OHCHR, 16 June 2008.
278 E.g., the Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity, agreed by a group of 29 eminent international human rights experts in Yogyakarta, Indonesia, on 26 Mar. 2007, may be a candidate for a new treaty in due course, see: http://www.yogyakartaprinciples.org.
every four to five years. There has also been an increase in the number of ratifications. It is widely agreed that the UN must ‘radically redesign’ its treaty monitoring system owing to, \textit{inter alia}, lack of coordination, duplication of work, and heavy reporting burdens upon states parties.\textsuperscript{279} The former High Commissioner for Human Rights stated that the current system has hit its limits of performance.\textsuperscript{280} The treaty body system is ‘rarely perceived as an accessible and effective mechanism’.\textsuperscript{281}

As part of wider UN reform initiatives,\textsuperscript{282} the OHCHR proposed in 2005 the creation of a single unified standing treaty body.\textsuperscript{283} Various models of a single unified treaty body were included in the proposal, including a single body with no chambers, chambers operating in parallel, chambers operating along functional lines (one for reporting, one for communications), chambers along treaty lines, chambers along thematic lines (or clustering rights), or chambers along regional lines.\textsuperscript{284} So what would a consolidated treaty body potentially mean for women?


The OHCHR asserts that a unified body would strengthen mainstreaming of the rights of particular groups in the interpretation and implementation of all human rights. A single body, it is posited, would facilitate the systematic consideration of the whole range of relevant human rights concerns. It may, for example, contribute to a fuller understanding of inequality, as it affects all human rights, and may allow for more attention to be given to structural causes of women’s inequality. A unified body would also highlight the interdependent and indivisible nature of the obligations set out in the treaty bodies. The Women’s Committee has raised concern however over the potential for divergent interpretations among the treaty bodies in the past and has called for communal drafting of General Recommendations and Comments, and even joint statements on particular issues. As noted above, the introduction of harmonised reporting procedures has gone some way to improving the situation, but the different and limited sitting times of the various committees and the part-time commitment of their members has made joint statements difficult to achieve.

Paradoxically, one of the arguments in favour of retaining a separate Women’s Committee is the lack of understanding of the causes of women’s persistent inequality within the mainstream treaty bodies. Despite the influences of the work of the Women’s Committee on the other bodies, it may equally be argued that the lack of coordination between the bodies has meant that their impact/influence has been only

---

285 Ibid., para. 28.
286 Ibid.
287 Ibid.
289 H.B. Schöpp-Schilling, ‘Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women’ (2007) 7 Hum. Rts. L. Rev. 201, 211. Schöpp-Schilling also states that the same lack of understanding is found in some of the staff at the Office of the High Commissioner for Human Rights.
limited and could be enhanced by greater integration. Early criticisms against a separate institutional framework for women played out and weakened the advocacy for women in general human rights forums.\textsuperscript{291} Although mainstreaming is distinct from unification (the former is normative or substantive in nature, the latter structural or institutional),\textsuperscript{292} the latter may facilitate the former. The CEDAW, for example, does not add rights to those already available under other treaties; rather it clarifies how the rights ought to be guaranteed for women.\textsuperscript{293}

On the other hand, there is concern that unification would reduce attention paid within the UN human rights framework to different categories of rights holders.\textsuperscript{294} Françoise Hampson, a member of the Sub-Commission on the Promotion and Protection of Human Rights, has characterised the proposal as ‘fundamentally flawed and irresponsible’.\textsuperscript{295} She gives two main reasons for her view. First, she argues that it would reduce the current sitting time to 52 weeks per year whereas, cumulatively, the existing bodies meet for more than this. And second, and of more relevance to this study, the particular focus and expertise developed in the specialist bodies will be lost.\textsuperscript{296} I find her second point somewhat concerning. The treaty bodies are meant to be staffed by qualified experts, they should not be used as ‘learning grounds’ for non-expert members. A unified treaty body may bring an enhanced level of professionalism


\textsuperscript{296} F.J. Hampson, ‘An Overview of the Reform of the United Nations Human Rights Machinery’ (2007) 7 \textit{Hum. Rts. L. Rev} 7, 12. She suggests instead that the HRC and the CESCRI be full-time, while the other treaty bodies remain part-time.
to their work and make states take more seriously the candidates nominated and elected to these important positions. The preference of some members of the Women’s Committee has been for further harmonisation and integration rather than a unified treaty body.\(^{297}\) The mainstream/sidestream debate is not new to the UN system. Feminist scholars in the 1990s criticised the fact that dealing with women’s concerns in specialised, separate institutions was part of the ‘ghettoisation’ of women’s human rights.\(^{298}\) A decade later, it seems that the greatest fear of merging the treaty bodies appears to be that specialist expertise accumulated over the years in the ‘ghetto’ may be lost in ‘the city’.

Predicting such concerns, the OHCHR’s 2006 Concept Paper emphasises that in any new model ‘specificities of each treaty must be preserved and their focus on specific rights ... and the rights of particular rights holders, such as children, women, and migrant workers ... should not be diminished’.\(^{299}\) At the same time, the Concept Paper acknowledges that protection for particular groups could decrease owing to a single entity’s potential inability ‘to monitor implementation of the specificities of each treaty in sufficient depth’.\(^{300}\) The OHCHR asserts that, at a minimum, existing obligations must be strengthened, not renegotiated.\(^{301}\) The extent to which this is a likely outcome of a unified structure would also depend on measures put in place to safeguard equitable gender representation on such a unified committee and guarantees of substantive


\(^{300}\) Ibid., para. 59.

\(^{301}\) Ibid., para. 7.
expertise in women’s rights. Michael O’Flaherty and Claire O’Brien rightly call for the values of diversity, inclusion, and participation to be embodied in any new mechanism. Based on the historical exclusion of women from mainstream forums, it is logical for there to be concern in any merger. However, it would be a shame for women not to benefit from improved efficiency and protection in any consolidated model. After all, the proliferation of treaty bodies and petitions systems not only burdens states parties and affects the quality, reliability, and timeliness of reports, not least those on politically less important topics as women’s rights, it also affects women and women’s groups who must navigate the myriad bodies to be able to voice their grievances.

Some alternative models have also been proposed. Wouter Vandenhole has advocated splitting the responsibility for particular types of discrimination between the treaty bodies, but to date this has not been seriously considered. Manfred Nowak recommends that it is time to consider a World Court of Human Rights, with the treaty bodies continuing to exercise their main function of examining state party reports. In particular, he suggests that such a body could allow non-state actors, such as intergovernmental organisations (including the UN) and transnational corporations, to be subject to its jurisdiction. He does not go as far as to suggest that victims could bring action directly against perpetrators rather than against the state, but this could be a possibility. Nowak’s model does not entirely reject the public/private divide in so far as not all non-state actors are envisaged as falling within its jurisdiction, but it does go

---

305 Ibid., 256-257.
further than any other proposed model. Nowak, in particular, does not refer to guerrilla
or rebel groups or quasi-state entities, for example. Similarly, Kerri Ritz has called for
criminal jurisdiction over both individual and state violators of human rights.\footnote{306} A
World Court could also contain binding and enforceable interim measures,\footnote{307} such as
injunctive relief in the case of domestic violence, which are not presently available
under any of the treaty-based petition systems apart from the discretionary interim
measures aimed at stopping irreparable harm. The CERD has also proposed the creation
of a single body to deal with communications. Its proposal was based on the belief that
a single communication procedure would allow higher visibility, better accessibility to
rights holders, and a more holistic interpretation of the treaties that would ensure more
effective protection of rights holders.\footnote{308} A single procedure would allow a complainant
to raise applicable provisions from the range of treaty bodies in a single procedure.\footnote{309}
This would appear on its face to be beneficial to women, noting the choice of venue a
female victim must make, including the choice of language and rhetoric. See, Chapters
3, 4 and 5.

Whatever model is eventually adopted, of key importance will be that the interests and
concerns of women are considered at all stages of the process. A single unified treaty
body has much to recommend it. It is arguably time for ‘gender mainstreaming’ to be
fully entrenched into human rights, which could be more easily achieved through a
single entity provided that qualified experts are recruited to the unified body and
existing expertise is not lost. Nevertheless, any model would still suffer from a lack of
enforceability by the non-binding status of decisions. The establishment of an

\footnote{306} K.L. Ritz, ‘Soft Enforcement: Inadequacies of the Optional Protocol as a Remedy for the Convention
Rev. 191, 212.
\footnote{308} H.B. Schöpp-Schilling, ‘Treaty Body Reform: the Case of the Committee on the Elimination of
\footnote{309} OHCHR, Concept Paper on High Commissioner’s Proposal for a Unified Standing Treaty Body, UN
international human rights court, in contrast, would revolutionise the human rights system from one based on political compromise and negotiation to an independent and enforceable one. For women, any new system would need to incorporate procedural safeguards for female victims of human rights violations and ensure that the make-up of the decision-making panel is gender balanced. An interim period in which particularly difficult cases could be dealt with by a specialist panel or chamber of the unified treaty body might be considered.

J. CONCLUSION

This chapter has shown that the lack of women in positions of power within the UN system is not simply part of the historical record; it continues to inhibit and influence the work of the international treaty bodies. As Charlesworth argues:

Unless the experiences of women contribute directly to the mainstream international legal order, beginning with women's equal representation in law-making forums, international human rights law loses its claim to universal applicability.\(^{310}\)

System-wide, women are still under-represented in all of the treaty bodies except those on women and children, and gender expertise is not readily apparent in the make-up of any of the committees. Experience shows that legal guarantees of balanced sex representation are inadequate without constant lobbying and monitoring by women's groups. Women are under-represented for a myriad of reasons, including the low levels of female nominees, arising from sexist municipal systems, and the political nature of the election process, which is less concerned with equal representation or qualifications and more concerned with political trading and bargaining. Early evidence drawn from the Sub-Committee on the Prevention of Torture, which as noted above contains a

provision calling for 'balanced gender representation', confirms that legal provisions are insufficient on their own to guarantee equal participation of women.

Apart from the Women's Committee and the Children's Committee, the only international institution that has attained near parity in membership in decision-making positions is the International Criminal Court\textsuperscript{311} (ICC). Although it is a court rather than a treaty body, it is a useful comparator in terms of processes for ensuring equal representation.\textsuperscript{312} Heavy lobbying by NGOs, including women's organisations,\textsuperscript{313} succeeded in securing language in the Rome Statute that required 'fair representation of female and male judges' on the bench and stipulated that judges with legal expertise in certain areas, including violence against women, be considered favourably.\textsuperscript{314} This type of lobbying was missing from the drafting of the first seven human rights treaties.

Together with state commitment and continued pressure by international women's groups, the result was an initial bench composed of an unprecedented number of women members: seven women judges elected out of a total of 18 (or 38 per cent). The second election of six judges in January 2006 saw an even split, with three female and three male judges elected, although more men had been nominated (6 to 4).\textsuperscript{315} As at September 2008, there were eight women judges (or 44 per cent). The ICC had also managed to achieve a more or less balanced geographical representation of women,

\textsuperscript{312} For more information on the ICC, see O. Bekou and R. Cryer, The International Criminal Court (Aldershot and London: Ashgate Publishing, 2004).
\textsuperscript{313} Particular mention here is due to the Women's Caucus for Gender Justice (now Women's Initiatives for Gender Justice), which was set up with its primary purpose to ensure women were given a voice in the creation of the ICC. See, http://www.iccwomen.org/
although none of the female judges originates from the Western Europe and Other States Group (WEOG).

Nonetheless, the success with respect to the ICC is limited to the composition of the bench. The same gender-balance criterion applies in relation to filling staffing requirements of the ICC Office of the Prosecutor, and the Registry.\textsuperscript{316} The Chief Prosecutor is additionally required to appoint advisors with expertise on specific issues, including, but not limited to, sexual and gender violence,\textsuperscript{317} while the Victims and Witnesses Unit is expected to include staff with expertise in trauma, including trauma relating to crimes of sexual violence.\textsuperscript{318} Despite the success in the election of judges, the Women’s Initiatives for Gender Justice identified in 2006 that only 17 of 109 appointees to the Court as legal counsel were women (equivalent to 9 per cent), and 70 per cent of these women were from WEOG.\textsuperscript{319} Left to their own devices, international institutions, dominated by men and backed up by domestic systems dominated by men, revert to gender inequality. The feminist claims outlined in Chapter 1 continue to ring true with women’s participation generally marginalised into the treaties on women and children. Any reform of the existing treaty system, with preference for a single unified treaty body with its eventual development into a universal human rights court, would need to ensure that women’s representation is secured, including in terms of substantive expertise.

This chapter has also shown that, while there has been an improvement in the inclusion of women’s concerns within state party reports, including the attention paid by the treaty bodies to such issues, it remains a haphazard process driven by local and national

\textsuperscript{316} Art. 36(8)(a)(iii) and (b), ICC Statute.
\textsuperscript{317} Art. 42(9), ICC Statute.
\textsuperscript{318} Art. 43(6), ICC Statute.
priorities. It has further been demonstrated that women are under-represented as complainants in the individual petitions system, where they face a range of legal, procedural, and practical challenges to the admission of their cases. It follows that the less accessible the human rights system is to women, the more abstract it becomes, and the more it supports feminist views that it is irrelevant to women's lives. To date, the treaty bodies have spent little time reflecting upon the effect of their procedural rules on women, and very few initiatives have been instituted to improve women's access, such as the provision of compulsory legal aid, other funding opportunities to support claims, or educational campaigns. To make the treaty bodies relevant to women's lives, much more needs to be done at international, national, and grassroots levels to ensure that facially gender-neutral procedures do not hide the exclusion of women and that women are able to access all components of the treaty body system. In particular, for women to utilise the individual petitions system, they need to be able to rely on consistent interpretations and applications of traditional norms to their everyday experiences. I now turn to the issue of interpretation and application in the next three chapters.
Chapter 3

Equality and Non-Discrimination on the Basis of Sex

A. INTRODUCTION

This thesis explores how the international human rights treaty bodies have responded to women's concerns generally and in relation to violence against women specifically. One of the primary ways the treaty bodies have addressed women's concerns is through the principles/concepts of equality and non-discrimination on the basis of sex. In this chapter I analyse how these two principles/concepts have been understood under international law generally, and in terms of their application to violence against women in particular. Has this strategy of inclusion under existing human rights norms (in this chapter, the re-conceptualisation of equality and non-discrimination on the basis of sex) produced any real results for women, or has it bolstered the myriad feminist critiques of the international system?

There are two parts to this chapter. The first half of the chapter starts with an overview of how the concepts have been understood in a general sense and feminist critiques thereof, before examining how they are treated in international law. 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? I canvass the responses of the treaty bodies to five issues relating to equality/non-discrimination: formal versus
substantive equality; discrimination versus equality; public and private discrimination; structural inequality; and multiple discrimination. Within this overview, relevant feminist critiques are highlighted, including three proposals for reconceptualising equality. I find that, although there has been progress in terms of adjustments of meaning from ideas of formal to substantive equality, there is still uncertainty as to the meaning of the terms and their application in particular settings. The implementation record of the treaty bodies of these principles to various cases is mixed. Many of the feminist critiques of equality outlined in Chapter 1 and in this chapter remain valid, particularly as the interpretations and applications of these concepts/principles are still tethered to a sameness/difference ideology. I find that the proposed reconceptualisations present more effective ways of reimagining equality in general and thereby broadening its ambit, but they continue to suffer from a number of limitations in the specific context of violence against women.

The second half of the chapter turns to the specific issue of the application to violence against women of the principles of equality and non-discrimination on the basis of sex. This approach, developed by the Committee on the Elimination of All Forms of Discrimination against Women (the Women’s Committee), and followed to a greater or lesser extent by the other treaty bodies, treats violence against women as a form of sex discrimination. Given the absence of an explicit prohibition outlawing violence against women in international law, this thesis asks whether this approach is effective in filling this gap. As a pragmatic solution to the absence of an explicit prohibition, it is clear that guarantees of equality have been used to plug an important hole in the law. At the same time, however, I find that the approach is inherently problematic. First, it equates violence against women to sex discrimination and is therefore subject to understandings of the latter term, which have proven to be complex and unsettled (however defined).
Second, this approach covers only gender-related forms of violence rather than all forms of violence against women and creates, therefore, a two-tiered system of protection. Third, it reinforces an international legal system that disadvantages women by their subjection to additional, different, or unequal criteria. By requiring women to characterise the violence they suffer as sex discrimination rather than as violence per se, they are treated unequally under law. In addition, I find the rhetoric of equality to be weaker than the language of violence.

B. EQUALITY AND NON-DISCRIMINATION: GENERAL CONCEPTS AND FEMINIST CRITIQUES

The principle of equality has been recognised as one of the fundamental principles of liberal democracies and government by the rule of law, and it has been absorbed into many legal systems, including the system of international law. ‘[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.’

‘[I]t is philosophically related to the concepts of freedom and justice.’ Nonetheless, some have considered ‘equality’ so vague and so wide a term as to be almost meaningless. So what do the concepts of equality and non-discrimination on the basis of sex mean generally, and how have they been interpreted under international law?

---

The principles of equality and non-discrimination in law are deeply contested. As ideals of justice, they are well-accepted principles, 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. This is also referred to as the Aristotelian view of equality as 'treating like alike' or that persons in similar positions should not be treated unequally. The problem with this view is that it does not address what differences are relevant to determining whether individuals are equals or unequals. 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. This view of equality has largely been translated into national modern laws as equality of opportunity (or formal equality) and has faced feminist criticism. That is, any distinction, exclusion, or restriction must not be arbitrary but should be justified on the basis of objective and reasonable criteria. This 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. But these liberal feminist goals have been criticised by other feminist scholars for ignoring difference. 'The prohibition of discrimination is not a prohibition of differentiation ... Distinctions are prohibited only to the extent that they are unfavourable. Equality

---

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


9 Ibid.


could easily be transformed into injustice if it were to be applied to situations which are inherently unequal. For writers such as Margareth Etienne, the paradigm of ‘equality as parity’ employed under national and international laws fails to recognise that ‘equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.’ Because of this, she argues, women do not receive special protection against harms specific to their experiences as women. It has also been asserted that the orientation of the Convention on the Elimination of All Forms of Discrimination against Women (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.

An 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. Substantive equality can be achieved, for example, through positive or affirmative action, protective or corrective measures, a recharacterisation of human rights, or a gender-sensitive discrimination principle. Because formal equality does not take full account of women’s structural disadvantage, especially in the private sphere, it has been replaced in many legal jurisdictions by ideas of substantive equality.

Substantive equality is geared towards bringing about not just formal but ‘effective and genuine’ equality.\textsuperscript{18} Although there have been some shifts away from traditional constructions of equality as sameness/difference, it has been noted that the traditional equality paradigm remains the dominant framework, even after Beijing.\textsuperscript{19}

The concept of equality further prompts debate on 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 discrimination; deciding on the relevance of purpose and effect;\textsuperscript{20} and articulating whether there is any real difference between discrimination and inequality. Because of the concerns with existing understandings of equality and non-discrimination and the many questions that remain unanswered, many feminist scholars have sought to theorise new ways of conceptualising these concepts. The work of three scholars are outlined here.

Drawing on the work of the Canadian Supreme Court, Kathleen Mahoney has recommended a new vision of equality in terms of ‘socially created advantage and disadvantage’ instead of sameness and difference.\textsuperscript{21} 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’.\textsuperscript{22} The problem with the sameness/difference model is that it serves women only in ‘a derivative way’, that is, when they suffer violations in the same way as men. This in turn reinforces the ‘male

\textsuperscript{18} \textit{Minority Schools in Albania}, Advisory Opinion, 1935 PCIL ser. A/B, no. 64, 19.
\textsuperscript{21} \textit{Ibid.}, 441.
\textsuperscript{22} \textit{Ibid.}, 442.
world-view and supports male dominance in the international order. It cannot cope with or take account of female-specific circumstances. Moreover, under the Aristotelian model, systemic and persistent disadvantage is not contemplated. The model assumes that social institutions should continue to exist as they are. To be equal, women need only the same chance as men to participate in such institutions. Mahoney writes: ‘This universalistic, gender-neutral approach does not recognize that institutional structures may impinge differently on men and women.’ Instead, Mahoney supports the replacement of the Aristotelian test for one that focuses on the impact of laws and on the context of the claimant. What is at issue is the disadvantage suffered. Under this view, no male comparator is needed:

If a person is a member of a persistently disadvantaged group and can show that a distinction based on personal characteristics of the individual or group not imposed on others continues or worsens that disadvantage, the distinction is discriminatory whether intentional or not.

This test requires decision- and policy-makers to look at women or other claimants ‘in their place in the real world’ and ‘to confront the reality that the systemic abuse and deprivation of power [that] women experience is because of their place in the sexual hierarchy.’

Iris Marion Young has proposed an analysis of inequality in terms of oppression and domination rather than distributive justice. Existing models of sameness/difference equality fail to consider issues of institutional organisation and decision-making power. She argues that reliance on discrimination as the benchmark is problematic.

---

because, as Robert Fullinwider states: ‘[I]f we do not do preferential hiring, we permit discrimination to exist. But preferential hiring is also discrimination. Thus, if we use preferential hiring, we also permit discrimination to exist. The dilemma is that whatever we do, we permit discrimination.’29 Admitting that affirmative action policies discriminate, Young suggests that the focus of the debate has been skewed. She claims that we must acknowledge that discrimination is not the only or primary wrong that certain groups suffer. Instead, ‘[o]ppression, not discrimination, is the primary concept for naming group-related injustice’. She notes:

While 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.30

Under her 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.31 Supporting the view of Young, Charlesworth has suggested that less emphasis be given to non-discrimination. Instead, she recommends that a broader idea of equality ought to be developed and has argued that the elision between the two concepts has constrained their ability to deal with women’s realities.32

Catharine MacKinnon is the third feminist scholar I wish to mention who has recommended a reorientation of the concept of equality. 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

30 Ibid., 195.
32 Ibid.
second-class citizenship’ of women because of their sex. The mainstream equality model of sameness/difference relies on a male standard and thereby relegates women to a status of inferiority indefinitely. That model has been unable to cope with real differences such as pregnancy, or systematic social disadvantages such as sex segregation in the workforce resulting in lack of equal pay for work of comparable worth, or violence against women that is systematically tolerated worldwide. It offers only two alternative routes: to be the same as men or to recognise women’s differences and to grant ‘special benefits’ or ‘double standards’. According to MacKinnon, the problem with this is that ‘[t]he sameness standard gets women, when they are like men, access to what men already have; the differences rule seeks to cushion the impact of women’s distinctiveness or value women as they are under existing conditions’. For the most part, the mainstream equality model has granted men the benefit of those few things women have historically had. ‘If systematic relegation to inferiority is what is wrong with inequality, the task of equality law is to end that status, not to focus on conditions under which it can be justified.’

In MacKinnon’s reorientation, the concept that has emerged, and which she suggests has already taken place 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 ....

---

35 Ibid., 72.
36 Ibid., 72.
37 Ibid., 73.
38 Ibid., 74.
Inequality is about dominance and subordination, not sameness/difference. 'The fundamental issue of equality is not whether one is the same or different; it is not the gender difference; it is the difference gender makes.' MacKinnon argues that, as soon as all forms of violence against women in society, and impunity for it in law, are recognised as sex-inequality violations as reimagined by her, 'law will be made new in women's hands'.

Although each scholar has articulated their reconceptualisation of equality/non-discrimination in a slightly different way, it is possible to draw out three common factors. First, they agree that the sameness/difference equality model is inadequate to tackle the underlying social disadvantage or sexual hierarchy that exists. This is because it seeks to put women in the same position as men without deconstructing institutional systems that reinforce that inequality. It does not therefore take account of female-specific differences. This view of equality is also reinforced by a focus on narrow ideas of discrimination as distinction instead of broader conceptions of equality as the end of oppression or disadvantage. Second, the sameness/difference model posits men's experiences as the norm and therefore ignores the reality of women's lives or the context in which women live and work. Third, the answer to these problems is to adopt a broad view of inequality as social injustice or social disadvantage/oppression/hierarchy in order to identify what is really happening in women's lives, and to construct policies and programmes around that reality.

The merit of these reformulations of equality will be evaluated alongside the
sameness/difference paradigm in this chapter. First, though, how have the principles of
equality and non-discrimination been translated into international law?

C. EQUALITY AND NON-DISCRIMINATION ON THE BASIS OF SEX IN
INTERNATIONAL LAW

1. The 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. 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’. These principles were
elaborated in the Universal Declaration of Human Rights 1948 (UDHR). Article 1 of
the UDHR provides: ‘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.’ It is claimed by some scholars that the ‘spirit of brotherhood’
was extended to women only with the adoption of the CEDAW. Article 2 of the
UDHR provides: ‘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,

---

42 Arts. 1(3), 8 and 55(c), Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans
1153, entered into force 24 Oct. 1945. See, also, Preambulary 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.’


45 Art. 1, UDHR.

Elimination of All Forms of Discrimination against Women made a Difference?’ (2004-2005) 12 Tulsa J.
Comp. & Int’l L. 481, 482.
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, within marriage, to public service and political participation, and in the workplace. All other rights apply to ‘everyone’, with the exception of measures of special protection during motherhood and childhood. ‘Everyone’ in this sense includes men as well as women.

The inclusion of guarantees of equality in the UN Charter and the UDHR resulted from heavy lobbying from women delegates and NGOs. Although sex was always listed alongside other identity-based attributes such as race, religion, and political opinion in early UN documentation, it has been argued that the concept of equality that was initially conceived in international law related to the principle of equality of states.

---

47 Art. 10, UDHR.
48 Art. 16, UDHR.
49 Art. 21, UDHR. This provision is though limited to citizens in its references to political participation in the government of ‘his country.’
50 Art. 23, UDHR.
51 Art. 25, UDHR.
52 At one stage during the drafting process of the UDHR, specific reference to ‘equality between men and women’ had been removed. The language 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.2/8R.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 (Philadelphia: University of Pennsylvania Press, 1999), 118.
rather than equality between persons. Early equality rights also focused heavily on
racial discrimination rather than sex discrimination.\textsuperscript{55}

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 \textit{International Covenant on Civil
and Political Rights} (ICCPR)\textsuperscript{56} and the \textit{International Covenant on Economic, Social
and Cultural Rights} (ICESCR).\textsuperscript{57} Each treaty contains an overarching 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.\textsuperscript{58} 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.\textsuperscript{59} Regardless of overlap, the Third Committee of the General
Assembly at the time of drafting the ICESCR stated that the purpose of Article 3 in
addition to Article 2(3) was for emphasis.\textsuperscript{60} This same argument can be extended to the

\textsuperscript{56} Art. 2, 3, 14(1) and 26, ICCPR.
\textsuperscript{57} Arts. 2 and 3, ICESCR.
\textsuperscript{58} Art. 2(1), ICCPR; Art. 2(1), ICESCR.
\textsuperscript{59} Art. 3, ICCPR; Art. 3, ICESCR.
\textsuperscript{60} 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 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.’ \textit{Draft International Covenants on Human Rights
Report of the Third Committee}, UN Doc. A/55/65, 17 Dec. 1992, para. 85; as re-stated in ICESCR,
General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic,
drafting model in the ICCPR, and it has been accepted by a number of commentators who recall the positive nature of Article 3 of the ICCPR.\(^\text{61}\)

These non-discrimination guarantees are non-derogable and cannot be removed or weakened by states even during states of emergency.\(^\text{62}\) Similar accessory non-discrimination provisions are found in most of the major human rights instruments, including the Convention on the Rights of the Child (CRC),\(^\text{63}\) the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (IMWC),\(^\text{64}\) and the Convention on the Rights of Persons with Disabilities (ICRPD).\(^\text{65}\) However, there are no provisions outlawing sex discrimination or inequality between men and women in either the UN Convention against Torture and Other Cruel,

---


\(^{62}\) Art. 4, ICCPR; Art. 2(1), ICESCR, as interpreted by CESC. General Comment No. 3: The Nature of States Parties Obligations (Art. 2(1)) (1990), UN Doc. E/1991/23, para. 1.

\(^{63}\) Convention on the Rights of the Child 1989, G.A. res. 44/25, 20 Nov. 1989, 1577 UNTS 3; entered into force 2 Sept. 1990 (CRC). 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.'

\(^{64}\) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, GA res. 45/148, 18 Dec. 1990, 2220 UNTS 93; entered into force 1 July 2003 (IMWC). Art. 7, IMWC: '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 the 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.'

Inhuman or Degrading Treatment or Punishment (UNCAT)\(^\text{66}\) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).\(^\text{67}\)

The ICCPR also guarantees: 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, secondary education to be generally available, and higher education to be equally accessible based on capacity (Article 13).

In addition, the ICCPR includes a stand-alone or autonomous right to equality in Article 26, which guarantees equality before the law and equal protection of the law.\(^\text{68}\)

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).


\(^{67}\) Clearly the ICERD is a non-discrimination instrument, but it is specifically focused on racial discrimination. The CERD has though recognised the inter-sectionalitly of race and sex: CERD, General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7.

\(^{68}\) Art. 26, ICCPR 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.’
The first UN treaty devoted entirely to equality and non-discrimination was the ICERD.

The ICERD builds on the Charter references to dignity and equality and translates them into the context of race discrimination,\(^6\) 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.\(^7\)

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 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.\(^8\)

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.\(^9\) The final version was a synthesis of these two views, with both discrimination ‘against women’ and ‘distinction, exclusion or restriction on the basis of

---


\(^7\) Art. 1(1), ICERD.

\(^8\) Art. 1, CEDAW.

sex’ included, although the treaty clearly covers sex discrimination only 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 sphere. 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, to 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.

The third discrimination-based treaty at the UN level is the ICRPD. It borrows the definition employed in the two earlier treaties, with an important addition in relation to ‘reasonable accommodation’ of difference:

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.

74 Art. 4, CEDAW.
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.\(^{75}\)

Unlike the ICERD, the ICRPD contains two further provisions that acknowledge the multiple forms of discrimination suffered by women with disabilities.\(^{76}\) 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'.\(^{77}\) 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'.\(^{78}\)

Some other forms of discrimination have been dealt with in non-binding international instruments.\(^{79}\) Apart from the omission of equality guarantees in some human rights instruments,\(^{80}\) the principles of equality and non-discrimination are now well established in international legal instruments. The problem with the international legal framework is not that rights to equality and non-discrimination on the basis of sex are missing. Rather, the issue is how these concepts are interpreted and applied. Some of the difficulties arise from the explicit definitions outlined above that focus on distinctions, exclusions, and restrictions; that is, they focus on the negative face of discrimination rather than on the positive face of equality. How have these concepts been interpreted and applied in practice?

\(^{75}\) Art. 2, ICRPD. See, also, Art. 5, which provides further explanations for what constitutes equality and non-discrimination.

\(^{76}\) See, Arts. 3(a) and 6, ICRPD.

\(^{77}\) Art. 6(a), ICRPD.

\(^{78}\) Art. 8(b), ICRPD.


\(^{80}\) E.g. sex discrimination is not explicitly prohibited in the UNCAT.
3. International jurisprudence

(a) Formal versus substantive equality

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

The PCIJ’s successor, the International Court of Justice, has also dealt with non-discrimination in a number of cases. Of particular note is the dissenting opinion of Judge Tanaka in the South West African Cases. 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’. In endorsing the Aristotelian view that treating different matters equally would be as unjust as treating equal matters differently, Judge Tanaka 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.

---

81 Minority Schools in Albania, Advisory Opinion, 1935 PCIJ ser. A/B, no. 64.
82 See, e.g., Rights of Nationals of the USA in Morocco (France v. USA) 1952 ICJ Reports 176 (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).
In 1981, the Human Rights Committee (HRC) in its General Comment on Article 3 stated that the provision applies to equality both in law and in fact.\textsuperscript{86} In 1989, the HRC adopted a subsequent General Comment on equality and non-discrimination in relation to Article 26. This General Comment provides that ‘[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights.’\textsuperscript{87} Referring to the definitions of discrimination contained in the ICERD and the CEDAW, the HRC stated:

> 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.\textsuperscript{88}

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.\textsuperscript{89} In addition, the HRC noted that treatment on an ‘equal footing’ does not mean identical treatment in every instance, but it observed that any exceptions are explicitly referred to in the ICCPR itself.\textsuperscript{90} In spite of its suggestion that any exceptions to identical treatment are self-contained in the ICCPR, the HRC has added that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such

\textsuperscript{86} HRC, General Comment No. 4: Equality Between the Sexes (Art. 3) (1981), UN Doc. HRC/GEN/1/Rev.1, para. 2.
\textsuperscript{87} HRC, General Comment No. 18: Non-Discrimination (1985), UN Doc. HRC/GEN/1/Rev.5, para. 1. See, also, CERD, General Recommendation XIV: Definition of Discrimination (Art. 1(1)) (1993), UN Doc. A/48/18, para. 1.
\textsuperscript{88} HRC, General Comment No. 18: Non-Discrimination (1989), UN Doc. HRC/GEN/1/Rev.5, para. 7.
\textsuperscript{90} HRC, General Comment No. 18 (1989): Non-Discrimination, UN Doc. HRC/GEN/1/Rev.5, para. 8. The HRC 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).
differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.\textsuperscript{91} The HRC further accepts that affirmative action may be required to satisfy equality guarantees and that the former does not contravene the latter.\textsuperscript{92}

Like the HRC, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD) have each accepted that equality includes both formal and substantive equality.\textsuperscript{93} According to the CESCR, formal 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.\textsuperscript{94} In regard to the latter, the CESCR has acknowledged that temporary special measures may be needed to bring disadvantaged groups ‘to the same substantive level as others’.\textsuperscript{95} 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.\textsuperscript{96} Indirect discrimination, in contrast, occurs when a law, policy, or practice does not appear on the face of it to be discriminatory but is discriminatory in its effect.\textsuperscript{97} Discriminatory purpose or intent is considered irrelevant.

Generally, the HRC has held that laws that discriminate on the face of them between men and women breach Article 26. It has done so in the fields of, \textit{inter alia},

\textsuperscript{91} HRC, General Comment No. 18: Non-Discrimination (1989), UN Doc. HRC/GEN/1/Rev.5, para. 13.
\textsuperscript{92} \textit{Ibid.}, para. 10.
\textsuperscript{94} CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, paras. 7 and 8.
\textsuperscript{95} \textit{Ibid.}, para. 15.
\textsuperscript{96} \textit{Ibid.}, para. 12.
\textsuperscript{97} \textit{Ibid.}, para. 13.
immigration regulations, unemployment benefits, widow pensions, and access to courts in relation to matrimonial property.\textsuperscript{98} However, the HRC has rejected other cases of facially discriminatory law. In \textit{Vos v. The Netherlands}, for example, the HRC accepted facially discriminatory legislation on the basis that there was no discriminatory intent,\textsuperscript{99} contrary to the general position of international law since Judge Tanaka's judgment in the \textit{South West African Cases}. 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 eligible only for a widow's pension, which in Ms Vos's 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 26'.\textsuperscript{100} In fact, the \textit{Vos} judgment conflicts with other, earlier decisions of the HRC that disregarded questions of intent, as well as with its 1989 General Comment outlined above. Dissenting opinions in other decisions

\textsuperscript{98} See, e.g., \textit{Ameeruddy-Geiffra v. Mauritius}, HRC 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); \textit{Avellanal v. Peru}, HRC 172/1984 (a Peruvian law that prevented married women from taking legal action with respect to matrimonial property was held to breach Art. 26); \textit{Brooks v. The Netherlands}, HRC 172/1984 (Mrs Brooks 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); \textit{Faugier v. Austria}, HRC 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); \textit{Zwaan de Vries v. The Netherlands}, HRC 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).


\textsuperscript{100} H. Charlesworth, 'Concepts of Equality in International Law', in G. Huscroft and R. Rishworth (eds.), \textit{Litigating Rights: Perspectives from Domestic and International Law} (Oxford: Hart Publishing, 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 \textit{Ballantyne, Davidson and McIntyre v. Canada}, HRC 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).
have made allowances for socio-economic developments to permit a margin of
discretion to states in relation to discriminatory legislation.\textsuperscript{101} This leniency contrasts
with the view of the CESCR that, while economic and social rights are to be
'progressively realised', equality guarantees are of immediate effect.\textsuperscript{102}

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.'\textsuperscript{103} 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 that has the effect
of creating or perpetuating racial discrimination.\textsuperscript{104} The CERD also indicates that any
differentiation of treatment is to be judged against 'the objectives and purposes of the
Convention'\textsuperscript{105} 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 \textit{unjustifiable
disparate impact} upon a group distinguished by race, colour, descent, or national or
ethnic origin'\textsuperscript{106} (my emphasis). The position taken by CERD appears to be broader
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,

\begin{footnotes}
\textsuperscript{101} Sprenger \textit{v. The Netherlands}, HRC 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 \textit{v. The Netherlands}, HRC 426/90, per Messrs
Herndl, Millerson, N'Diaye, and Sadi.
\textsuperscript{102} CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All
allowable exception for the non-discriminatory application of economic rights by states parties to the
ICESCR is for non-citizens located in developing countries: Art. 4(3), ICESCR.
\textsuperscript{103} W. Vandenhoele, \textit{Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies
(Antwerp: Intersentia, 2005), 37.}
\textsuperscript{104} 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 exists.'
\textsuperscript{105} CERD, General Recommendation XIV: Definition of Discrimination (Art. 1(1)) (1993), UN Doc.
A/48/18, para. 2.
\textsuperscript{106} \textit{Ibid}. 
\end{footnotes}
which accept 'reasonable and objective justifications' uncoupled from the treaty scope. Second, the CERD suggests that the assessment standard should be 'unjustified disparate impact upon a group'. It thus considers racial discrimination within the context of collective disadvantage rather than as an individual aberration.

In the specific context of discrimination against non-citizens, in which some minor distinctions are permitted within the text of various treaties, the CERD 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'.

Like the HRC and the CESC, 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'. 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'. Both qualitative and quantitative equality are considered to be at the heart of the CEDAW. Despite these general statements, its case law has been mixed. In Nguyen v. The Netherlands, 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, owing to a restriction of a so-called anti-

---

accumulation clause.\textsuperscript{111} 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 \textit{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.\textsuperscript{112}

Unlike the HRC and the CESC\textsuperscript{R} (and most other international bodies),\textsuperscript{113} however, the Women’s Committee has not accepted what is considered the ‘widely used pragmatic’ definition of discrimination, that is, differential treatment in a comparable situation without a reasonable and objective justification.\textsuperscript{114} The Women’s Committee has indicated that ‘any objective and reasonable justification’ be used only as a basis for the implementation of temporary special measures,\textsuperscript{115} not otherwise.

Ultimately, therefore, the general approach has been to treat men and women identically by adopting a sameness/difference ideology. The goal appears to be identical treatment unless any differences in treatment can be justified according to ‘reasonable and objective’ criteria. Although formal and substantive equality are now accepted, the goal still seems to be to treat men and women identically or, at least, to treat women in a similar manner to men. I find this general approach of the treaty bodies problematic on three grounds, summarised here but repeated throughout this chapter. First, the treaty bodies continue to advance a male standard whether they are dealing with formal or substantive equality. This has the effect of relegating women to a position of inferiority

\textsuperscript{111} Nguyen \textit{v.} The Netherlands, CEDAW 3/2004.
\textsuperscript{112} \textit{Ibid.}
\textsuperscript{113} \textit{Ibid.}, per Gabr, Schöpp-Schilling and Shin, para. 10.5.
\textsuperscript{115} CEDAW, Concluding observations on Peru, UN Doc. A/53/38/Rev.1 (Part II) (1998), paras. 319-320.
indefinitely. Second, they disregard the gendered application of criteria such as ‘reasonableness and objectivity’ and assume that these are gender-neutral terms. This is dealt with further below. Finally, they confine ideas of equality to distinctions and differences rather than, for example, to ideas of the liberation of women from patriarchy and the right to be treated as human beings with dignity instead of as subhuman.

(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 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.’116 The CESC has stated that they are ‘integradly related and mutually reinforcing’.117 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’.118 A 2005 study was inconclusive on whether there is any real difference between the two terms as applied under international law.119 It is generally accepted that, at a minimum, non-discrimination is a negative right as it prohibits the making of distinctions between

117 CESC, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 3.
individuals or giving preferences on the basis of irrelevant criteria or without reasonable and objective justification, 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.

I would argue that, within the equality/non-discrimination discourse, non-discrimination should be conceived as a sub-set of equality. That is, it can be a tool to guide us on the path to equality in particular situations where women seek identical treatment to men. Nonetheless, it is not as far-reaching as equality and cannot achieve equality on its own. Sole reliance on non-discrimination principles is unlikely to bring about transformative outcomes for women, as it seems to deal with only facial distinctions rather than issues of oppression, disadvantage, or patriarchy. Its co-option by men to challenge laws that exclude them reveals that it can operate quite separately from ideals of equality. For those scholars who argue that equality should be recast as oppression/domination, advantage/disadvantage, or the end of hierarchy, non-discrimination tends to hold back progress as far as it is fixed to the sameness/difference ideology. That is, non-discrimination is based on the idea that there are justified and unjustified distinctions and that 'men' are the standard against which this is to be determined. I agree with those who assert that the focus of international law on discrimination has been to the detriment of higher goals of equality.\textsuperscript{120} Although a sameness/difference ideology worked, for example, in the context of racial discrimination and the ending of apartheid in South Africa, it has struggled to be useful beyond legal equality. The same ideology has not kept pace with the problems of social inequality that continue to exist long after unequal laws have been regulated. Rather than comparing women against the male

standard, which reinforces women’s inferior position in society, equality law should instead be asking how to deconstruct domination, disadvantage, or hierarchy.

(c) Public and private discrimination

In 2000, the HRC issued a further General Comment on equality of rights between women and men.\textsuperscript{121} Building on its earlier statements, the HRC stated 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’.\textsuperscript{122} According to the HRC, therefore, both public and 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.\textsuperscript{123}

Unlike the ICCPR, the CEDAW has the advantage of an express provision that covers discrimination in public and private spheres of life.\textsuperscript{124} As a core provision,\textsuperscript{125} the Women’s Committee has asserted that any reservation to it is contrary to the object and

\textsuperscript{121} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10.
\textsuperscript{122} Ibid., para. 4.
\textsuperscript{123} HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.
\textsuperscript{124} Art. 2(e), CEDAW.
\textsuperscript{125} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 10.
purpose of the treaty and, therefore, incompatible with international law.\textsuperscript{126} Under what has become known as the concept or test of due diligence, 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’.\textsuperscript{127} This paradigm has become the accepted test for incorporating the acts of non-state actors in international law.\textsuperscript{128} In \textit{Goekce v. Austria}, the Women’s Committee held Austria liable for the failure on the part of the Austrian police to respond to an emergency call, which led to the death by shooting of the complainant at the hands of her husband.\textsuperscript{129} It stated:

The 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.\textsuperscript{130}

The Women’s Committee has also held that a perpetrator’s right to liberty cannot supersede women’s human rights to life and to physical and mental integrity.\textsuperscript{131} Despite its explicit mandate over ‘private’ actors in Article 2(e), however, the Women’s Committee has extended it no further than the other treaty bodies. At no time has international human rights law recognised, for example, the right of individuals to bring

\textsuperscript{126} CEDAW, Concluding observations on Morocco, UN Doc. A/52/38/Rev.1, para. 59. Cf. CEDAW, General Recommendation No. 4: Reservations (1987) (no UN Doc.), does not identify specific articles.
\textsuperscript{127} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 9.
\textsuperscript{128} The due diligence standard first emerged in the Inter-American Court of Human Rights in Velásquez Rodríguez 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 Appl. No. 39272/98, 4 Dec. 2003). See, further, Ch. 4.
\textsuperscript{129} \textit{Goekce v. Austria}, CEDAW 5/2005.
\textsuperscript{130} \textit{Ibid.}, para. 12.1.4. See, also, \textit{Yıldırım v. Austria}, CEDAW 6/2005 (case concerned Turkish woman subjected to physical abuse who was eventually stabbed to death by her husband. The Women’s Committee considered that the failure to detain the husband breached the state party’s due diligence obligation to protect the complainant).
actions directly against their perpetrators, whether government officials or private individuals, before an international court.\textsuperscript{132} That is, international law does not have direct horizontal effect.\textsuperscript{133} This is arguably the real barrier to dismantling the public/private dichotomy, because although private acts can now be brought within the realm of human rights law, a close linkage with the state is still required. Chapter 4, on torture, further discusses the problems this poses for women’s claims.

\textit{(d) Culture, custom, and structural inequality}

Several of the treaty bodies have examined structural causes of discrimination. The Women’s Committee, for example, has made statements that discrimination is rooted in ‘traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles’.\textsuperscript{134} 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’.\textsuperscript{135}

Article 5(a) provides:

\textsuperscript{132} One could argue that the international criminal tribunals and the International Criminal Court serve this purpose, but they are generally confined to criminal prosecution in the context of crimes committed during war or on a widespread or systematic scale, and limited to crimes in the 1949 Geneva Conventions.

\textsuperscript{133} 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: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), 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 as mentioned in Ch. 2: see, M. Nowak, ‘The Need for a World Court of Human Rights’ (2007) 7 Hum. Rts. L. Rev. 251.

\textsuperscript{134} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 10.

\textsuperscript{135} Art. 2(f), CEDAW. Art. 5(a) further provides: 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.’ Art. 10(c) provides: ‘States Parties shall take all appropriate measures to eliminate discrimination against women in
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.

The inclusion of civil, political, economic, social, and cultural rights in a single treaty places the Women’s Committee in a better position than the HRC to tackle, in a holistic manner, structural aspects of violence against women, such as poverty and socio-economic disadvantage. Both the International Covenants have, however, referred to tradition, history, religion, and culture as being at the basis of inequality. In Lovelace v. Canada, for example, the HRC impliedly stated that the protection of culture cannot discriminate against women on the basis of their sex. In this case, Canadian law had removed the applicant’s Native Indian status because she had married a non-Native Indian man. Under this legislation, a man would not have lost his status by marrying a non-Native Indian woman. The HRC held that there was no reasonable justification for the domestic legislation applying to the complainant’s particular situation, as she had divorced her non-Native Indian husband. The HRC held that the ongoing denial of her Indian status and her rights to return to the reserve following her divorce violated her right as a person belonging to a minority read in the context of her right to equality and non-discrimination on the basis of sex. As mentioned in Chapter 1, issues of culture and religion have not been without controversy, including within feminism. This case, however, could easily have been differently decided – as one of the arguments for the legislation in the first place was the preservation of culture protected by Article 27 of

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 ICCPR. In fact, the Canadian Supreme Court had rejected Lovelace's claim, stating that her exclusion from the community was reasonable in light of the aim of the legislation and, therefore, was not discrimination.\textsuperscript{138} This reveals the difficulty of applying the sameness/difference model that permits reasonable excuses for differential treatment.

The treaty bodies have also had difficulties identifying structural causes of inequality. 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.\textsuperscript{139} Instead, Spanish law maintained that first-born daughters would succeed only if they 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 constituted a violation of the CEDAW. The application was declared inadmissible on two grounds, one of which is of relevance here.\textsuperscript{140} Eight members of the Women’s Committee adopted a concurring opinion in which they stated:

\begin{quote}
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.\textsuperscript{141}
\end{quote}

The same view was expressed by the HRC in two similar cases.\textsuperscript{142} While recognising that titles of nobility are not generally compatible with ideals of equality, human rights,

\begin{flushright}
\textsuperscript{139} Muñoz-Vargas y Sainz de Vicuña v. Spain, CEDAW 7/2005.
\textsuperscript{140} The other ground of inadmissibility was that it involved an issue that 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 (Dariam).
\textsuperscript{141} Muñoz-Vargas y Sainz de Vicuña v. Spain, CEDAW 7/2005, para. 12.2 per Dominquez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan, and Zou.
\end{flushright}
or democratic governance, in a literal reading of the text of the CEDAW, it nonetheless appears that general discontent with viewing titles of nobility as a human rights issue trumps the issue of inequality, especially in terms of equal access. In dissent, Shanthi Dairiam invoked Article 5(a) of the CEDAW and reoriented 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’. She noted:

... when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women’s right to equality. 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.

I agree with Dairiam that 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. At a minimum, the right to equal treatment before the law should have been at issue as Spanish law endorsed the passage of lineage through the male line. The Committee members failed to engage in ‘feminist contextual reasoning’ in this case. Had they done so, they would have realised that such titles are not ‘devoid of any legal or material effect’ but in fact reinforce a social system that posits men as superior to women. Conceptualising inequality as an issue of social

---

144 Muñoz-Vargas y Saim de Vicuña v. Spain, CEDAW 7/2005, para. 13.7 per Dairiam.
justice or around the concepts of oppression/domination, advantage/disadvantage, or hierarchy may have helped the majority of the Women’s Committee to arrive at a different result, as social titles, transferred through sex, are based on a social and power hierarchy that posits men above women. Under this hierarchy, men are the beneficiaries of privilege, not women.

(e) Multiple discrimination

The intersection of sex and other identity-based attributes has been recognised by many of the treaty bodies. The committees have recognised the intersection 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. Of all the treaty bodies, the CERD has dealt with this issue most holistically. In 2000, the CERD issued a General Recommendation on the gender-related dimensions of racial discrimination. It noted that racial discrimination does not always affect women and men equally or in the same way. It recognised, for example, that certain forms of racial discrimination may be directed towards women specifically because of their sex, such as sexual violence committed against female members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilisation of indigenous women; or the abuse of women

\[145\] See, e.g., CESC, General Comment No. 3: The Nature of States Parties Obligations (Art. 2(1)) (1990), UN Doc. E/1991/23, para. 5; CESC, General Comment No. 5: Persons with Disabilities (1994), UN Doc. HRI/GEN/1/Rev.6, paras. 19 and 31; CEDAW, General Recommendation No. 18: Disabled Women (1991), UN Doc. HRI/GEN/1/Rev.7; CEDAW, Concluding observations on Sweden, UN Doc. A/56/38 (Part II), para. 334 (the Women’s 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); CRC, General Comment No. 7: Implementing Child Rights in Early Childhood (2006), UN Doc. CRC/C/GC/7/Rev.1, 20 Sept. 2006, para. 11(b)(v); CRC, General Comment No. 9: The Rights of Children with Disabilities (2007), UN Doc. CRC/C/GC/9, 27 Feb. 2007, para. 10. See, further, W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: intersentia, 2005), ns. 443, 444, 445, and 446.

workers by their employers in the informal or domestic sectors.\textsuperscript{147} It further acknowledged that the consequences of racially motivated violence may be different between women and men, such as social ostracism for victims of rape, or the pregnancy and birth of children resulting from rape. Furthermore, women may have greater difficulties accessing remedies and complaint mechanisms for racial discrimination because of gender-related impediments such as gender bias in the legal system and discrimination against women in private spheres of life.\textsuperscript{148} The CERD called upon states parties to describe, as far as possible in quantitative and qualitative terms, the factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention.\textsuperscript{149} Again in 2000, the CERD issued a General Recommendation relating to discrimination against Roma, noting that Roma women are often victims of double discrimination.\textsuperscript{150} Its prior position, however, indicates that the CERD had yet to grasp the intersection of race and sex. In \textit{Yilmaz-Dogan v. The Netherlands}, the CERD did not address the question of discrimination based on gender stereotypes when an employer sought to terminate the employment of a Turkish woman who was pregnant. As the state party sums up the issue:

\begin{quote}
When 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.\textsuperscript{151}
\end{quote}

Likewise, in a case before the Women’s Committee 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

\begin{thebibliography}{99}
\bibitem{147} Ibid., para. 2.
\bibitem{148} Ibid.
\bibitem{149} Ibid., para. 7.
\bibitem{151} \textit{Yilmaz-Dogan v. The Netherlands}, CERD 1/1594.
\end{thebibliography}
ethnicity may have had on her treatment by the state.\textsuperscript{152} 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.\textsuperscript{153} It was also in spite of the state party raising irrelevant considerations in its defence such as the complainant’s 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 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’.\textsuperscript{154} No comment was made in relation to this by the state party, or by the Committee in its final ‘views’. This case shows a lack of understanding of the interplay between gender and ethnicity.

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 in this chapter and in Chapter 1. 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. This is driven by an emphasis on non-discrimination rather than equality. The standard for achievement of equality is the male sex. Put another way, it calls for a female-to-male progression, that is, men are the standard against which all individuals are judged under

international law. It reinforces a hierarchy in which men are above women. Inequality under this paradigm is when women are not treated the same as men; special treatment is allowed only as far as it will lead to their eventual identical position as men. The majority of the case law on equality, as outlined above, has been brought by women, for example, alleging facially unequal treatment compared with men in a similar or the same situation (or at least a comparable situation). Occasionally, men have brought complaints along the same lines.155 Structural inequality has not been readily apparent or always addressed by the treaty bodies. On the positive side of the ledger, discriminatory intent seems to have been set aside permanently as an irrelevancy, with the 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 v. The Netherlands and Muñoz-Vargas y Sainz de Vicuña v. Spain.

According to most of the treaty bodies, any distinctions between the treatment of men and women under the sameness/difference paradigm should be justified according to criteria of ‘reasonableness’ and ‘objectivity’. Reasonableness is also used in international law in the context of assessing whether a state has fulfilled its obligations under due diligence, which is studied later in this thesis. Under this standard, a state is required to take reasonable steps to prevent acts of violence. Reliance on standards such as reasonableness has proven problematic as they are regularly tied to masculinity and thereby risk a biased interpretation. Feminist scholars have argued that there is no such thing as an objective or reasonable standard, as it gives rise to questions such as ‘Who decides?’ and ‘By whose standard of reasonableness and objectivity is one being judged?’ In the area of tort law, for example, the ‘reasonable person’ standard has been criticised for being premised on the behaviour of the ‘reasonable man’ rather than the

155 See, e.g., Johannes Vos v. The Netherlands, HRC 786/1997, which found discrimination on the basis of sex in a situation where married men were required to reach a greater age than married women to be entitled to a pension.
'reasonable person',\textsuperscript{156} with some suggesting that the shift in language from 'man' to 'person' is 'no more than cosmetic'.\textsuperscript{157} Druccilla Cornell has argued that '[r]easonableness is not natural and objective but rather socially and politically constructed through the identification of this supposedly neutral concept with masculinity'.\textsuperscript{158} It is not clear why a standard linked to a 'reasonable state' would fare any better.

Only the Women's Committee has rejected what could be labelled the 'reasonable excuse' 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.\textsuperscript{159} The focus on discrimination, however, overemphasises differences between men and women, and it gives space to biological arguments to justify oppressive practices. It seems that it is time for the committees to indicate that there are limited biological differences that are relevant to justifying any difference in treatment. These might be restricted to reproduction, childbirth, pregnancy, and pre- and post-natal issues, and even then, though these factors can justify the introduction of positive measures to bring about equality, they cannot justify differences in treatment otherwise. 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 the


\textsuperscript{159} W. McKeen, \textit{Equality and Discrimination under International Law} (Oxford: Clarendon Press, 1983), 186 (pointing out that the UN Declaration on the Elimination of Discrimination of Women 1967, UN Doc. A/RES/48/104, 20 Dec. 1993, the predecessor to the CEDAW, was based on this premise).
introduction of special measures in order to bring about equality *writ large*. This is at the heart of the sex/gender distinction and the difficulties therein.

Overall, the principles of equality and non-discrimination on the basis of sex 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. Any distinctions between sex discrimination and inequality also remain unclear. Whether the terms are synonymous or qualitatively different is ‘inconclusive’.

Underlying social, political, and economic disparities 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 unfair distinctions in law or practice between women and men, although there have been serious slippages when irrelevant considerations such as administrative convenience have been taken into account. There has also been a rhetorical acceptance of direct and indirect forms of discrimination, although the committees have not always addressed both aspects in individual cases. The committees have, furthermore, tended to disregard structural causes of inequality in their case law, which can mean they are assessing a particular case in isolation of its social and cultural context. However, the practice of the

---

Women's Committee of indicating at the end of a communication General Recommendations in addition to the individual decision (see Chapter 2) has highlighted that inequality requires structurally based solutions. 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; meanwhile, the CESC has used language of inherent disadvantage, albeit still confined within a sameness/difference model. 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 first half of this chapter has highlighted the hazards inherent in an equality law framed around sameness and difference. So, what if an alternative vision of equality was adopted by the treaty bodies? A broader analysis that locates the individual woman within her lived context of group disadvantage, under-representation, and limited or lack of political or economic power would require deeper questions about the role that gender plays in her life and what needs to be done to ensure that, in the words of Judge Tanaka of the PCJ, she is recognised as having 'an equal value in [herself]'\textsuperscript{161} It would go further than simply permitting her to participate in the institutions or processes from which she was excluded or to gain access to benefits that have been denied her, unless reasonable excuses for such denials could satisfy the decision-maker. If nothing else, a reconceptualisation would untie women from the need to compare themselves to the norm of men.

The remainder of this chapter considers the approach developed by the Women's Committee and adopted by several of the other treaty bodies of treating violence against

women as a form of sex discrimination. I first outline what the approach entails before exploring what it means for female victims of violence. Is it a satisfactory approach to the omission of an explicit prohibition on violence against women in international law?

D. VIOLENCE AGAINST WOMEN AS SEX DISCRIMINATION

1. Violence against women = sex discrimination

In 1989, the Women’s Committee issued its first General Recommendation on violence against women. It cited Articles 2, 5, 11, 12, and 16 of the CEDAW 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.162 Elaborating upon its earlier position, the Women’s Committee adopted a more comprehensive Recommendation in 1992 in which it dealt with individual treaty provisions and links between sex discrimination and violence against women.163 The Women’s Committee was particularly concerned that, despite its 1989 General Recommendation, not all state party reports adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.164 The General Recommendation emerged at a time when heightened focus was placed on violence against women within the UN system. As outlined in the Introduction to this thesis, the 1985 Nairobi Forward-looking Strategies for the Advancement of Women outlined a set of measures to combat violence against

---

164 Ibid., Background para. 4.
women, but their implementation proved problematic. In 1991, the Economic and Social Council (ECOSOC) recommended that a framework for an international instrument be developed that would explicitly address this issue. Debate ensued at that time as to whether a new instrument was the way forward. Among the arguments were that an entirely new instrument could create confusion over the relevance of existing human rights instruments, risk limited ratification, and necessitate the expense of implementation. Furthermore, any new instrument would open up controversial debate on how to define such violence. Alternative approaches, including the drafting of a Declaration, which, as noted in the Introduction to this thesis, was adopted in 1994, as well as a General Recommendation by the Women’s Committee, were preferred, although the possibility of a new treaty if these other approaches proved unsuccessful is still available.

The 1992 General Recommendation that ensued 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’. In other words, the Women’s Committee developed a formula equating violence against women (VAW) with sex discrimination (SD), namely VAW = SD. It stated 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.\textsuperscript{170}

Clarifying its approach, the Committee stated:

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.\textsuperscript{171}

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’.\textsuperscript{172}

In many ways, the development of the VAW = SD formula transformed the CEDAW from an anti-discrimination treaty into a gender-based violence treaty. Not only was equality seen as a foundational principle of the CEDAW, the Women’s Committee argued that so, too, is gender-related violence. The two issues are inseparable, and they both limit and restrict women’s enjoyment of all other human rights.

In its 1992 General Recommendation, the Women’s Committee, furthermore, drew a link between custom and tradition, and violence. The General Recommendation provided 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’.\textsuperscript{173} The Committee further stated that ‘[s]uch prejudices and practices may justify gender-based violence as a form of protection or

\textsuperscript{170} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 6.

\textsuperscript{171} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 7.

\textsuperscript{172} Ibid., para. 6.

\textsuperscript{173} Ibid., para. 11.
control of women' as well as contribute to the maintenance of women in subordinate roles, their low level of political participation, and low levels of education, skills, and work opportunities. 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'. 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.'

Adopting a near-identical approach to the Women’s Committee, the CESCR stated in 2004:

Gender 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.

The approach of the HRC 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. From the catalogue of forms of violence outlined in the General Comment as being of relevance to Article 3 (and other provisions; see below), it is clear that the HRC considered that violence against women impairs women’s entitlement to enjoy ICCPR rights in equality and in totality.

174 Ibid.
175 Ibid.
176 Ibid., para. 12.
177 CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 27.
178 HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 2.
Nonetheless, it is not clear that the HRC considers violence against women to be a form of sex discrimination per se, along the lines of the Women’s Committee, without additional considerations.

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

So what have been the consequences of the VAW = SD formula for women?

2. Assessing the VAW = SD formula

Characterising violence against women as sex discrimination has filled an important gap in international human rights law, namely the absence of an explicit binding prohibition on violence against women. However, it also carries its own set of problems for women, which make it at best a stop-gap measure. I now review the pros and cons of the VAW = SD formula.

(a) Benefits of the VAW = SD formula

The first, and most obvious, advantage of the VAW = SD formula is that, had it not been developed, the UN treaty bodies would be constrained in their treatment of violence against women. In much the same way as MacKinnon, in her work on sexual harassment in the US in which she argued that sexual harassment is sex discrimination in order to locate a legal cause of action before US courts, the approach of the Women’s

---

179 Art. 4, ICERD.
Committee is a pragmatic response to a gap in the law.\textsuperscript{181} Prior to the 1992 General Recommendation, violence against women as a specific issue was not given official attention by the UN treaty bodies.

Under the formula, the Women’s Committee has addressed a wide range of issues of violence against women, such as sexual violence, including gang rape and marital rape, domestic violence, physical violence, sexual harassment, and pornography.\textsuperscript{182} The Committee has identified measures to eliminate violence against women, including criminalisation, awareness-raising and education, the training of police, judicial, and other personnel, national action plans, and assistance to victims in the form of crisis centres, hotlines, legal, medical, psychological, and emotional support, socio-economic integration measures, and effective remedies.\textsuperscript{183} Sexual harassment in the workplace has also been identified as an issue of equality by the Women’s Committee, which notes that ‘[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace’.\textsuperscript{184}

It has also driven other committees to take up the issue of violence against women within an equality paradigm. For example, the CESC R has made references to the lack,

\textsuperscript{183} W. Vandenhole, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies (Antwerpen: intersentia, 2005) 152-153, referring to a range of Concluding observations on state party reports.
\textsuperscript{184} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, paras. 17 and 18.
in many states, of legislation outlawing sexual harassment,\(^ {185}\) and it has linked the right to family life and inequality in the context of domestic violence, forced marriage, and gender-based violence generally.\(^ {186}\) The CESC has, furthermore, raised concern regarding family laws that provide an obligation upon a wife to obey her husband\(^ {187}\) and for polygamy,\(^ {188}\) unilateral divorce by husbands,\(^ {189}\) more severe punishment for adultery imposed upon women,\(^ {190}\) and 'honour' crimes.\(^ {191}\) The HRC has similarly linked inequality between women and men and violence with a range of ICCPR rights, including in relation to female genital mutilation,\(^ {192}\) the pledging of girls for economic gain,\(^ {193}\) the detention of women rejected by their families,\(^ {194}\) domestic violence,\(^ {195}\) a lack of rape prosecutions\(^ {196}\) or exemption from prosecution if marriage follows rape,\(^ {197}\) the sexual exploitation of foreign women,\(^ {198}\) and trafficking in women.\(^ {199}\) Nevertheless,

\(^ {185}\) CESC, Concluding observations on Chile, UN Doc. E/C.12/1/Add.105 (2004), para. 21.
\(^ {186}\) CESC, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 27.
\(^ {188}\) Ibid.
\(^ {189}\) Ibid.
\(^ {190}\) CESC, Concluding observations on Syrian Arab Republic, UN Doc. E/C.12/1/Add.63 (2001), para. 31.
\(^ {191}\) Ibid.
\(^ {194}\) See, e.g., HRC, Concluding observations on Yemen, UN Doc. CCPR/CO/75/YEM (2002) (Arts. 3, 9 and 26), para. 12.
\(^ {196}\) See, e.g., HRC, Concluding observations on Iceland, UN Doc. CCPR/CO/83/ISL (2005) (Arts. 3, 7 and 26), para. 11.
\(^ {197}\) See, e.g., HRC, Concluding observations on Egypt, UN Doc. CCPR/CO/76/EGY (2002) (Arts. 3 and 26), para. 9; Venezuela, UN Doc. CCPR/CO/70/VEN, para. 20; Mongolia, UN Doc. CCPR/C/79/Add.120 (2000) (Arts. 3 and 26), para. 8; Morocco, UN Doc. CCPR/C/79/Add.97, paras. 11 and 15; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) (Arts. 3 and 23), paras. 18-19.
\(^ {198}\) See, e.g., HRC, Concluding observations on The Netherlands, UN Doc. CCPR/CO/72/NET, para. 10.
a discrimination lens has not always been centre stage. With a wider range of provisions from which to choose, the HRC has, for example, preferred to characterise forms of violence against women as torture, which is examined in Chapter 4 of this study, while the CESCRe has tended to consider violence as an issue related to women’s health.\textsuperscript{200} There are advantages and disadvantages to these approaches too, but it is beyond the scope of this thesis to deal with them here. The analysis of the Women’s Committee, however, has undoubtedly been a catalyst to the acceptance that violence against women is a human rights concern across the treaty bodies.

The second advantage of the formula is not only that the Women’s Committee is now able to address violence against women per se, but that it can do so in a broad way that encompasses structural causes of inequality and violence. That is, there has been a conceptual breakthrough. Violence against women is recognised as a ‘group-based harm, a practice of social inequality carried out on an individual level’.\textsuperscript{201} Violence against women is no longer perceived as an individual criminal act but part of a systemic and political problem, requiring a systemic, political solution.\textsuperscript{202} Without the formula, the treaty bodies would have been able to deal only with specific incidences of violence that were otherwise linked to other treaty rights. For the Women’s Committee, this may have been limited to the specific context of trafficking, which is expressly included in Article 6 of the CEDAW. Likewise, the HRC would have had only the

\begin{footnotesize}
\begin{enumerate}
\item[(Arts. 3 and 8), para. 14; Suriname, UN Doc. CCPR/C/80/SUR (2004) (Arts. 3 and 8), para. 13; Czech Republic, UN Doc. CCPR/C/72/CZE (2001) (Arts. 3 and 8), para. 13.
\item CESCRe, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3, para. 29 (unequal access to water and sanitation resources that bear on a women’s health); CESCRe, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000), UN Doc. HRI/GEN/1/Add.6, para. 8 (the right to health includes control over one’s body and sexual and reproductive freedom) and para. 10 (a wider definition of the right to health takes into account violence and armed conflict).
\item Ibid., 255.
\end{enumerate}
\end{footnotesize}
option of dealing with it as a violation of other provisions such as those on torture, slavery, or security of person or life.203

Instead, the Women’s Committee has directly criticised a range of traditional practices that are considered discriminatory (and violent) to women, such as dowry, sati, and devadasi systems,204 and female genital mutilation,205 gathering together the links between custom/tradition and violence against women that the Committee identified in its 1992 General Recommendation. The Women’s Committee has also referred to the non-consensual genital examinations of women,206 unequal marriage practices between men and women, including low legal ages of marriage, dowry practices, early and forced marriage, levirate,207 and the inheriting of women.208

In the 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 the Ciudad Juárez area of Chihuahua, Mexico, alongside social and cultural breakdown, a lack of social services, poverty, class, and other social and economic factors. The disjuncture between evolving gender roles of women and traditional ‘patristral attitudes and mentalities’ fostered an environment that was said to have developed ‘specific characteristics marked by hatred and misogyny. There have

203 In fact, the approach of the HRC has been to utilise the other provisions in spite of obvious sex discrimination issues: see, Ch. 4.
204 CEDAW, Concluding observations on India. UN Doc. A/55/38 (2000), para. 68. Dowry (or bride price) is the payment of money, gifts or estate by a woman’s family to a her husband in marriage. It is a practice in many societies. Sati (or widow burning) is a funeral practice among some Hindu communities in which a recently widowed woman would immolate herself on her husband’s funeral pyre. Devadasi is a Hindu practice in which girls are ‘married’ to a deity. Although largely derived from Hindu practices, similar practices are found elsewhere: see, A. Smail Bilyeu, ‘Trokosi – The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights’ (1999) 9 Ind. Int’l & Comp. L. Rev. 457.
206 CEDAW, Concluding observations on Turkey, UN Doc. CEDAW/C/TUR/CC/4-5, para. 25.
207 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. It has also been described as the wife being ‘inherited’ by her husband’s family.
been widespread kidnappings, disappearances, rapes, mutilations and murders. 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. [my emphasis]

Other traditional practices harmful to or discriminatory against women and girls that have been identified by the Women’s Committee include dietary restrictions for pregnant women and a preference for male children.

What an equality paradigm provides for is the equal protection of women before the law. This might include the removal of exceptions or distinctions in criminal laws for particular forms of gender-related violence, or its selective prosecution. The failure of a legal system to treat domestic violence as seriously as violence by strangers would be discriminatory against women. Women are often denied the equal protection of criminal law, in contravention of the principle of equality before the law. Rape inside as well as outside of marriage would need to be classified as a criminal offence to satisfy the principle of non-discrimination on the basis of sex. The selective failure to prosecute rapists of prostitutes or members of vulnerable groups such as disabled women would also be disallowed under an equality paradigm. For example, an equality paradigm could prove useful when a state investigates murder cases against men but fails to do the

---

210 Ibid., para. 34.
213 Ibid.
214 Ibid. See, e.g., ECHR decision, X and Y v. The Netherlands, 91 Eur. Ct. H. R. (Ser. A) (1985), in which the rape of an institutionalised girl with mental disability was considered under the right to privacy in Art. 8 ECHR, but the ECHR did not consider it necessary to deal with the question of discrimination.
same in respect of ‘honour’ killings against women.\textsuperscript{215} 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 made unlawful.\textsuperscript{216}

Furthermore, the VAW = SD formula 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 a lack of economic and political autonomy for women. Violence against women seen in this way is a symptom of a much wider social problem. As Julie Goldscheid, for example, argues:

\begin{quote}
[T]he 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.\textsuperscript{217}
\end{quote}

Treating violence against women as rooted in unequal relations between women and men allows the committees to delve deeper into the causes of it. In fact, the VAW = SD formula may respond to some of the feminist critiques of international human rights law regarding its failure to respond to women’s particularised experiences, its oversimplification of complex power relations, or its disallowance of transformative outcomes.


\textsuperscript{216} A Hudood Ordinance is a law intended to implement Shari’a law by enforcing punishments against extramarital sex, false accusation of extramarital sex, theft, or alcohol consumption. It is particularly criticised by deterring women from making complaints of rape, because if unproved, they are open to prosecution under the Hudood Ordinance for adultery, which can carry penalties of death in some countries. 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 (Philadelphia: University of Pennsylvania Press, 1994) 43.

The final value of constructing violence against women as sex discrimination is that it turns what may otherwise be characterised as a 'private indiscretion' or merely criminal activity into political violence. Inequality as a social phenomenon rather than as an 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.

In its first admissible decision in A.T. v. Hungary, the Women's Committee, for example, 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 (c) of the CEDAW, in particular the recognition by the state administrative apparatus of the unrestrictive property rights of the husband to the family home, the Committee reiterated that 'traditional attitudes by which women are regarded as subordinate to men contribute to violence against women' and that these attitudes plagued the state's dealings with the complainant. Similar discussions have occurred in the above-mentioned cases of Goekce and Yildirim. However, in those aforementioned cases, none of the General Recommendations made to the state party targeted socio-economic inequality outside the specific context of domestic violence.

220 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.
The sex discrimination template can also be used by men who experience gender-related violence because they do not adhere to accepted social and cultural mores.

(b) Concerns relating to the VAW = SD formula

The VAW = SD formula is not, however, a panacea for the absence of a prohibition on violence against women. First, the attachment of violence against women to the concepts of sex discrimination and inequality is subject to understandings of these latter terms, which, as shown in this chapter, 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. As noted in the first half of this chapter, these concepts are still tied to a sameness/difference ideology that is not as flexible a mode of analysis as the paradigms of oppression/domination, advantage/disadvantage, or lack of hierarchy.

Second, although the prohibition on discrimination is a non-derogable right, it is a limited one. Apart from the Women’s Committee, all the approaches of the treaty bodies to discrimination give room to justifying discriminatory practices on the basis of ‘reasonable and objective’ criteria. As noted above as well as in Chapter 1, such criteria are often treated as neutral terms by decision-makers, but in reality they are applied within a socio-political-cultural context and are influenced by the socio-political-cultural background and sex/gender of those decision-makers. That is, such exceptions are open to exclude or disregard the particular circumstances facing women, and they have been criticised for doing so.221 The concern is that these same excuses are

available to be argued and applied to failures to protect women from certain forms of violence, to prosecute or punish alleged offenders, or to provide appropriate redress.

Third, difficulties in articulating the concepts of equality and non-discrimination on the basis of sex lead to problems of implementation. Geldscheid notes that the connection between sex discrimination and sexual and domestic violence is 'not easily, nor precisely, described'.\textsuperscript{222} The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) shows that recognising rape, for example, as discriminatory can be problematic. In the \textit{Kunarac, Kovač and Vuković} case, the defendants admitted rape but argued that the rape was a personal indiscretion rather than political. Although the ICTY rejected these arguments, the record notes that the defence provided that 'even if it were proved that he raped a woman, the accused would have done so out of a sexual urge, not out of hatred'.\textsuperscript{223} Moreover, the discrimination considered relevant to this case was that of ethnicity, not sex.\textsuperscript{224}

Similarly, under international refugee law, arguments are frequently made by governments that acts of gender-based violence do not amount to political persecution, as the acts are simply personal. In the United Kingdom House of Lords asylum decision of the \textit{Shah and Islam} case, 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.'\textsuperscript{225} 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


\textsuperscript{223} E.g., \textit{Prosecutor v Kunarac, Kovač and Vuković}, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001, para. 816. The Court did not accept this argument however.

\textsuperscript{224} Ibid.

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. The violence or threat of violence itself was insufficient, even though it was perpetuated within a social and legal context that endorsed differential treatment between women and men.

A fourth concern with the VAW = SD formula is that it encompasses only gender-related forms of violence, that is, violence that is based upon or linked to sex 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 and other treaties. It thus sets up a two-tier system of protection: those acts motivated by gender and those that are not; those that are worthy of international human rights protection and those that are not. Requiring a link to be established between the act of violence at issue and discriminatory intent in order to recognise that violence is an issue of human rights law narrows considerably the scope of application of human rights law and the protection available. Gender alone may not be a significant or relevant factor in each act of domestic or sexual violence. 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 [or instead of] gender’. It also speaks to some feminist scholars who


227 See, also, the experience in the US' domestic courts under the Violence Against Women Act, which required the courts to find a link between the violent conduct and discriminatory intent, in which results were mixed. Some of the lower courts had no problem making out the link by, for example, the defendant's use of sexist epithets, the fact that the crime involved unwanted sexual conduct, the presence of multiple female victims, and the use of violence to force women into a stereotypical submissive role: see, S.F. Goldfarb, 'Applying the Discrimination Model to Violence against Women: Some Reflections on Theory and Practice' (2002-2003) 11 Am. U. J Gender Soc. Pol’y & L. 251, 262, n. 58 (for cases).

have resisted the priority or exclusiveness of gender over other identity-based factors, as discussed in Chapter 1.

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 noted that many if not most of the reforms or responses to sexual and domestic violence target neither sex discrimination nor other socio-political factors.\textsuperscript{229} In contrast, at the international level, there is some evidence to suggest that broader recommendations for social or cultural change are within the responses of the treaty bodies, whether in relation to individual cases or concluding observations on state party reports.

More problematic is that the rhetoric of inequality seems weaker than the language of violence. The symbolism of language cannot be underestimated. Language has both legal and moral implications. It can serve to construct and reinforce patriarchal systems. It is important to label an act appropriately in order to ensure an appropriate response. The language of inequality or sex discrimination has tended to be applied in the context of discrimination in relation to unequal access to work or unequal pay for work of equal or comparable value. At the level of national law, sex discrimination has therefore tended to be reserved for civil suits, and it is possible under the discrimination paradigm for the discriminatory treatment to be inadvertent. This is to be compared with violence, which carries purposeful and usually criminal behaviour and sanction. Language can also dictate the remedies available: anti-discrimination laws usually impose financial penalties, whereas violence carries harsher criminal penalties of jail or, in some jurisdictions still, death. These in turn reflect social values and attract societal disapproval. Generally, violence is condemned in society to an extent that

\textsuperscript{229} Ibid., 362.
discriminatory treatment against women is not. This reality opens up two possibilities. Either the use of the more powerful language (violence) should be advocated, or a reinvigoration of the weaker language to apply it with greater force (sex discrimination) should be advocated. At an international level, an interim stage might also be suggested to utilise the language of discrimination until the language of violence is legally entrenched. In other words, using sex discrimination in the context of violence requires one to travel across disparate legal (and moral) regimes. Although inequality and discrimination may be the root cause of some forms of violence (e.g., in criminal law, it may be seen as an aggravating factor, such as crimes of incitement to racial hatred or genocide), a violent act has nonetheless been committed. Utilising sex discrimination law merely because it is the only available remedy almost covers up the violence that has occurred or diminishes the extent of the conduct. Similar questions are raised in relation to torture in Chapter 4. There is something counter-intuitive about calling violent conduct discrimination rather than violence itself. Indeed, the apartheid regime was discriminatory, but it was also violent. The problem of language and perception also raises the question of whether the prohibition against sex discrimination is being asked to do too much. As it has not yet been able to deliver in a few fundamental areas so far, it seems ambitious to be asking it to also rid the world of systemic violence.

Finally, the VAW = SD formula results in the unequal treatment of men and women under international law. The formula does not make violence against women into prohibited conduct per se. Female victims of violence, whatever its form or manifestation, are protected by human rights law to the extent that they can establish that the violence is discriminatory or otherwise fits within another provision.230 Violence that disproportionately affects men, in contrast, is not burdened with an

---

230 See, Chs. 4 and 5.
additional link to sex discrimination or any other additional factors. While it has been argued in feminist academic circles that rape of women, for example, is always discriminatory (that is, women are at risk of rape owing to gendered assumptions and stereotypes concerning the value and worth of women and to women's oppression in society at large),\(^{231}\) this is far more difficult to prove through empirical evidence in individual cases. Of course, it also turns on the meaning given to inequality. If the approach of Mahoney, Young, or MacKinnon is adopted - discrimination as disadvantage, oppression, or hierarchy - then it may be easier to cast rape per se, for example, as a form of discrimination. Rape is after all about the exertion of power over a victim; it is not about sex.

E. 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. This chapter has shown that the approach of international law to equality has not changed significantly since the adoption of the UN Charter, except that ideas of formal and substantive equality are now generally accepted components of equality law, and women's equality is a more prominent feature on the international equality agenda. These advances are, however, still held to ransom by the usage of gender-charged criteria of exception, such as reasonableness and objectivity, and these in turn reinforce sex-based hierarchies. The first half of this chapter points to a system that continues to struggle with interpreting and applying these concepts, in particular because they remain tied to a sameness/difference ideology.

\(^{231}\) 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 D.G. Dallmeyer (ed.), Reconcepting Reality: Women and International Law (American Society of International Law, 1993) 171, 174.
What if the meaning of equality was framed within any of the reconceptualisations outlined above? Would it make any real difference in the context of violence against women? All three proposals – oppression/domination, advantage/disadvantage, or lack of hierarchy – are strides ahead of the current approaches of the treaty bodies to discrimination and inequality generally, as they move away from comparisons between men and women to freedoms from gender straitjackets. They do not, however, seem to overcome the difficulties of applying them in practice in the context of violence against women. Ideas of oppression/domination, advantage/disadvantage, and lack of hierarchy are also complex concepts. In addition, they too add an additional layer of proof for individual complainants. Not only does a woman need to establish that she has been raped, she also needs to prove that the rape was discriminatory, however that discrimination is conceived. Such an additional layer of analysis is not applied to men in relation to violence that disproportionately affects them. The meaning of equality is also problematic as early definitions of discrimination that had intent as an element in characterising a policy or practice as discriminatory have generally been discarded. A sexist intent of an individual perpetrator might, for instance, be easier to establish in a given case than trying to claim that the entire social or cultural system is discriminatory (whether because women are treated differently to men or because it is a sexually oppressive regime). All three approaches also relegate women to positions of disadvantage in perpetuity. Finally, the discrimination/violence link, however discrimination is recast, 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 built into the prohibition, and in doing so, the violence suffered by women is ‘exceptionalised’.
In the next chapter, I explore the second case example of this thesis and determine whether the treaty bodies have performed any better by characterising violence against women as torture or other forms of cruel, inhuman or degrading treatment or punishment.
Chapter 4

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

A. INTRODUCTION

The prohibition against torture and other cruel, inhuman or degrading treatment or punishment has attracted considerable feminist attention. This chapter is concerned with the interpretation and application of the prohibition against torture under international law and, in particular, how it has been extended by the UN treaty bodies to apply to women’s experiences of violence. I begin with an overview of how torture and other forms of cruel, inhuman or degrading treatment or punishment have been understood generally under international law, before moving on to consider interpretations championed by some feminist scholars and women’s rights activists and taken up by the treaty bodies to incorporate violence against women into the torture prohibition.

I conclude that the interpretation and application of the torture prohibition to women’s concerns has been mixed. As a feminist strategy that benefits from the symbolism of a peremptory norm of international law, it has its advantages. For example, it puts rape, sexual violence, and other forms of violence against women onto the international agenda. However, it also feeds into and reinforces existing structures and dialogue. Absent an international prohibition against violence against women, women have had to ‘fit’ their experiences within existing provisions. One way this has been achieved is by equating their experiences to that of torture – whether in nature, seriousness, or the
identity of the perpetrator. In reality, there may be no equivalent. Furthermore, fitting violence against women within the criteria of the torture prohibition subjects women and their advocates to an additional layer of analysis: they must first substantiate that they have been raped and then that that rape amounts to torture, or alternatively that any distinctions in their treatment compared to the norm (read: male) justifies the creation of an exception to the rule. Rape and other forms of violence against women are not prohibited conduct per se. Women are thus treated unequally under international law.

B. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT UNDER INTERNATIONAL LAW

1. International instruments

Ranked among the most important human rights provisions, the first modern prohibition against torture is found in Article 5 of the Universal Declaration of Human Rights 1948 (UDHR). It provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This prohibition was replicated in Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR), with an additional phrase prohibiting non-consensual medical and scientific experimentation. Article 7 provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] free consent to medical or scientific experimentation.

---

Article 7 is an absolute right; no restrictions are permitted. Its status as a fundamental right or *jus cogens* norm of international law is widely accepted, even though the exact meaning given to its terms has yet to be fully resolved and is constantly evolving.

Amid concern that the incidence of torture was increasing as a tool of repression against political opponents in many autocratic regimes throughout the world, the UN General Assembly issued a *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1975 (1975 Declaration on Torture). The Declaration asserted that ‘every act of torture is a grave offence against human dignity’. Shortly afterwards, in 1977, the General Assembly formally requested the Commission on Human Rights to draft the text of a binding treaty based on the 1975 Declaration. The drafting of an explicit treaty soon took shape, with its unanimous acceptance by the General Assembly in March 1984. Article 7 of the ICCPR had been unable on its own to halt the alarming practices of some governments. The *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (UNCAT) instead hoped to ‘achiev[e] a more effective implementation of the existing prohibition under international and national law …’

---

3 Art. 4(2), ICCPR.
5 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975, GA res. 3432 (XXX), 9 Dec. 1975.
6 Art. 2, UN Declaration on Torture 1975.
9 Preambular para. 5, UNCAT.
Following the 1975 Declaration definition, Article 1(1) of the UNCAT defines ‘torture’ as:

1. For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of a wider application.

It is one of few international human rights instruments that provide a definition of ‘torture’.\textsuperscript{10} Article 16 of the UNCAT provides a separate definition of ‘cruel, inhuman or degrading treatment or punishment’ as:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

\textsuperscript{10} Other instruments that include a specific definition of ‘torture’ include the 1975 Declaration on Torture; Art. 2 of the Inter-American Convention to Prevent and to Punish Torture 1983 (adopted at the Fifteenth Regular Session of the OAS General Assembly at Cartagena De Indias, Colombia, 9 Dec. 1985, O.A.S. Treaty Series No. 67, entered into force 28 Feb. 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992)); and Art.7(2)(e) of the Statute of the International Criminal Court (Rome Statute of the International Criminal Court (UN Doc. A/CONF.183/9, 17 July 1998, 2187 UNTS 90; entered into force 1 July 2002). The Inter-American Convention defines ‘torture’ as: ‘For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.' The Statute of the ICC defines ‘torture’ in Art. 7(1)(e) as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Apart from a lower severity threshold, the main distinction between the two definitions in the UNCAT is that the purpose requirement is missing from the definition of cruel, inhuman or degrading treatment or punishment.\textsuperscript{11} The removal of the purpose element has the effect of broadening the types of scenarios that may fall under the heading of cruel, inhuman or degrading treatment or punishment rather than torture.

In addition to offering definitions of relevant terms, the UNCAT outlines a range of obligations imposed upon states parties; it clarifies some that were already associated with the prohibition under international law, while it codifies others. The overarching obligation upon states parties is to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.\textsuperscript{12} Specifically, this includes:

- the creation and prosecution of offences of torture under domestic criminal law and the extradition of alleged offenders where necessary;\textsuperscript{13}
- the inclusion of education and information on torture in the training of law-enforcement personnel, civil or military personnel, medical personnel, public officials, or other persons who may be involved in the custody, interrogation or treatment of any arrested, detained, or imprisoned individual;\textsuperscript{14}
- the conduct of systematic reviews of interrogation rules, instructions, methods, and practices;\textsuperscript{15}

\textsuperscript{12} Art. 2(1), UNCAT.
\textsuperscript{13} Arts. 4 – 9, UNCAT.
\textsuperscript{14} Art. 10, UNCAT.
\textsuperscript{15} Art. 11, UNCAT.
• prompt and impartial investigation;\textsuperscript{16}

• the establishment of complaints procedures for alleged victims, and prompt and impartial examinations of such complaints by competent authorities;\textsuperscript{17}

• provision of redress mechanisms within the legal system and an enforceable right to fair and adequate compensation, including full rehabilitation for victims or, where death results from torture, the entitlement of dependants to compensation;\textsuperscript{18}

• safeguards against the admission of any statements made as a result of torture as evidence in any proceedings.\textsuperscript{19}

One of the fundamental guarantees of the UNCAT is its inclusion of an explicit protection against expulsion, \textit{refoulement}, or extradition where there are substantial grounds for believing that a person would be in danger of being subjected to torture.\textsuperscript{20} The majority of decisions before the Committee against Torture (CAT) has involved Article 3 of the UNCAT.\textsuperscript{21}

Although most of the above-listed obligations are drafted as to apply to torture, Article 16 of the UNCAT specifically notes that obligations arising under Articles 10, 11, 12, and 13 also apply to acts short of torture. This does not mean, however, that other obligations do not also arise with respect to cruel, inhuman or degrading treatment or punishment. The use of the term ‘in particular’ in Article 16 indicates that the list of provisions was not intended to be exhaustive. No agreement could be reached during the drafting, however, on whether Articles 3 (\textit{non-refoulement}), 14 (right to

\textsuperscript{16} Art. 12, UNCAT.
\textsuperscript{17} Art. 13, UNCAT.
\textsuperscript{18} Art. 14, UNCAT.
\textsuperscript{19} Art. 15, UNCAT.
\textsuperscript{20} Art. 3, UNCAT.
\textsuperscript{21} Office of the High Commissioner for Human Rights (OHCHR), \textit{Combating Torture}, Fact Sheet No. 4/Rev.1 (undated), 14.
compensation), and 15 (prohibition against the use of statements in evidence) should also apply to Article 16 abuses. In a 2008 General Comment, the CAT clarified that the other provisions should also apply as a general principle to lesser forms of ill-treatment, although its jurisprudence indicates that the Article 3 non-refoulement guarantee applies only to torture as defined in Article 1. This is contrary to the view taken by the Human Rights Committee (HRC) in respect of Article 7 as well as under some regional instruments.

Like Article 7 of the ICCPR, torture under the UNCAT is a non-derogable right. The strong language of Article 2(2) provides: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture.’ The non-derogable status is not expressly applied to cruel, inhuman or degrading treatment or punishment. Article 2(3) further clarifies that superior orders may not be invoked as a justification for acts of torture.

Versions of the prohibition against torture are also found in the UN Convention on the Rights of the Child 1989 (CRC), the Convention on the Rights of Persons with

25 HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), para. 12, which clarifies that an obligation not to extradite, deport, expel, or otherwise remove a person from their territory exists under Article 7 of the ICCPR where there are substantial grounds for believing that there is a real risk of irreparable harm in either the country of removal or any other country to which the person may be subsequently removed.
Disabilities 2006 (ICRPD), all the major regional human rights treaties, the 1949 Geneva Conventions, the treaties establishing the various international criminal tribunals, and the Statute of the International Criminal Court 1998. To further strengthen the anti-torture regime, an Optional Protocol to the Convention against Torture (OPCAT) was agreed in 2002. Its aim is preventive in nature, through the establishment of an international Sub-Committee on the Prevention of Torture, which has a mandate to make unannounced visits to places of detention and requires states parties to form or designate complementary national preventive mechanisms. There are also a large number of soft law instruments that regulate the torture prohibition.

30 Arts. 3(1)(a) and (c), 27, 29, 31, and 147, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted 12 Aug. 1949, 75 UNTS 287; entered into force 21 Oct. 1950.
31 E.g., Arts. 2(b) and (c), 5(f) and (i), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. S/RES/827, 25 May 1993; Arts. 3(f) and (i), 4(a) and (e), Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, SC res. S/RES/955, 8 Nov. 1994, 33 ILM 1598, 1600 (1994).
32 Arts. 7(1)(f) and 8(2)(a)(ii), (b)(xxi) and (c), Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, 2187 UNTS 90; entered into force 1 July 2002.
The definition of torture as applied by the UN treaty bodies has been influenced by developments in these other fields. Torture prohibitions are missing from the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (IMWC).

2. International jurisprudence: Traditional constructs of torture

Articulating the meaning of ‘torture’ and other forms of inhuman treatment under international law continues to be one of the greatest juridical challenges for the UN treaty bodies. Although it is agreed that torture is inherently undesirable, the UN treaty bodies have had difficulty defining it and, where a definition exists, applying it in practice. Although there has been substantial convergence in meaning between the views of the CAT and the HRC, as autonomous treaty bodies governed by separate treaties, they have been free to adopt their own variations on the term, and have done so. This section of the study sets out early constructions of torture, and the subsequent section outlines the main feminist critiques of these interpretations.
Four elements can be distilled from the early jurisprudence concerning Article 7 of the ICCPR and Article 1 of the UNCAT, namely that the harm must be of a serious nature, whether physical or mental; intentionally inflicted; for a purpose related to interrogation, confession, or arrest; and committed by an official or with an official’s consent or acquiescence. First and foremost, the torture prohibition under international law was initially taken as applying to serious pain or suffering inflicted by government or public officials within the context of state custody for the purposes of interrogation, arrest, or related reasons. The 1973 draft resolution that called on the General Assembly to examine the question of torture was framed ‘in relation to detention and imprisonment’.  

This resolution, and the political environment in which it was promoted, set the scene for the scope of the discussions on the UNCAT, limiting the meaning of ‘torture’ to harmful conduct perpetrated within the context of detention and imprisonment. This was the most commonly accepted understanding of torture at that time, including under Article 7 of the ICCPR. The application of the torture prohibition has, however, been extended to harmful acts carried out in teaching or medical institutions and, as shown below, to violence outside the context of state custody.

The main challenge has been to determine what types of treatment would qualify as torture. The HRC’s first General Comment on Article 7 of the ICCPR stated that the purpose of Article 7 is to protect the ‘integrity and dignity’ of the individual. The HRC has stated that the addition of ‘cruel, inhuman or degrading treatment or

---

41 For commentary on the GA discussions and lead-up to the CAT, see N.S. Rodley, The Treatment of Prisoners Under International Law (2nd ed., Oxford: Clarendon Press, 1999), Ch.1.
42 HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982), para. 2 (referred to corporal punishment, including excessive chastisement as an educational or disciplinary measure); HRC, General Comment No. 20: Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992), paras. 5, 10 and 11 (accepted that torture or ill-treatment or punishment may occur within teaching or medical institutions). See, further, Higgins v. Jamaica, HRC No. 792/1998 (imposition or execution of a sentence of whipping with a tamarind switch violated Art. 7).
43 HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982), para. 1.
punishment’ extends the term ‘torture’ far beyond its normal meaning.\textsuperscript{44} While frequently repeated verbatim by academic scholars to support or encourage a broad interpretation of the provision,\textsuperscript{45} the HRC’s statement is not entirely clear. Negotiating states to the ICCPR generally agreed that the word ‘treatment’ was broader in scope than the word ‘punishment’,\textsuperscript{46} the latter referring specifically to disciplinary action. However, some states observed that the word ‘treatment’ should not be completely unlimited and, to that end, it should not apply to degrading situations that might be due to general economic and social factors.\textsuperscript{47} Compared with other forms of ill-treatment, torture was accepted as being reserved for the most abhorrent acts.

The word ‘torture’ is generally understood as including both physical and mental harm.\textsuperscript{48} What degree of severity would determine whether a particular act or omission would be included within the term was left aside during the drafting conference. Article 1 of the UNCAT makes clear that torture is to be reserved for the most severe forms of ill-treatment, and the general discussions at the time of drafting supported this view.\textsuperscript{49} Nigel Rodley, former UN Special Rapporteur on Torture, has stated that it is ‘virtually impossible’ to sum up the issue of how severe or aggravated specific treatment has to be

\textsuperscript{44} Ibid., para. 2.
\textsuperscript{48} UN Doc. E/CN.4/SR.149, paras. 33 and 38 (Egypt), para. 37 (The Philippines), para. 39 (Chairman), para. 41 (Lebanon). See, also, M.J. Bossuyt, Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights (Dordrecht: Martinus Nijhoff Publications, 1987), 150. See, later, HRC, General Comment No. 20: Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992), paras. 2 and 5.
for it to amount to torture. In its 2008 General Comment, the CAT acknowledged the overlap between the terms, noting that the ‘definitional threshold between ill-treatment and torture is often not clear’. Similarly, the HRC has not found it necessary to define or distinguish between the terms, although it has noted that any distinctions would depend on the ‘nature, purpose and severity’ of the particular act in question. Navigating the boundaries between torture on the one hand and other forms of ill-treatment on the other has proven difficult for the treaty bodies, as it has for other human rights bodies.

In order to avoid the boundaries between the terms, the HRC has simply discussed ill-treatment in a broad sense or declared that there has been a violation of Article 7 of the ICCPR without specifying which of its components. Owing to the structure of the UNCAT, the CAT, in contrast, has been unable to get away with the same level of generality. With two separate provisions that impose slightly differing obligations on states parties (see the above controversy), the CAT has had to be more specific in its findings, especially under its communications procedure in relation to Article 3 obligations, which has arguably narrowed its imaginative potential.

---

52 HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982), para. 2. This is to be contrasted with the position of the European Commission and Court on Human Rights which have taken the view that the inclusion of three separate terms in Article 3 of the ECHR shows a clear intention to distinguish between them. See, Ireland v. United Kingdom, A 25, para. 167. Art. 3 of the ECHR provides: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’
53 See, e.g., exacerbation of mental or physical health has been specifically rejected by the CAT as grounds to prevent deportation (G.R.B. v. Sweden, CAT 83/1997, para. 6.7); considerable hardship for an applicant caused by deportation to an area outside their region of origin and the ‘mere fact that he may not be able to return to his family and his home village’ was not held to amount to risk of torture protected by Art. 3 (B.S.S. v. Canada, CAT 183/2001, para. 11.5); family separation did not amount to protection from refoulement under Art. 3 (M.V. v. The Netherlands, CAT 210/2002; Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden, CAT 199/2002). This follows the position of the European Court of Human Rights in Berrahab v. The Netherlands A 138 (1988); Moustaquim v. Belgium A 193 (1991); Beldjoudi v. France A 234-A (1992).
The traditional mainstay of the CAT’s jurisprudence has included beatings, mock executions, solitary confinement, electric shocks, kicking, and threats of reprisals to family members.\textsuperscript{54} Torture has been established before the HRC, either individually or cumulatively, in the form of systematic beatings, electric shocks, burns, repeated immersion in a mixture of water, blood, vomit, or excrement (referred to as ‘submarino’), prolonged hanging from the hands (referred to as ‘Palestinian hanging’) and/or leg chains, standing for extended periods (referred to as ‘planton’), simulated executions, and amputations.\textsuperscript{55} The public official requirement has meant that such action has been perpetrated by government or public officials or other persons acting with official sanction, or with their consent or their acquiescence. Extended understandings of the terms are examined further below.

Thus, the intentions of the drafters of Article 7 of the ICCPR and Articles 1 and 16 of the UNCAT were to ban and take action against state-sponsored terror against political dissidents. The jurisprudence of the treaty bodies has largely kept this focus as the core meaning of the torture prohibition. The majority of individual communications under Article 7 of the ICCPR and under the UNCAT, for example, concern these traditional constructions of torture. In addition, the concurrent raising of Articles 7 and 10(1) of the ICCPR reinforces this understanding. Article 10(1) of the ICCPR has been accepted as applying to less serious forms of treatment within detention.\textsuperscript{56} The question for this thesis is what these traditional or early applications of torture mean for women.


\textsuperscript{56} Art. 10(1), ICCPR provides: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’
3. Feminist critiques of traditional constructs of torture

The main feminist critique of the original construction of the torture prohibition is that it has all the hallmarks of a 'gendered' prohibition. That is, the torture prohibition reflects and responds to the experiences of men rather than women. Traditionally conceived as a prohibition on physical assault perpetrated by public officials against political dissidents or common criminals, it fits within the 'male' paradigm of international law. The UNCAT, in particular, is cited as a prime example of the 'gendered' nature of international law precisely because, under its definition of torture, 'the severe pain or suffering' must be inflicted 'by a public official or other person acting in an official capacity' [my emphasis].

According to feminist scholars, women are more likely to suffer abuse at the hands of private citizens than by public officials, and thus, such violations fall outside the protection of international law. Put another way, the form of torture traditionally accepted as prohibited under international law involves a perpetrator — who is an official of the state, such as the police, the security forces, or the military — and a male victim — who is a political dissident or a prisoner of a common crime. If women are represented in the discourse at all, it is as the wives, mothers, or daughters of these victims. They are thus recognised under international law by virtue of their familial relationship with the victim rather than as autonomous actors. That is, women have historically gained access to the protective scope of the torture prohibition on male-defined and male-determined terms.

---


58 See, Ch. 1.
In the 1990s, feminist scholars and women’s rights activists began challenging the traditional view of torture in the context of the ethnically based conflict in the former Yugoslavia. During this conflict, widespread and systematic rape and sexual violence against women were used as a deliberate war strategy intended to terrorise the other ethnic group. Calls were made to prosecute and punish those responsible for these crimes and to recognise rape and other forms of violence against women as torture (VAW = T).

According to Rhonda Copelon, there are two obstacles to the recognition of gender-based violence as torture under international law. The first is the role of the public/private in international law. That is, the initial criterion that the state be the perpetrator of the harm, for example, reinforces the public/private dichotomy to the extent that women are more likely to suffer violence at the hands of non-state actors in ‘private’ than from public officials in state custody. The purposive requirement in the UNCAT that the harm be inflicted for the purposes of extracting information or a confession reinforces this view. The second barrier to viewing rape as torture, according to Copelon, is the persistent trivialisation of violence against women, even to the point of not seeing or recognising domestic (or other forms of) violence against women as a form of violence.\(^59\) In calling for the torture prohibition to apply to domestic and other forms of violence against women, Copelon asserts: ‘[W]hen stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence.’\(^60\)

MacKinnon puts forward similar arguments. She argues that what distinguishes torture from domestic or sexual violence against women is that ‘torture is done to men as well

---


\(^60\) Ibid., 296.
as to women'. 61 She refers to this as a ‘double standard’ – that is, torture is regarded as sufficiently serious to warrant international attention because it is done to men (as well as women), whereas there is less international attention paid to domestic or sexual violence because it is only or primarily a woman’s problem. 62 Copelon agrees when she notes that ‘history teaches us that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance’. 63 This is evidenced, for example, in the near total lack of international prosecutions for rape or other forms of sexual violence after the first and second world wars. 64 In peacetime, this is reflected, for example, in the continuation of marriage as a defence against rape in many national statutes. 65

Identifying control, intimidation, or elimination as the ‘generally recognized’ purposes of torture, MacKinnon argues that there is little difference between torture and rape or other forms of sexual violence. 66 Moreover, she does not reject the state nexus criterion required to establish torture. Rather, she argues that the state is not absent from the crimes committed against women: rape and other sexual violence are ‘neither random nor individual’ but ‘defined by the distribution of power in society’. 67 She argues that the state is ‘typically deeply and actively complicit in the abuses under discussion,

62 Ibid.
64 One of the cited exceptions to this was the Dutch prosecution of Japanese soldiers in Indonesia for the crime of ‘enforced prostitution’ of Dutch women: see, U. Dolopol and S. Paranjape, Comfort Women, An Unfinished Ordeal: Report of a Mission (International Commission of Jurists, 1994), 135-137.
65 See, e.g., Concluding observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 7.
67 Ibid., 22.
collaborating in and condoning them'.\textsuperscript{68} She claims that ‘[t]he abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of law and policy’.\textsuperscript{69}

Feminist activists and writers have harnessed the VAW = T school of thought owing to the status attached to torture under international law. Viewing rape as a form of torture, for instance, is thought to equate the severity of the assault with one of the most serious human rights violations. Hannah Pearce argues that doing so ‘give[s] the crime specific symbolic significance that recognises it as an affront to personal integrity, rather than as a crime against honour or custom’.\textsuperscript{70} MacKinnon similarly recommends relying on the ‘recognized profile’ of torture, partly because it carries with it effective legal sanctions and penalties.\textsuperscript{71} Similar arguments have been framed in the context of rape and sexual violence as genocide. Katharine Franke, for example, has praised the Prosecutor and the International Criminal Tribunal for Rwanda (ICTR) for finding that rape in the Rwandan conflict constituted a form of genocide. She states:

Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of injury ... [the Tribunal] has chosen to tailor the construction of these crimes to the way in which sex-related violence figures in the physical or mental destruction of a people or person.\textsuperscript{72}

In other words, some feminist scholars acknowledge the benefit of ‘the rhetorical connection of rape to genocide’ because it has brought attention to the pervasive extent of rape in war.\textsuperscript{73} The same arguments are used in relation to rape as torture. In addition,
it has been considered necessary to prevent the high-profile attention to rape (and other violence against women) from becoming a short-lived or ‘fashionable’ episode, as rape as torture should always be treated as a ‘violation of the highest order’.

This inclusive approach has been challenged by other feminist scholars. Karen Engle, for instance, criticises the debates that emerged among feminist international legal scholars during and after the Yugoslav conflict in relation to rape and genocide. She argues that this discourse served to ‘reify ethnic difference, diminish women’s capacity to engage in sexual activity with the “enemy” during the war, and downplay the extent to which any but extraordinary women could be perpetrators in war’. It might also be argued that focusing so heavily on rape and sexual violence results in debate that ignores the fact that women are subject to torture under its traditional construction. After all, women were among the first users of the individual communications procedures, alleging torture either on their own behalf or on behalf of other persons, including other women. Nevertheless, Andrew Byrnes argues that, even under these traditional circumstances, the international provisions do not fully reflect the nature and extent of violations faced by women in the public sphere. The VAW = T approach is further open to criticism for playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness

---

75 L. Koiz, ‘Dance, Sister, Dance!’, in B. Duner (ed.), An End to Torture: Strategies for its Eradication (London: Zed Books, 1998) 90. It is worth noting that this push to use existing instruments to the advantage of women has arisen alongside calls for the creation of separate instruments addressing violence against women, but has so far only culminated in a General Assembly Declaration on the Elimination of Violence against Women, GA res. 2283 (XXII), 7 Nov. 1967.
of the harm with male conceptions of torture rather than as grave human rights violations in their own right.

Clare McGlynn has questioned the merit of pursuing the feminist strategy of ‘rape as torture’ on two fronts. First, she argues that state complicity cannot extend to every rape. The difficulty of linking the state to the rape in question appears more punctuated in peacetime than in wartime, where in the latter, deliberate strategies targeting particular women for sexual violence or a disregard that it is taking place may be identified. In peacetime, on the other hand, governments may pursue a range of policies and programmes to combat violence against women that may be entirely ineffective. While acknowledging that ‘rape does happen because of gender inequalities’, McGlynn additionally asserts that viewing rape as torture will have no effect on reducing the prevalence of the crime or on ensuring that more perpetrators are brought to justice.\(^79\)

Second, McGlynn considers that the rhetoric of ‘rape’ is perhaps as powerful, if not more powerful, than that of ‘torture’\(^80\). Likewise, in Chapter 3, I have argued that the language of ‘violence’ is perhaps more obvious and, therefore, may be more effective as a feminist strategy to combat violence against women than the weaker language of sex discrimination. Many feminists agree that violence against women is a human rights violation, but where they disagree is in relation to the choice of provision and therefore terminology. Contrary to McGlynn’s approach of retaining the language of ‘rape’, I question whether ‘rape’ as a crime has gained the status of abhorrence at a domestic level in any society that is attributed to torture at an international level. The symbolism of labelling an act as ‘rape’ is socially and culturally contingent. Precisely because it is a crime generally considered to be perpetrated against women, it has not attained the same

\(^80\) Ibid., 78.
status under domestic or international laws. Perversely, the same could be said of the language and practice of torture. Not every society objects to torture or comprehends its boundaries in the same way. Nonetheless, at the level of international law, torture has attained a particular peremptory status. Rape, on the other hand, is not an identifiable international crime or human rights violation in its own right. Other scholars have argued that strategies that include the language of both rape and torture ought to be pursued: 'There is a need to recognize the general – rape as torture – as well as the particular – rape as rape. An accurate classification of abuse is important not just to give victims a voice, not only to break down stereotypes and not merely to accurately record the picture.'

Clearly, any effective feminist strategy must rely on terminology that invokes the most disapproval, and in the absence of an explicit prohibition on violence against women, women's rights activists must use the means at their disposal. However, the VAW = T approach is not without its problems in the context of violence against women.

One of the weaknesses of the VAW = T formula is that it is subject to the political environment in which it is posited. The VAW = T school of thought gained acceptance in the 1990s during a period in which the international community had moved its attention away from the autocratic regimes of the 1970s and 1980s to the wars in the former Yugoslavia and Rwanda, which were believed to be fought 'on and through women's bodies'. Following the terrorist attacks carried out against the United States on 11 September 2001, international human rights law has been subject to a number of

---

attempts at boundary redrawing in the counter-terrorism aftermath.\footnote{One example is the challenge to the precedent: in Chahal \textit{v. United Kingdom}, ECHR Reports – 1996 (Grand Chamber decision) 15 Nov. 1996, in which the European Court of Human Rights held that there was an absolute prohibition against return to substantial risk of torture. This decision was challenged unsuccessfully in the case of Saadi \textit{v. Italy}, Grand Chamber decision handed down 28 Feb. 2008 (Applic. No. 37201/06, ECHR Reports – 2008, with the United Kingdom intervening to argue that there should be exceptions to the general position. Another challenge is still pending: Ramzy \textit{v. The Netherlands} (Applic. No. 25424/05), admissibility decision 27 May 2008 – pending before ECHR, UK intervening. See, also, D. Moecckl, \textit{Saadi v. Italy: The Rules of the Game Have Not Changed} (2008) 8 \textit{Hum. Rts. L. Rev.} 534.} Within this dialogue, national and international discussions on what constitutes torture have retreated to the traditional canon of acts perpetrated by government (and in particular military) agents within custodial settings. Meanwhile, advances made by women’s rights groups in attempting to get violence against women on the international radar by advocating rape as torture, whether perpetrated by state or non-state actors, have lost some momentum.\footnote{See, e.g., H. Charlesworth, \textit{The Hidden Gender of International Law} (2002) 16 \textit{Temple Int’l & Comp. L. J.} 93; H. Charlesworth and C. Chinkin, \textit{Editorial Comment: Sex, Gender, and September 11th} (2002) \textit{96 Amer. J. Int’l L.} 600; C.A. MacKinnon, \textit{Women’s September 11th: Rethinking the International Law of Conflict}, in C.A. MacKinnon, \textit{Are Women Human? And Other International Dialogues} (Cambridge, MA: Harvard University Press, 2006) 259.} This reveals that tying the hope of women’s rights to traditional rights that were initially conceived to apply to a specific, ‘male’ set of circumstances is a strategy vulnerable to the peaks and troughs of the system of international relations as a whole.

Conversely, rejecting the VAW = T approach is risky, as doing so plays into the hands of those sceptics or so-called legal purists who argue that torture has a specific legal meaning and that it should not be ‘watered down’. Rejecting the inclusion of women’s concerns within existing provisions leaves women outside the protection of the law.\footnote{See, also, H. Charlesworth, \textit{Alienating Oscar? Feminist Analysis of International Law}, in D.G. Dallmeyer (ed.), \textit{Reconceiving Reality: Women and International Law} (American Society of International Law, 1993) 1.}

For feminist strategists, this is a fine line to walk, and it highlights further obstacles that must be overcome in equating violence against women with torture.
In response to feminist literature, women’s activism, and international criminal jurisprudence, the UN human rights treaty bodies have in principle adopted the pragmatic approach of equating violence against women with torture (VAW = T). Their practice has, however, been inconsistent and reveals some additional practical problems of this approach, which are discussed below.

C. VIOLENCE AGAINST WOMEN AS TORTURE: EMERGING INTERPRETATIONS

1. The severity threshold

Although slow to incorporate women’s experiences of violence within the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, the HRC, and to a lesser extent the CAT, now do so as a matter of routine. Under Article 7 of the ICCPR, the HRC has condemned domestic violence, rape and sexual violence, female genital mutilation, clandestine abortions, unequal treatment in relation to punishment for adultery, the failure to outlaw marital rape or levirate, ‘honour’

87 See, e.g., Sri Lanka (para. 20); Colombia (para. 14); Germany (para. 12); Lithuania (para. 9); Liechtenstein (para. 8); and Gambia (para. 16(c)): Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004).
89 See, e.g., Sri Lanka (para. 12); Colombia: Report of the Human Rights Committee, UN Doc. A/59/40 (Vol. I) (2004). Unsafe abortion has also been referred to in a number of States parties reports under Art. 6.
crimes,\textsuperscript{92} and early marriage.\textsuperscript{93} The HRC has called upon states parties to ensure: that their justice systems incorporate restraining orders to protect women from violent family members; that shelters and other support are provided to victims; that measures are established to encourage women to report domestic violence to the authorities;\textsuperscript{94} and that ‘material and psychological relief to victims’ is available.\textsuperscript{95} The HRC has also referred to the particular issues facing women within state custody, including sexual violence against female prisoners.\textsuperscript{96}

Similarly, the CAT has referred to the specific experiences of women. It regularly ‘expresses its concern’ for sexual violence and assault against female detainees and prisoners by law-enforcement personnel,\textsuperscript{97} which includes its use to extract information on the whereabouts of their husbands or other relatives.\textsuperscript{98} It has raised the issue of inter-prisoner sexual assaults.\textsuperscript{99} It has recommended to the US, for example, that it take action to investigate, prosecute, and punish those who violate the torture prohibition, ‘especially those who are motivated by discriminatory purposes or sexual gratification’.\textsuperscript{100} The CAT has also expressed concern over issues of female genital

\begin{itemize}
\item \textsuperscript{92} The HRC referred to so-called ‘honour’ crimes committed mostly against girls and women of foreign extraction in Sweden (para. 8) without identifying a particular ICCPR Article: Report of the Human Rights Committee, UN Doc. A/57/40 (Vol. I) (2002).
\item \textsuperscript{97} E.g., Concluding observations on USA, contained in Report of Committee against Torture, UN Doc. A/55/44 (2000), para. 179.
\item \textsuperscript{99} E.g., Concluding observations on The Netherlands, UN Doc. A/55/44 (2000), para. 187.
\item \textsuperscript{100} E.g., Concluding observations on USA, contained in Report of Committee against Torture, UN Doc. A/55/44 (2000), para. 180.
\end{itemize}
mutilation, \textsuperscript{101} domestic violence, \textsuperscript{102} and the sexual harassment of girls. \textsuperscript{103} The CAT has focused on criminal laws, raising concern, for example, that the Cameroonian Criminal Code permits an exemption from punishment of a rapist if he subsequently marries the victim. \textsuperscript{104} The CAT has congratulated the People's Republic of China and Hong Kong Special Administrative Region for 'increas[ing] sentences for certain sexual crimes, such as incest'. \textsuperscript{105} The Committee has further praised moves by Georgia to prosecute and punish violence against women, thus suggesting that it falls generally within the remit of the UNCAT. \textsuperscript{106}

In enumerating the above range of forms of violence against women, the committees acknowledge that these acts satisfy the severity threshold for findings of torture. That is, the committees accept in principle that these acts are as serious as traditional acts of torture or other forms of cruel, inhuman or degrading treatment or punishment. However, in spite of the rhetoric, the committees have not always stayed attuned to gender factors in their decision-making (see below). There is very limited guidance offered by any committee to determine on what legal basis these forms of violence against women may be said to be relevant to the torture prohibition, or why they specifically meet the torture threshold. Providing reasoned arguments is an important step to legitimising the approach taken. Without it, accusations that the committees have gone beyond their respective mandates are more easily supported by those who object to the approach, including states.

\textsuperscript{101} E.g., Concluding observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 7.
\textsuperscript{102} E.g., Concluding Observations on Greece, UN Doc. CAT/C/CR/33/2, 10 Dec. 2004, para. 5(k); Zambia, UN Doc. A/57/44, 25 Aug. 2002, para. 7(c).
\textsuperscript{103} E.g., Concluding observations on Greece, UN Doc. CAT/C/CR/33/2, 10 Dec. 2004, para. 5(h); Egypt, UN Doc. CAT/C/CR/29/4, 23 Dec. 2003, paras. 5(d) and (e).
\textsuperscript{104} Concluding observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 7.
\textsuperscript{106} Concluding observations on Georgia, UN Doc. A/56/44, 7 May 2001, para. 2(j).
(a) Rape and sexual violence

Of all the forms of violence against women, the issue of rape and sexual violence as torture has been given the most attention by international courts and tribunals. As noted above, this arose out of calls for the prosecution of those who had committed widespread and systematic rapes in the former Yugoslavia and Rwanda in the 1990s. A landmark decision, or at least the first decision of its kind, in terms of recognising women’s claims of having been subjected to torture (and genocide) during wartime is that of *Prosecutor v. Jean-Paul Akayesu*.\(^{107}\) The Trial Chamber of the ICTR ruled that, in certain circumstances, rape may constitute a form of torture for the purposes of criminal liability. The Trial Chamber stated:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity.\(^{108}\)

Similar findings were made by the International Criminal Tribunal for the former Yugoslavia (ICTY).\(^{109}\) Although decided under the *lex specialis* of international criminal law and international criminal responsibility, the analogy between rape and torture is clear. A similar statement that equates rape with torture under human rights law is the case of *Raquel Martí de Mejía v. Peru*.\(^{110}\) The Inter-American Commission on Human Rights referred to both the physical as well as the mental suffering caused by

---

107 *Prosecutor v Jean-Paul Akayesu*, ICTR Case No. ICTR-96-4-T, 2 Sept. 1998; Case No. ICTR-96-4-T (AC), 1 June 2001.
109 See, e.g., *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001; upheld on appeal, Case No. IT-96-23 and IT-96-23/1, 12 June 2002, paras. 482 and 496. The Trial Chamber found the three defendants guilty of torture, rape, and enslavement as both crimes against humanity and war crimes, pertaining to a ‘rape camp’ near Foca, a small Bosnian town southeast of Sarajevo, where they held women for many months and who were subjected to multiple rapes, including being ‘sold’ or ‘rented out’.
the act of rape upon the applicant. Additionally, the Commission mentioned expressly the fact that rape can cause a woman to suffer 'public ostracism', stating:

The fact of being made the subject of abuse of this nature [that is, rape] also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

In 1995, the Inter-American Commission report on the human rights situation in Haiti specified that rape not only represents inhumane treatment that infringes upon physical and moral integrity, but that it is also a form of torture in the sense of Article 5(2) of the American Convention on Human Rights (ACHR). The European Court of Human Rights has similarly held that rape is torture (see below).

Despite the above general statements on the broad scope of Article 7 of the ICCPR by the HRC, there have been very few female applicants who have brought proceedings alleging a breach of Article 7 as a result of sexual or other violence outside the traditional construction of torture within state custody. Moreover, in cases that raise specific forms of harm suffered by women, their concerns are almost entirely absent

111 Note, also, the case of Loayza-Tamayo v Peru, C33, Judgment 17 Dept. 1997, in which the Commission accepted that the applicant had been raped and that this constituted inhumane treatment, while the Court ruled that the accusation of rape could not be substantiated given the evidence. This case is interesting as the Court was prepared to accept other evidence relating to incommunicado detention, solitary confinement, intimidation with threats of further violence, etc. but not in relation to the rape (para. 58). It is arguable that a different level of proof was expected for an accusation of rape.
112 Raquel Martí de Mejía v Peru, Case 10.970, Report No. 5/96, IACHR, OEA/Ser. L/V/II.91 Doc. 7 at 157 (1996), (no page number but linked to n. 49).
114 Sexual violence, for example, has been asserted in a number of cases, but not by women: see, e.g., Alberto Grille Motta v. Uruguay, HRC 11/1997, in which the HRC found evidence of torture and inhuman treatment, in which the perpetrators, together with other forms of maltreatment, inserted bottles or barrels of automatic rifles into the male author's anus; Mohammed Ajaz and Amir Jamil v. Republic of Korea, HRC 644/1995, in which the authors asserted that electric shocks had been applied to their genitals in order to force a confession, but on the evidence before it, the HRC found no violation; Rodriguez v. Uruguay, HRC 322/1998, in which one of the alleged violations was of electric currents being applied to his eyelids, nose and genitalia. See, also, K.L.B-W. v. Australia, HRC 499/1992, in which a woman claimed to have been sexually assaulted as a hospital patient. Her case failed at the admissibility stage because the alleged assault occurred prior to the entry into force of the Optional Protocol on the State party concerned.
from deliberations. In *Gedumbe v. Democratic Republic of Congo* (DRC), a male teacher from the Democratic Republic of Congo (DRC) brought a claim under Article 7 of the ICCPR, alleging injury to himself. He taught at a consular school in Bujumbura, Burundi. His accusation was that a former ambassador had embezzled his salary 'in order to force him to yield his wife [to the ambassador].' The complainant argued that the arbitrary deprivation of his employment, the embezzlement of his salary, and the destabilisation of his family caused by the alleged 'adultery' (language taken from the complaint itself) constituted torture and cruel and inhuman treatment. He also claimed, *inter alia*, breaches of Articles 17 and 23(1) of the ICCPR. Although finding that the author's claims were unsubstantiated, and therefore declaring certain aspects of the case to be inadmissible, the HRC did not state that such allegations would have fallen outside the parameters of Article 7 should they have been otherwise substantiated. Of significance for present purposes is that the HRC did not comment upon the fact that the complainant's wife was also an aggrieved party and arguably the proper complainant for such a communication, especially in relation to her 'forced' affair

---

115 Most other jurisdictions have had similar difficulty with these issues. See, e.g., *Loayza Tamayo v. Peru*, I-A. Crt. H.R. Ser. C, No. 33, Judgment 17 Sept. 1997, para. 58 (The case involved a female professor accused of terrorism-related offences who alleged that she had been subjected to forms of torture by officers of the Peruvian National Police Force, including, inter alia, rape, fondling, threats of drowning, beating, and solitary confinement, in order to force a confession. Cumulatively these acts, with the exception of the rape, were held to infringe her dignity and to amount to inhuman treatment. However, in relation to the alleged rape, in spite of the assertion by the Commission that she had been raped, the Court stated 'upon an examination of the file and, given the nature of this fact', it could not be substantiated. The Court does not elaborate what it means by taking into account the 'nature of this fact', but given that the Court accepted a number of other forms of physical violence, including 'blows and maltreatment', the decision raises speculation that a different standard of proof was being expected to establish rape). Cf. *Dianne Ortiz v. Guatemala* Case 10.536, Report 31/96, I-A C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 332 (1997), in which the Inter-American Court held that the kidnapping, physical assault, and repeated rape by state agents of a United States' citizen and Catholic nun held that, although she could not substantiate the rape (she could substantiate the other violence she suffered through medical evidence), any sexual violence would have formed part of the torture to which she was subjected.


118 *Ibid.*, paras. 3.1 and 3.2.

119 Art. 17 provides: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.' Art. 23(1) provides: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'
(potentially a case of sexual slavery under Article 8 of the ICCPR or, at a minimum, degrading and inhuman treatment in terms of being treated as chattel to be bargained over). In fact, the author argued that being forced to ‘yield’ his wife to the ambassador constituted ill-treatment to him, but not against his wife. Her circumstances were completely absent from the communication. A similar case in which a male complainant alleged that his exclusion from military service owing to a finding of guilt by a military tribunal, without being given the possibility of mounting a defence, because he ‘tolerated the dishonourable lifestyle of his wife’ constituted ‘an attack on his honour’ (my emphasis) and degrading treatment to him.\textsuperscript{120}

An earlier case illustrates a similar pattern of gender blindness. Information was provided in the complainant’s statements that government forces had visited his house where his pregnant wife lived. The house was ransacked, and she was beaten to the point of causing her to suffer a miscarriage. Although it is beyond dispute that the husband was also a victim of egregious violations of Article 7, his wife was not added as a party to the communication, and nor did the HRC comment upon this omission or the vicious attack upon her.\textsuperscript{121} As shown in Chapter 2, there is nothing in the procedural rules of the treaty bodies that would prevent any complaint from being amended to include the injuries to the complainant’s wife or to otherwise comment on gendered aspects of such cases.

\textsuperscript{120} \textit{V.E.M. v. Spain}, HRC 467/1991. The HRC declared the claim inadmissible, in accordance with Spain’s reservation to Art. 5(2)(a) of the Optional Protocol, as the same matter had been examined and declared inadmissible by the European Commission on Human Rights. This decision was made notwithstanding the European Commission’s summary dismissal of the case and that it had not been considered on its merits. No details were available on what the alleged ‘dishonourable lifestyle’ entailed.

\textsuperscript{121} Roberto Zelaya Blanco v Nicaragua. HRC 328/1988, para. 6.7. Blanco was an engineer and university professor who was sentenced to thirty years’ imprisonment for outspoken criticism of the ‘Marxist orientation of the Sandinistas’ (para. 2.1). He served ten years of the sentence and was subjected to serious forms of abuse.
Like the HRC, there have been few individual communications before the CAT raising rape or sexual violence as a form of torture. In the early cases, the CAT did not confront the issue head-on, but its approach has improved. In *Kisoki v. Sweden*, for example, the CAT shied away from explicitly finding rape as a form of torture. In fact, the Committee simply did not refer to the written testimony that the complainant, a political activist of an opposition party in what was at the time Zaire, had alleged that she was raped on more than ten occasions during her one year in detention.\footnote{\textit{Pauline Muzonzo Paku Kisoki v. Sweden}, CAT 41/1996. See, also, \textit{E.B. Abad v. Spain}, CAT 59/1996.} 

Caroline Lambert argues that ‘the sexualised nature of the torture, particularly the rape[s], was erased from the committee’s consideration of the issue’.\footnote{C. Lambert, ‘Partial Sites and Partial Sightings: Women and the UN Human Rights Treaty System’, in S. Pickering and C. Lambert, \textit{Global Issues, Women and Justice} (Sydney, NSW: Sydney Institute of Criminology Series No. 19, 2004) 136, 152-3.} Instead, the CAT stated that ‘her political affiliation and activities, her history of detention and torture, should be taken into account when determining whether she would be in danger of being subjected to torture upon return’.\footnote{*A.S. v. Sweden*, CAT 41/1996, para. 9.3.} Although it can be implied from this decision that rape in detention is a form of torture, it was not explicitly articulated, even in such an obvious case.

In a later case, that of \textit{A.S. v. Sweden}, the CAT held that Sweden would be in breach of Article 3 of the UNCAT if it were to return an Iranian woman to Iran. As a widow of a ‘martyr’, she had been forced into a sighe or mutah marriage after the death of her husband. She had been sentenced to death by stoning for having committed adultery with a Christian man.\footnote{A.S. v. Sweden, CAT 149/1999. A *sighe* or *mutah* marriage is a short-term or fixed-term contract of marriage, usually accompanied by dowry payments, which is believed to have its origins in Islam. Its apparent aim is to avoid the repercussions of adultery or sexual intercourse outside marriage. The marriage ends without divorce upon the expiration of the contractual period. In the case of A.S., the period was one and a half years. If the marriage is consummated then the woman is not allowed to remarry until a certain period of time has elapsed. The practice is widely criticised by women’s rights groups as denying a woman her internationally recognised rights associated with equality and marriage, such as consent, mutual divorce, and joint responsibility for children. Frequently, these marriages are not consensual.} Although being far from clear in its findings, the decision in
favour of her implies that either alone or in concert both these acts (the forced marriage and the punishment for adultery) amounted to a form of torture for the purposes of applying Article 3 pertaining to non-refoulement protection. 126 While this is a progressive decision in terms of its final outcome, the CAT did not deal with the gender aspects of the case thoroughly. The Committee did not, for example, elaborate upon or mention in its final statements the sexual slavery attributed to this sighe or mutah marriage, A.S.’s harsh questioning by the Zeinab Sisters – the female equivalents of the Pásdárán, the Iranian Revolutionary Guards – who investigate women suspected of ‘un-Islamic behaviour’, or the domestic violence she suffered at the hands of her sighe or mutah ‘husband’ after being delivered to him by the police. 127

In comparison to the above jurisprudence, the CAT has expressly stated that, where a woman has been raped multiple times, she has been a victim of torture in at least two cases. In C.T. and K.M. v. Sweden, a Rwandan citizen and her son sought to stay a deportation order. C.T. claimed that her forced deportation to Rwanda would amount to a breach of Article 3 of the UNCAT because she feared that she would be immediately detained and tortured by the Rwandan Directory of Military Intelligence and subjected to rape and interrogation. She claimed that she had been detained in Rwanda in 2002 as a member of the PDR-Ubuyanja party and that she had been repeatedly raped under threat of execution during her detention. As a result of the rapes, she became pregnant with her son K.M. Finding in her favour, the CAT held:

The first named complainant was repeatedly raped in detention and as such was subjected to torture in the past. On examining the dates of her detention and the date of the birth of her son, the Committee considers it without doubt that he

126 ibid., para. 8.4.
127 ibid., para. 2.5. On the issue of punishment for adultery, see the European Court of Human Rights in Jabari v. Turkey, ECHR Reports 2000-VIII, Final Judgment, 11 Oct. 2000, in which it was held to be contrary to Art. 3 ECHR to return an Iranian woman to Iran who faced stoning to death for adultery. The Court stated that the punishment itself constituted a breach of Art. 3, regardless of any extenuating or subjective circumstances of the case.
was the product of rape by public officials, and is thus a constant reminder to the first named complainant of her rape.\textsuperscript{128} [my emphasis]

The second case, that of \textit{V.L. v. Switzerland}, involved a woman who claimed that her return to Belarus would violate Article 3 of the UNCAT.\textsuperscript{129} Prior to her initial departure from Belarus, she claimed that she had been interrogated and raped by three police officers seeking information on the whereabouts of her husband, who had been politically active and critical of the President of Belarus. The husband had fled Belarus, seeking asylum abroad. During the interrogations, she was beaten and penetrated with objects. After complaining to the officer-in-charge about the sexual abuse, she was subjected to a campaign of harassment, until one day the same officers who had previously raped her then kidnapped her and drove her to an isolated spot and raped her again. In relation to whether the rapes constituted acts of torture, the CAT set about linking the components of her situation to the definition in Article 1:

The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, punishment, retaliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture.\textsuperscript{130}

In relation to any suggestion that torture has to occur within an official place of detention, the CAT clarified:

In assessing the risk of torture in the present case, the Committee considers that the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities ... Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities.\textsuperscript{131}

These two cases therefore set aside any lingering doubts that rape by public officials can constitute torture under Article 1 of the UNCAT — it is both sufficiently painful and

\textsuperscript{130} \textit{Ibid.}, para. 8.10.
\textsuperscript{131} \textit{Ibid.}, para. 8.10.
serious as well as committed for a range of proscribed purposes, including gender
discrimination. Although recognised as conceptual breakthroughs in these respects,
these cases do not step outside the paradigm of state-perpetrated or -sponsored terror
against political opponents or their family members. At the same time, however, they
serve to remind us of the political affiliations of women and their risk of torture by
reasons of association.

Overall, the case law in relation to rape and sexual violence is mixed. It shifts from
complete blindness to total recognition. The latter is partly a reflection of growing
expertise and analysis within the treaty bodies, with a better performance record in the
last few years. At a minimum, rape is recognised as a form of torture in a specific set of
circumstances. However, the mixed record raises a number of practical and conceptual
problems with the VAW = T approach. Acknowledging that there are a large number of
reasons why women hesitate to bring such claims before national or international
bodies,\(^{132}\) the fact that there have been only a handful of cases before the treaty bodies
nonetheless suggests a lack of confidence in the treaty bodies and their gender expertise.
Women are not yet able to rely on a consistent approach to gender in decision-making,
and many women’s experiences of violence fall outside these contexts.

\((b)\) Psychological forms of torture

Sexual violence, of course, is not the only harm from which women seek protection
and/or redress for, although the focus on sexual violence within feminist literature could
suggest otherwise. Since the initial discussions over the terminology to be incorporated
into Article 7 of the ICCPR and Articles 1 and 16 of the UNCAT, there has been no

---

\(^{132}\) See, Ch. 2.
question that torture can include psychological forms of intimidation or threats of violence in addition to physical ones. The travaux préparatoires show an acceptance that Article 7 of the ICCPR, for example, embraces both physical and mental torture.\textsuperscript{133} This has been confirmed in the HRC's 1992 General Comment on torture\textsuperscript{134} and is endorsed in the views of both committees.

Specifically relevant to women's experiences is the HRC's acceptance that Article 7 applies to 'indirect' torture or, in other words, the suffering and torment endured by third persons, such as close relatives of detained or 'disappeared' persons. The HRC stated in \textit{Quinteros v. Uruguay}:

\begin{quote}
[T]he Committee ... understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.\textsuperscript{135}
\end{quote}

This decision has given voice to the many claims of women as wives, mothers, sisters, and daughters of politically active persons or of relatives in prison, and can be regarded as a positive expansion of the torture prohibition for women (as well as fathers, brothers, and sons). It is notable too that this case bucks the trend of decisions involving the traditional fodder of the torture prohibition that tend to centre around male prisoners, in so far as the principal complainant was a 'disappeared' daughter. The

\begin{flushright}
\textsuperscript{133} UN Doc. E/CN.4/SR.149, paras. 33 and 38 (Egypt), para. 37 (The Philippines), para. 39 (Chairman), para. 41 (Lebanon).
\textsuperscript{134} HRC GC No. 20; Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992) (no UN Doc.), para. 5.
\textsuperscript{135} HRC 107/1981, para. 14. In \textit{Quinteros v. Uruguay}, the HRC found that anguish and stress caused to the mother by the abduction and disappearance of her daughter by security forces and by the continuing uncertainty concerning her fate and whereabouts breached Article 7. Similarly, in \textit{Schedkov v. Belarus}, HRC 886/1999, a breach was found where a mother was not informed of the date, nor the hour, nor the place of her son's execution, nor the exact place of her son's subsequent burial. The latter was found to amount to inhuman treatment. See, also, Slavetovitch v. Belarus, HRC 887/1999; Jensen v. Australia, HRC 762/1997; C v. Australia, HRC 900/1999; Bondarenko v. Belarus, HRC 886/1999; Lyashkevich v. Belarus, HRC 887/1999; Sarma v. Sri Lanka, HRC 950/2000. The HRC has not always taken into account the psychological harm to the family members of victims: see, \textit{Katombe L. Tshishimbi v. Zaire}, HRC 542/1993, in which the main victim had been abducted and was missing. No mention was made of the suffering of the wife, the person submitting the application on her husband's behalf.
\end{flushright}
decision serves to highlight that women are not mono-dimensional characters but participate in both the public and the private sphere: a factor often overlooked by the treaty bodies.

(c) Forced sterilisation

In respect of the second sentence of Article 7 (prohibition against non-consensual medical or scientific experimentation), the Working Group of the Third Committee of the UN General Assembly commented during the drafting debate that ‘[c]ertain kinds of treatment became cruel, inhuman or degrading only because they were administered without the subject’s free consent’. 136 Similarly, the HRC has stated in its 1992 General Comment:

The Committee … observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health. 137

An absence of consent can thus be a contributing factor to the characterisation of a particular act as torture or ill-treatment, whether or not it is within the context of medical or scientific experimentation. It can be implied from the language of the HRC’s 1992 General Comment that experimentation within detention or imprisonment is but one example of such prohibited acts. In support of this, the HRC has referred to the sterilisation of women without their consent as a breach of Article 7, both in a number


137 HRC, General Comment No. 20: Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992) (no UN Doc.), para. 7.
of concluding observations on states parties' reports and in a later General Comment issued in 2000.

In its concluding observations on Slovakia in 2003, for example, the HRC raised concern about the 'forced or coerced sterilisation' of Roma women 'without free and informed consent'. Forced sterilisation has also been noted as being of particular concern for disabled women and girls. Despite these statements by the HRC, however, only very few individual communications have raised issues of non-consensual experimentation, and these cases have fallen into the category of traditional forms of ill-treatment, such as the use of hallucinogenic drugs or electro-convulsions to force confessions. The lack of cases raises questions about the effectiveness of the torture prohibition for some issues of violence against women.

(d) Other unconventional claims

The HRC has considered a range of other so-called unconventional cases under Article 7, including, for example, that compulsory military service or alternative service breaches Article 7; and that enforcement of a deportation order resulting in the permanent separation of an individual from his family and/or close relatives, and

---

138 See, also, Concluding observations on Japan (1998) UN Doc. CCPR/C/79/Add.102, para. 31; Concluding observations on Peru (2000) UN Doc. CCPR/CO/70/PER, para. 21; Concluding observations on Slovakia (2003) UN Doc. CCPR/CO/78/SCK, para. 12.
139 HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), para. 11.
141 See, CRC General Comment No. 9: The Rights of Children with Disabilities (2007), UN Doc. CRC/C/GC/9, 27 Feb. 2007, para. 60 (noting that disabled girls are subjected to forced sterilisation, which the Children's Committee considered to violate their rights to physical integrity).
142 See, e.g., Luciano Weinberger Weiss v. Uruguay, HRC 28/1978 (forced use of hallucinogenic drugs); Estrella v. Uruguay, HRC 74/1980 (forced use of hallucinogenic drugs); Acosta v. Uruguay, HRC 110/1981 (claimed subjected to psychiatric experiments for three years by the forced injection of tranquilizers every two weeks); K.L.B.-W. v. Australia, HRC 499/1992 (subjected involuntarily to a regime of electro-convulsion therapy, being maintained in deep sleep without food, and on drug dosages that exceeded forensic limits and without muscle relaxants).
banishment from the only country the complainant ever knew and in which he grew up, amounts to cruel, inhuman and degrading treatment.\textsuperscript{144} Given the comprehensive admissibility criteria,\textsuperscript{145} many of these cases have not proceeded to a review of the merits. However, it is noted that the HRC has not explicitly stated that they failed by reason of falling outside the scope of the provision. These cases suggest the possibility of opening up Article 7 beyond traditional forms of torture. Instead, the problem seems to lie in a lack of cases or a failure to substantiate the allegations, which in turn points to questions regarding the VAW = T approach. The CAT has not received the same range of individual communications, with most falling within the traditional construction of torture.

\textit{(e) Discrimination and torture}

The interlinkages between discrimination and torture also feature in the committees' jurisprudence and are of particular relevance to female claimants. In many of its concluding observations, for example, the HRC discusses Article 7 concerns in conjunction with Article 3 (equality between men and women), but there has been no consistency in its approach. Initially, the HRC did not point out the need (and requirement) for states to interpret and apply Article 7 of the ICCPR \textit{without discrimination}. General Comment No. 20 (1992) concerning the prohibition against torture noted two provisions that impact on the interpretation and application of Article

\textsuperscript{144} Charles E. Stewart \textit{v.} Canada, HRC 538/1993. The HRC declared the claim to be inadmissible on the basis of a lack of substantiation of the claim. See, also, Canepa \textit{v.} Canada, HRC 558/1993. See, further, Ngoc Si Truong \textit{v.} Canada, HRC 743/1997, in which the author claimed that removal to a country where he allegedly had no legal status would amount to cruel, inhuman and degrading treatment. The HRC found that he had not substantiated his claim, in particular, they disputed that he would be stateless. See, also, Francesco Madaffari \textit{et al.} \textit{v.} Australia, HRC 1011/2001, separation from family pending removal would cause psychological and financial problems. HRC found violation of Art. 10(1), but did not address Art. 7.

\textsuperscript{145} See, Ch. 2.
7, naming Articles 10 and 2(3) explicitly.\textsuperscript{146} No reference, however, was made to Article 2(1) (the non-discrimination clause) of the ICCPR.\textsuperscript{147} Such an omission was later ‘corrected’ by a subsequent General Comment on the equality of rights between women and men, in which the HRC pointed out the issues at stake for women under each of the Covenant provisions.\textsuperscript{148} In relation to torture, the HRC referred to domestic or other types of violence against women, including rape, the denial of access to safe abortion when pregnancy has resulted from rape, forced abortion or forced sterilisation, and the practice of genital mutilation.\textsuperscript{145} Although acknowledging the listing of these acts of violence as relevant to Article 7, the HRC failed to explain why or how they satisfy the scope of the torture prohibition. As stated earlier in this chapter, the failure to explain its reasoning provides scope for questions to be raised about the legitimacy of these views by opponents of the VAW = T strategy, especially states parties.

In addition, the listing of these acts within a separate General Comment on the issue of equality between women and men, rather than within a General Comment on torture, follows what has become a familiar isolationist method of UN treaty bodies in which women’s concerns are dealt with separately from mainstream human rights.\textsuperscript{150} In other words, gender mainstreaming, which was outlined in the Introduction to this thesis, remains an ‘add women and stir’ process.

\textsuperscript{146} Art. 2(3) provides: ‘Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his (sic) right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.’

\textsuperscript{147} Cf. HRC, General Comment No. 9: Humane Treatment of Persons Deprived of Liberty (Art. 10) (1982), para. 1(3) (Art. 10, ICCPR to be applied without discrimination).

\textsuperscript{148} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000).

\textsuperscript{149} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), para. 11. See, also, para. 15 which refers to separation of men and women in prisons.

Discrimination as a form of 'degrading treatment' rather than torture has been recognised in other jurisdictions, albeit with mixed success. The HRC has not yet received a communication that would establish its views on the relevance of discrimination to a finding of torture. However, the HRC has confronted allegations that biased tribunals (or discrimination more generally) could give rise to claims under Article 7 generally. Two cases are relevant here. The first concerned allegations that proceedings for determining refugee status by a biased tribunal amounted to cruel, inhuman, and degrading treatment. In this case, the applicant, a Ghanaian citizen seeking asylum in Canada, alleged that one of the commissioners, also of Ghanaian origin but of a different ethnicity to the applicant, was biased. The case was declared inadmissible on a number of grounds, including that the claimant had not complained about the bias during the proceedings for refugee status.\footnote{Kwame Williams Abu v. Canada, HRC 654/1995.} A second case raised sexist and racist bias in alleging that the Australian court system was corrupt and that it was biased against women and immigrants. On the facts before it, the HRC ruled that the applicant had not substantiated her claims, stating that they remained 'sweeping allegations'.\footnote{B.L. v. Australia, HRC 659/1995.} Although neither of these cases proceeded past the admissibility stage, they remain important in so far as neither the HRC nor the states parties concerned sought to argue that claims raising bias (or, for that matter, discrimination) are beyond the parameters of Article 7. This may suggest that, should similar cases be raised in the future, and if they can be substantiated, they would be considered by the HRC to be within Article 7.

The question of whether sex discrimination constitutes a form of inhuman or degrading treatment is complex, not least because it is tied to problems inherent in the discrimination hierarchy that has developed under international law. This hierarchy, as
described in Chapter 3, posits race discrimination as being of a more serious character than sex discrimination. For example, a 1973 European Commission decision held that racially discriminatory legislation that prevented Asian residents in Kenya and Uganda who had retained their United Kingdom citizenship from entering the UK for the purpose of settlement constituted, *inter alia*, 'degrading treatment' within the meaning of Article 3 of the ECHR.  In this case, the European Commission stated that 'a special importance should be attached to discrimination based on race' and that such discrimination 'could, in certain circumstances, of itself amount to degrading treatment ...'  In contrast, the European Court of Human Rights has arguably taken a different approach to immigration laws that differentiate rights on the basis of sex. In *Abdulaziz, Cabales and Balkandali v. United Kingdom*, the European Court accepted the arguments of three women applicants lawfully and permanently settled in the UK that laws which refused permission for their husbands to join them in the UK were discriminatory on the basis of sex, race, and, in the case of Mrs Balkandali, birth. However, the Court was not satisfied that such discrimination constituted 'inhuman or degrading treatment' under Article 3. In its ruling, the Court stated that 'the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and it was not designed to, and did not, humiliate or debase but was intended solely to achieve the aims ...' of limiting immigration and protecting the domestic labour market in times of high unemployment. There has been no blanket statement that sex discrimination, whatever its form or effect, is degrading (or inhumane).

---

For the CAT, the question of discrimination has emerged within the context of the action’s purpose, which is a criterion of the definition in Article 1 of the UNCAT. The list of proscribed ‘purposes’ in the final version of Article 1 is broader than the 1975 UN Declaration on Torture on which the UNCAT was based. Of particular relevance here is that the UNCAT definition includes ‘discriminatory purposes’.\(^{157}\) However, the ‘discriminatory purposes’ ground was not without its sceptics at the time of drafting.

The UK delegate to the drafting conference stated:

> The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.\(^{158}\)

The ‘discriminatory purpose’ ground has been raised by at least one applicant before the CAT, arguing that his Romani ethnicity should be taken into account. He asserted that his membership in a ‘historically disadvantaged minority group’ rendered him particularly vulnerable to ‘degrading treatment’ – in this case in the form of physical and verbal abuse. He was kicked and beaten while the police insulted his ethnic origins and cursed his ‘gypsy mother’. He argued: ‘All else being equal, a given level of physical abuse is more likely to constitute “degrading or inhuman treatment or punishment” when motivated by racial animus and/or coupled with racial epithets than when racial considerations are absent.’\(^{159}\) The CAT did not comment on this aspect of the claim, finding in any event that the alleged abuses amounted to torture within the meaning of Article 1.

In 2008, the CAT issued its second General Comment, in which the issue of discrimination featured as an indicator of torture. The General Comment provided: ‘The

\(^{157}\) Art. 1 of the UNCAT also includes ‘coercive’ purposes, which was not contained in the UN Declaration on Torture 1975.  
^{158}\) UN Doc. E/CN.4/L.1470, para. 27.  
Committee [against Torture] emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.\textsuperscript{160} In adopting the 'historic' language of non-discrimination rather than equality,\textsuperscript{161} the CAT stated:

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, \textit{regardless of} race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above. [my emphasis]\textsuperscript{162}

The CAT followed up this general non-discrimination statement by requesting specific information from states parties in their periodic reports in relation to women:

State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.\textsuperscript{163}

\textsuperscript{161} See, Ch. 3.
\textsuperscript{163} \textit{Ibid.}, para. 22.
Eliminating employment discrimination and conducting ongoing sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations and building a culture of respect for women and minorities. States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, educational, prison/detention, law enforcement, judicial and legal fields, within State institutions as well as the private sector. States parties should include in their reports information on their progress in these matters, disaggregated by gender, race, national origin, and other relevant status.\textsuperscript{164}

2. \textit{Public/private dichotomy}

As noted in Chapter 1, the demarcation between public and private spheres of everyday life for the purposes of international rules is at the source of women’s exclusion from international human rights law. The torture prohibition is no exception. Traditionally, international law was concerned only with state-perpetrated torture. As shown above, there has been a shift to incorporate acts of equivalent seriousness committed by non-state actors within the torture prohibition; however, to do so has required a link to be established between the act in question and the state. Under the ICCPR and most international human rights treaties, this requirement is known as the concept or test of due diligence. First elaborated in \textit{Velásquez Rodríguez v. Honduras} by the Inter-American Court of Human Rights, a state will be held accountable for the harm in question if the state has failed to prevent the harm by taking all reasonable steps or if it has failed to protect the victim, to investigate and prosecute those responsible, and to provide redress:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.\textsuperscript{165}

\textsuperscript{164} \textit{Ibid.}, para. 24.
The Court in *Velásquez Rodríguez v. Honduras* characterised the duty on states to exercise ‘due diligence’ as including obligations to prevent, investigate, and punish violations of human rights and to ensure that victims have access to adequate compensation.\(^{166}\) The duty to prevent, according to the Court, ‘includes all those measures of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages’.\(^{167}\) The due diligence concept is a broadly framed paradigm that has substantially extended the reach of international human rights law and the obligations of states, but it also has its limitations.\(^{168}\)

Although heralded as a triumph for women’s claims in so far as the standard permits the inclusion of non-state violence within international law,\(^{169}\) the case of Velásquez Rodríguez was decided in the absence of any gender analysis. In this case, the ‘disappeared’ person fitted within the traditional rights-bearer paradigm as a man accused of political crimes and subjected to torture who was then ‘disappeared’, yet the Court still found it necessary to comment on non-state forms of harm. The realisation that violence committed by non-state or private actors is a universal, rather than an exclusively female, issue is a fact that is often missing from feminist analyses of the law. It is not only women’s claims that benefit from a collapsing of the division between the public and the private for the purposes of international law. Similarly, in international refugee law, the first cases that successfully accepted that the ‘refugee’ definition applied to persecution at the hands of non-state actors in circumstances where

---


\(^{168}\) For further discussion on due diligence, see A. Byrnes and E. Bath, ‘Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments’ (2008) 8 *Hum. Rts. L. Rev.* 517.

the state is ‘unable or unwilling’ to protect the individual against such abuse did not involve a gender component or women.\textsuperscript{170} Of course, the emergence of the due diligence test in men’s rather than women’s cases, even though ‘private’ abuse disproportionately affects women, reminds us that, until an issue is of relevance to men, it is not an issue worth pursuing at the level of international law, and it will remain marginalised.

A different standard appears to have developed for the purposes of the UNCAT. According to the wording in Article 1 of the UNCAT, a state is responsible for the torture perpetrated by non-state actors when such pain or suffering is inflicted ‘by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity’ (my emphasis). Whether there is any real difference between the two approaches will be examined in turn below.

In its first General Comment on Article 7 in 1982, the HRC stated that Article 7 prohibits ill-treatment ‘even when committed by persons acting outside or without any official authority’\textsuperscript{171} (my emphasis). Almost from the outset, therefore, the HRC included within Article 7 the ultra vires actions of public or government officials, although it had yet to include purely (if there is such a thing) ‘private’ harm. Rape and other violent acts that were not part of a deliberate government policy could not, therefore, be excused as being mere criminal activities of a few rogue officers, as had been past practice under national and international laws. Under this analysis, the state has responsibility for its officials even if they act beyond their prescribed roles and orders.


\textsuperscript{171} HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982), para. 2.
The HRC’s subsequent General Comment issued in 1992 goes a step further by providing that Article 7 prohibits acts ‘whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity’\(^{172}\) (my emphasis). This General Comment seems to expand the definition of torture to embrace the actions of non-state actors who are not linked to any official position. Similarly, General Comment No. 31 (2004) on the nature of general legal obligations under the ICCPR clarifies that the obligations of states parties will be fully discharged only 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 their enjoyment of those rights. The 2004 General Comment provides that a state would be in violation of its obligations as a result of permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by ‘private’ acts. This duty to take positive measures to protect persons against ‘private’ harm is, therefore, ‘implicit’ within Article 7.\(^{173}\) These statements square with the decision of the Inter-American Court of Human Rights in Velásquez Rodríguez v. Honduras, outlined above.

Despite the willingness expressed by the HRC to integrate ‘private’ harm perpetrated against women within Article 7, the exploitation of ‘due diligence’ to do so remains embryonic in jurisprudential practice. There are only a handful of individual cases that directly discuss the question of persons acting outside their official capacity (in many cases, it is assumed that their actions were officially condoned), and even fewer invoke liability as a result of failing to act to counter private acts of harm.

\(^{172}\) HRC, General Comment No. 20: Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992), paras. 2 and 13.

\(^{173}\) HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), para. 8.
In *Wilson v. The Philippines*,\(^{174}\) for example, the HRC utilised language that appears to be more usually associated with the UNCAT (see below) than with the ICCPR, the HRC deciding that a breach of Article 7 arose in circumstances where other inmates beat the complainant, either on the guards' direct orders, or 'with their acquiescence'. The HRC did not explain precisely what it meant by 'acquiescence', but there was some indication that prisoner-on-prisoner violence was known to occur, if not encouraged, in specific circumstances and that the guards did not intervene to stop it.\(^{175}\) Concluding observations of the HRC on periodic reports by states parties have mentioned positive obligations such as enacting legislation outlawing torture and training state officials: efforts aimed at *protecting* individuals from and *preventing future* situations of abuse. So far, however, the HRC's jurisprudence tends to refer exclusively to positive *post-* abuse measures such as duties to investigate claims, to prosecute and to punish offenders, and to pay compensation to victims.

Because of the paucity of jurisprudence before the HRC invoking the due diligence standard in respect of women's claims, the decisions of other human rights bodies provide some guidance on how the standard is to be applied, and these are therefore highlighted here. In *M.C. v. Bulgaria*,\(^{176}\) the applicant (a 14-year-old girl who alleged she was raped by two men) claimed that Bulgarian law and practice did not provide 'effective protection' against rape and sexual abuse, as only those cases where the victim physically resisted were prosecuted. In line with decisions of other international and regional bodies, the European Court of Human Rights (ECtHR) held that Bulgaria

---


\(^{175}\) *Ibid.*, para. 7.3.

\(^{176}\) *M.C. v. Bulgaria*, ECHR Appl. No. 39272/98, 4 Dec. 2003. This case involved a fourteen-year-old girl who claimed that she was raped by two men, aged twenty and twenty-one year old. Criminal investigations in Bulgaria found insufficient evidence that M.C. had been compelled to have sex with the two men. The district prosecutor terminated the proceedings on the grounds that the use of force or threats had not been established beyond reasonable doubt and that no resistance on her part had been established.
had a positive obligation both to enact criminal legislation to punish rape effectively and to apply this legislation through effective investigation and prosecution. In particular, the ECtHR criticised the Bulgarian law for emphasising force rather than consent in defining the crime of rape. The ECtHR noted in particular that victims of sexual abuse, particularly girls below the age of majority, often fail to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. The ECtHR held that rape laws must reflect changing social attitudes requiring respect for the individual’s sexual autonomy and for equality. Not only is this a landmark decision in terms of the ECtHR’s emphasis on consent rather than force in relation to definitions of rape, it also effectively applied concepts such as sexual autonomy and equality to support its findings.\footnote{See, also, \textit{X & Y v The Netherlands}, A 91 ECHR (1985), in which the European Court found that failing to have a law allowing for criminal proceedings against perpetrators of sexual assault against a mentally handicapped girl violates the ECHR.} It was held that the state had failed in their due diligence obligations under Article 3 of the ECHR.

Although not dealt with as a torture issue, the Committee on the Elimination of All Forms of Discrimination against Women (the Women’s Committee) held Hungary to be in violation of the CEDAW in having failed in its duty of due diligence to provide a female victim of domestic violence with effective protection from the serious risk to her physical integrity, her physical and mental health, and her life – such risks being posed by her common-law husband.\footnote{\textit{A.T. v Hungary}, CEDAW 2/2003.} The Women’s Committee concluded that the state had failed in its obligations under the CEDAW because it had not enacted specific legislation to combat domestic violence and sexual harassment, because no shelters existed for the immediate protection of a woman in the victim’s circumstances with a disabled child, and because there was no injunctive relief, such as a restraining order,
available to her. Although the Women’s Committee did not analyse this case in light of international torture provisions, its findings, specifically the itemising of actions that ought to be taken by a state in order to fulfil its obligations of ‘prevention and protection’, may have ramifications for the test of due diligence applied by the HRC and other bodies. I now turn to the approach of the CAT.

As described above, the most criticised aspect of Article 1 of the UNCAT is the nexus requirement that the severe pain or suffering must be inflicted or instigated by or have the consent or acquiescence of a public official or other person acting in an official capacity. At the time of its drafting, there was discussion as to whether or not the definition of torture should be limited to acts of public officials. It was generally agreed that the UNCAT should apply both to acts committed by public officials as well as to acts for which public officials could be considered to bear some responsibility. France was alone in arguing that an act of torture relates to the ‘intrinsic nature of the

179 Ibid., para. 9.3.
180 Hungary had indicated that the Hungarian Parliament had adopted a resolution on a national strategy for the prevention and effective treatment of violence within the family, including the following: ‘introducing a restraining order into legislation; ensuring that proceedings before the Courts or other authorities in domestic violence cases are given priority; reinforcing existing witness protection rules and introducing new rules aimed at ensuring adequate legal protection for personal security of victims of violence within the family; elaborating clear protocols for the police, child care organs and social and medical institutions; extending and modernizing the network of shelters and setting up victim protection crisis centres; providing free legal aid in certain circumstances; working out a complex nationwide action programme to eliminate violence within the family that applies sanctions and protective measures; training of professionals; ensuring data collection on violence within the family; requesting the judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority; and launching a nationwide campaign to address indifference to violence within the family and the perception of domestic violence as a private matter and to raise awareness of State, municipal and social organs and journalists.’ (para. 5.7). It also stated ‘prompt and effective intervention by the police and other investigating authorities; medical treatment of pathologically aggressive persons and application of protective measures for those who live in their environment; operation of 24-hour “SOS” lines; organization of rehabilitation programmes; organization of sport and leisure activities for youths and children from violence-prone families; integration of non-violent conflict resolution techniques and family-life education into the public educational system; establishment and operation of crisis intervention houses as well as mother and child care centres and support for the accreditation of civil organizations by municipalities; and launching of a media campaign against violence in the family.’ (A.T. v Hungary, CEDAW 2/2003, para. 5.8).
act of torture itself, irrespective of the status of the perpetrator. Because of the inclusion of this phrase in Article 1, it has been criticised by feminist writers as impliedly excluding private acts. The case law on this point has been mixed.

In *G.R.B. v. Sweden*, in which the complainant said she objected to being returned to Peru because members of Shining Path had raped her and she feared the group’s reprisals, the CAT found that her claim failed on two grounds. First, the CAT held that a state party does not have an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the government. Such cases, it held, fall outside the scope of Article 3 of the UNCAT. Second, the complainant failed to show that she would be personally at risk.

Robert McCorquodale and Rebecca La Forgia rightly criticise this decision as the CAT did not deal with the issue of state acquiescence. They argue that the CAT ought to have decided whether the government of Peru had properly investigated the rape, how many reported rapes had not been investigated, and whether non-state actors were able to rape because of the lack of state action. The complainant submitted that her parents had reported the events to the police, ‘but they did not show any interest in the matter’. This decision is particularly troublesome in light of the well-documented evidence of rape and other violence perpetrated against women by Shining Path, including the assassination of 12 leading feminists. Human Rights Watch reported in 1992 that the military engages in widespread rape and that such abuse has been considered only ‘an
occasional, regrettable excess'.\(^{188}\) This decision shows that the CAT may not always grasp how the issue of 'acquiescence' should be applied and further indicates that, while the definition of 'torture' has scope to include abuse by non-state actors where the state is taken as 'acquiescing' in that abuse, the CAT is not always attuned to it. The public/private dichotomy can, therefore, be overcome only when the CAT pays closer attention to it.

An earlier case, *S.V. et al. v. Canada*,\(^{189}\) in which the author feared return to Sri Lanka owing to the actions of the Liberation Tigers of Tamil Eelam (LTTE), also failed. Like *G.R.B. v. Sweden*, this earlier ruling seemed to centre on the fact that the government of Sri Lanka did not support the actions of the LTTE or any other insurgent group, that is, it did not consent or acquiesce in LTTE’s actions. Rather, they simply did not have control of the territory in which the LTTE were operating. These cases may suggest that in order to satisfy the 'consent or acquiescence' requirement something more than an 'inability' to act is needed: arguably a higher standard than that under due diligence as applied by the HRC. As understood by the CAT, the consent or acquiescence requirement implies some knowledge of the activities of the non-state actors, general agreement with those actions, or a purposive refusal to act. However, the CAT, in *S.V. et al. v. Canada*, did not consider the issue of whether LTTE members had attained a certain level of quasi-government status, at least as far as their control over a particular territorial area was concerned, or whether the second limb of Article 1 applied ('other person acting in an official capacity'). The extent to which complainants are required to inform or complain to the local authorities in order to meet the 'consent or acquiescence' standard is another issue begging further analysis, of which no guidance is available in either committees' jurisprudence.


\(^{189}\) *S.V. et al. v. Canada*, CAT 49/1996.
The case of S.V. can be contrasted with a subsequent decision in *Elmi v. Australia*,\(^{190}\) in which the CAT was prepared to characterise Somali warring factions as ‘other persons acting in an official capacity’ for the purposes of Article 1 of the UNCAT. The clans in question prescribed their own laws, had their own law-enforcement mechanisms, and provided their own education, health, and taxation systems.\(^{191}\) The CAT distinguished the Elmi case from *G.R.B. v. Sweden* because in the Elmi case there was a situation in which the non-state actors were in ‘effective’ control and there was an absence of a central government from which Mr Elmi could have sought protection.\(^{192}\) This reasoning would seem to exclude almost all claims in which non-state groups directly perpetrate the harmful conduct, as very few states, if any, lack a central government.

In fact, a subsequent, near identical, case of *H.M.H.I. v. Australia*,\(^{193}\) involving a rejected Somali asylum-seeker’s claim that his return to Somalia would breach Australia’s obligations under Article 3, distinguished the case of Elmi. The CAT did so by stating that the ‘exceptional’ situation of a country wholly lacking state authority (that existed at the time of the Elmi decision) no longer existed in Somalia, owing to the existence of the Transitional National Government (TNG). The TNG was considered by the CAT to be a state authority, partly because of its relations with the international community. Because H.M.H.I. feared torture at the hands of non-state actors, and not from the new state authorities, his claim was considered to fall outside the scope of Article 3 of the UNCAT. However, what was not taken into account in this case was whether the state authority would acquiesce in the feared acts of other clans or other

---


\(^{191}\) Sadiq Shek Elmi v Australia, CAT 120/1998, para. 5.5.


\(^{193}\) *HMMH v Australia*, CAT 177/2000.
'private' citizens, either through inaction, not having put in place measures to protect such persons against this type of fear, or because of impunity.

In contrast to the above decisions, the CAT has held in a communication with a different set of facts that actions of non-state or private actors can fall within the UNCAT by virtue of the terms 'consent or acquiescence', albeit in more limited circumstances than under the ICCPR. In the case of Dzemajl et al. v. Yugoslavia, the CAT was satisfied that the police had been informed of the immediate risk facing the complainants by a 'mob' of several hundred non-Roma residents armed with stones, Molotov cocktails, and other objects and who had broken car and house windows and then set them on fire. At the end of the rage, the whole settlement had been levelled, and all properties belonging to the Roma residents were either burnt or completely destroyed. In finding that the police had not taken any appropriate measures to protect the complainants, the police had 'acquiesced' in the actions in the sense of Article 16 and ipso facto in the sense of Article 1, although the latter was not found to have been breached. If the reasoning in this ruling is followed, it could prove pivotal to holding the state responsible in specific domestic or family violence or other non-state actor cases.

These cases demonstrate that the UNCAT definition of 'torture' has been interpreted more restrictively than its ICCPR equivalent by the HRC and by most other international bodies. The specific wording in Article 1 of the UNCAT has given scope to the CAT to limit the types of cases that would otherwise satisfy the torture threshold. This is not to say that the actions of non-state or private actors do not fall within the

---

195 Ibid., CAT 161/2000, paras. 2.7-2.9.
196 The CAT has reiterated its concern regarding alleged failures of the state to prevent and to fully and promptly investigate violent attacks by non-state actors against ethnic and other minorities: see, Concluding observations on Croatia, UN Doc. CAT/C/CR/32/3, 11 June 2004, para. 8(f).
remit of Articles 1 or 16 of the UNCAT. The CAT itself has raised concern, for example, in its concluding observations on state reports about the perpetration of torture, arbitrary detention, or ill-treatment at the hands of non-state actors, such as ‘traditional chiefs, sometimes with the support of the forces of law and order’. 197

However, not every act of a non-state actor will fall within the definition, as it will depend on the role played by the state itself or another person acting in an official capacity, the latter being, so far, limited by the CAT to quasi-governmental structures that exercise effective control over a territory and where there is no central government. 198 This latter interpretation limits its application to very few, if any, situations worldwide. The current jurisprudence of the CAT does not protect women against brutal rapes or mass killings by rebel soldiers, for example, except where it can be said that the soldiers were in effective control of the territory and there was no central government. Similarly, this interpretation of the UNCAT does not protect women from harm if the state has no knowledge of it and cannot be said therefore to have consented or acquiesced in it, even if they may have failed in a more global sense in their responsibilities of due diligence. A mere inability to act or lack of knowledge would not meet the CAT’s understanding of ‘consent or acquiescence’.

In contrast to the above analysis, and contrary to its case law thus far, the CAT in 2008 stated emphatically that the due diligence test guided its work in relation to non-state actors. General Comment No. 2 states:

The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State

197 Concluding observations on Cameroon, UN Doc. CAT/C/CR/31/6, 5 Feb. 2004, para. 4(c).
198 It has been argued that under the law of state responsibility, this is the only interpretation that the CAT could have adopted: see, K. Fortin, Rape as Torture: A Triumph or a Straight Jacket?, LL.M Dissertation, Utrecht University, The Netherlands, 2008 (published by Faculty of Law, Utrecht University, Science Shop of Law, Economics and Governance, 2008).
officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.199

Perhaps the tide is turning on how the CAT handles non-state torture? The above General Comment appears to suggest that failures to fulfil due diligence obligations would also satisfy the consent or acquiescence wording of Articles 1 and 16 as a matter of course. In fact, the case of Velásquez Rodríguez used the language of acquiescence in framing the due diligence duty:

What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support of, or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.200 [my emphasis]

That is, consent or acquiescence requires no more than a failure to fulfil due diligence obligations of prevention, investigation, prosecution, punishment, and compensation. So far, however, the CAT’s general practice has been to apply a stricter interpretation of its mandate. What, then, is the difference between the duty of ‘due diligence’ applied in other human rights areas and the ‘consent or acquiescence’ standard of the UNCAT as applied in the above case law?

As far as can be determined from the approaches of the two treaty bodies, the duty of due diligence requires states to take both pre- and post-abuse measures. For example, states are required to take steps to prevent domestic violence generally, including

through legislation and other measures. If they fail to act to the level of due diligence required, they could be held responsible for an actual occurrence of domestic violence on their territory. Thus, a state would be responsible for domestic violence if it were lawful for a man to beat or rape his wife under the law or if the police were instructed not to prevent such violations or not to offer assistance, whether or not they knew or acquiesced in a particular incident. The state is also obligated to investigate, prosecute, and punish those responsible and to offer compensation to those aggrieved. This is a positive outcome for female claimants.

In contrast, the jurisprudence outlined in this thesis shows that the ‘consent or acquiescence’ element of the UNCAT has been approached by the CAT as requiring actual knowledge of a particular incident and actual refusal to act: a higher standard of proof than due diligence. The CAT’s approach in these decisions does not appear to create any pre-abuse preventative obligations on a state, although a state may be held to breach other individual provisions of the UNCAT.\footnote{E.g. by failing to enact legislative, administrative, judicial or other measures to prevent acts of torture (Art. 2), to criminalise torture (Arts. 4 and 5), to education and train law enforcement personnel, civil or military, medical personnel, public officials or other persons involved in custody, interrogation (Art. 10), to investigate (Art. 12), etc.} Nonetheless, it is possible for female victims of domestic violence who have suffered ‘severe pain or suffering’ and who have reported such incidents to the police to no avail to mount successful claims before the CAT if the police or other government officials fail in their duties to offer assistance, or to investigate, prosecute, or punish alleged offenders. Nonetheless, as long as some form of recognised state structure exists, this rationale will not protect women from the actions of non-state armed groups who control parts of the territory, even if that structure is not wholly effective. There are myriad examples of women (and men) who are therefore not protected by the UNCAT under this construction. Apart from the 2008 General Comment, ‘acquiescence’ has not been read by the CAT as
including a failure to act, for example, by failing to have the appropriate mechanisms in place to prevent such actions or to protect persons against such harm.

Feminist scholars are, therefore, right to criticise the definition of torture under the UNCAT, but not merely because of the need to link a particular harm to that of a ‘public official’ or the state (a prerequisite for any human rights violation under international law). Rather, the terms ‘consent or acquiescence’ and ‘other person acting in an official capacity’ have not been interpreted in the way the drafters of the treaty intended, or to reflect evolving realities. The Chairman-Rapporteur for two years of the drafting process stated: ‘All such situations where responsibility of the authorities is somehow engaged are supposed to be covered by [this] rather wide phrase appearing in Article 1.’\(^{202}\) This has not been the accepted interpretation of the UNCAT to date, with the exception of the 2008 General Comment, which hints that the CAT is attempting to conform to the generally accepted position at international law of due diligence and to break with its own precedent. The public/private dichotomy has therefore been only partly fractured under the UNCAT.

3. Contextual analysis

A final issue that merits attention is the way in which the treaty bodies have adopted a contextual analysis of torture. That is, to what extent have the individual’s subjective characteristics been deemed relevant to a determination of whether an act meets the severity threshold for torture? Almost repeating the language used by the European

Court of Human Rights in *Ireland v. United Kingdom*[^203] the Human Rights Committee stated in *Vuolanne v. Finland*:

... [T]he assessment of what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.[^204] [my emphasis]

Similarly, in the case of *Kindler v. Canada*, the HRC referred to 'personal factors' in determining whether the imposition of capital punishment would constitute a violation of Article 7.[^205] These statements indicate that subjective factors are relevant to whether the nature of a particular act constitutes torture or another form of ill-treatment or punishment. That is, it is not a purely objective test. Obviously, there are some forms of harm that would constitute a breach of Article 7 regardless of the particular characteristics of the victim. Nonetheless, there may be other forms of harm that would not reach the requisite level of seriousness of torture or a lesser form of ill-treatment or punishment if only so-called objective or (gender-) neutral standards were applied. According to feminist scholars, applying only objective or neutral standards would be disadvantageous, if not discriminatory, for women because the standard applied would most likely be 'male'.

In its list of issues for state party reports, the CAT, too, has referred to gender, age, and geographical location, as well as asking that states parties legislate with 'specific provisions regarding gender based breaches of the Convention, such as sexual violence'.[^206] However, more specifically, in the case of *V.L. v. Switzerland*, the CAT proved sympathetic to gendered reasons why a woman would not be forthcoming.

[^205]: *Kindler v. Canada*, HRC 470/1991. The HRC also referred to the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.
regarding alleged sexual assaults. The Swiss authorities raised doubt about her story because she had failed to mention the sexual abuse in the early stages of her asylum procedure. The CAT responded:

> It is well known that the loss of privacy and prospect of both humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members.\(^{207}\)

Why taking subjective factors into account is important is illustrated by a few potential examples: intimidating language that may fall short of Article 7 abuse when applied against a male adult may reach the threshold if inflicted upon a child; assaulting a known haemophiliac would be more serious than the same conduct perpetrated against a non-haemophiliac; solitary confinement or psychological forms of intimidation might be additionally severe for an individual with mental illness,\(^{208}\) and the sexual intimidation of male Arab Muslims at the hands of female soldiers may take on a different tone than the same conduct perpetrated against non-religious Western men.\(^{209}\)

The capacity of the Human Rights Committee to take into account personalised or subjective factors in its deliberations, including sex and gender, is an essential part of ‘gender mainstreaming’. Even though the HRC has stated that subjective factors are relevant (and the CAT has accepted the same approach, albeit less directly), one can detect an absence of such references in its jurisprudence. In *Darwinia R. Mónaco (Ximena Vicario) v. Argentina*, the HRC made reference to special protections owed to children under Article 24 of the ICCPR. However, in this decision, the HRC did not go on to use the child’s age or maturity to help it apply Article 7 in an age-friendly manner,


but instead opted to make a finding under Article 24. The CAT requires the individual to be ‘personally at risk’. Nonetheless, the CAT has not taken this to mean subjective factors rather than causal ones. So far, this requirement has not been interpreted in such a way for subjective factors to have the effect of lowering the ‘objective’ severity threshold.

The European Court of Human Rights in Aydin v. Turkey illustrates how this would work in practice, albeit with some limitations. The Grand Chamber of the European Court of Human Rights in this case ruled (14 to 7):

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

The Grand Chamber referred to both the sex and youth of the applicant (a 17-year-old female) in making its decision, as well as to associated conditions of her treatment. The ECtHR accepted that the ‘accumulation of acts of physical and mental violence’ and ‘especially the cruel act of rape’ amounted to torture in breach of Article 3, adding that the Court would have reached the same conclusion on either of these grounds.

---

210 Darwinia R. Mónaco (Ximena Vicario) v. Argentina, HRC 400/1990. The author’s granddaughter (Ximena Vicario) was taken to the headquarters of the federal police with her mother in February 1977. Her father was apprehended the following day. Both parents and the child subsequently disappeared. An investigation was launched but the parents were never located. XV was subsequently found in the home of a nurse who claimed to have taken care of the child. The nurse was preventatively detained by the state on grounds of having committed a crime of concealing the whereabouts of a minor and forgery of documents. In 1989, the author was given provisional guardianship of XV, but the nurse was also granted visiting rights. Although the grandmother objected to this in court, she was told she had no standing as she was neither the child’s parents nor her legal guardian. Various other appeals were made against the visits on the basis that they were psychologically damaging to the child. The author claimed, inter alia, that the visits and the delayed proceedings constituted a breach of various rights, including Art. 7. The HRC did not rule on whether the visits amounted to psychological torture.


212 Ibid., para. 83.

213 Ibid., para. 84.
taken separately.\textsuperscript{214} This case not only represents the first case of the ECHR to recognise rape as a form of torture, but it is also the first finding of ‘torture’, rather than a lesser form of ill-treatment, issued by the Court.

The minority, however, engaged in mathematical reasoning as to the alleged date of sexual assault and the birth of the applicant’s first child. Without providing any information or evidence to support their statements, they suggested that the complainant’s subsequent marriage to her cousin only a few days after the alleged rape was ‘surprising in the cultural context of the region’. The minority did not request further information from the applicant as to the reasons for her ‘quick’ marriage.\textsuperscript{215} Despite the minority dissenting opinion, this decision represents a reversal of the 1976 European Commission Report in \textit{Cyprus v. Turkey},\textsuperscript{216} in which it was concluded (12 to 1) that incidents of rape carried out by Turkish soldiers against Cypriot nationals constituted only ‘inhuman treatment’, not torture, within the meaning of Article 3 of the ECHR.

The above shows both how contextual reasoning and subjective factors can work to allow a more accurate picture to be painted that better reflects the circumstances and experiences of individual women. At the same time, however, it evidences that contextual analysis is itself subject to gender bias and prejudice. Moreover, gender is only one of the factors that may be relevant to a particular case. Calling for a particular type of analysis, however conceptually or theoretically sound, is only as good as those who apply it and will be insufficient on its own to solve the dilemma of the exclusion of women.

\textsuperscript{214} \textit{Ibid.}, para. 86.
\textsuperscript{216} \textit{Cyprus v. Turkey}, Comm. Rep. 4 ECHR 482, 10 July 1976.
4. The Women's Committee and torture

As noted, the CEDAW does not contain a specific prohibition against 'torture' or other associated forms of ill-treatment. It would seem that the drafters of the CEDAW failed to recognise the application of torture protections to women, even during the period in the 1970s of the increasing heavy handedness of autocratic regimes in many parts of the world, including against women, either as activists themselves or by being implicated by membership in the family of politically active relatives. This may explain the Women's Committee's own treatment of torture in its jurisprudence.

In its first fact-finding inquiry carried out in the Ciudad Juárez area of Chihuahua, Mexico, referred to in Chapters 3 and 5 of this thesis, the Women's Committee appears to adopt the traditional interpretation of 'torture' from Article 1 of the UNCAT. Its statement at paragraph 67 illustrates its approach:

As far as [the Committee] know[s], the method of these sexual crimes begins with the victims' abduction through deception or by force. [The women] are held captive and subjected to sexual abuse, including rape and, in some cases, torture, until they are murdered. Their bodies are then abandoned in some deserted spot.217 [my emphasis]

This approach to torture is much more conservative than that of other international and regional bodies. The term 'torture' in this report is used in a very traditional sense to refer to physical or psychological pain or suffering applied by public officials or others acting in an official capacity to extract confessions or information from detainees, that is, as something different to rape or other forms of sexual assault carried out by private citizens. The Women's Committee views torture quite separately from issues of rape or sexual crimes. Such assessments evoke questions about the effectiveness of utilising the

---

torture label for acts of violence against women, especially as it conflates old and new interpretations of the same term.

D. THE FEMINIST RECORD ON TORTURE

How far have the UN human rights treaty bodies come in terms of incorporating the realities of women’s lives within the torture provisions? From the above review, it can be seen that significant rhetorical progress has been made since the 1990s to accept non-traditional understandings of torture. Recognising rape and other forms of sexual violence as meeting the severity threshold of torture or cruel, inhuman or degrading treatment or punishment must be heralded as a great leap forward, albeit long delayed. This position appears to be accepted by all the major human rights courts as well as under international criminal law. This jurisprudence indicates a departure from the view of rape and, by analogy, other forms of violence against women ‘as sexual, not political, a permissible “private” indiscretion, rather than as a tool of political domination’. It is now accepted by every international and regional human rights body with a mandate over torture that rape is a sufficiently serious form of harm as to constitute torture under international law. This consensus position must now be said to crystallise rape into a prohibited form of torture under customary international law.

In addition to rape, the HRC has found, inter alia, female genital mutilation, domestic violence, and forced abortion or forced sterilisation to fall within Article 7 protections, while the CAT has referred to domestic violence, forced marriage, incest, and stoning

for adultery as relevant to its mandate. There has also been some recognition that discriminatory laws or conduct may breach the ill-treatment provisions, although such laws or conduct would probably not be of sufficient severity to reach the threshold reserved for findings of ‘torture’ itself. In the absence of an international treaty outlawing violence against women, it could be argued that the torture provisions are fast becoming the primary human rights protection in this area.\textsuperscript{220} A question for this study is whether it is an effective feminist strategy.

Although the record of the treaty bodies has not been consistent, with many decisions still continuing to omit references to or exclude an analysis of relevant gender factors, the overall picture presented indicates an acceptance at the level of international law that the torture provisions can be interpreted and applied to reflect the \textit{nature and type} of women’s experiences. As noted, the torture provisions have always been available to detained female political dissidents and activists, even if this has not been widely acknowledged. As the Human Rights Committee stated in its first General Comment on Article 7 of the ICCPR: ‘As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood.’\textsuperscript{221} These interpretations have updated the torture prohibitions, and they also reflect a better understanding of the importance of the non-discrimination and equality foundations of international human rights law. The real linguistic difficulties appear to lie less in the appearance of the masculine pronoun, as some feminists suggest,\textsuperscript{222} than in the specific meanings acquired over time for the term ‘torture’. It remains without doubt that torture has come to be accepted as representing particular forms of prohibited conduct of state-

\textsuperscript{220} Cf. Chs. 3 and 5. Note, too, that Arts. 8 (slavery; servitude) and 9 (security of person) of the ICCPR have not been used to the same degree.
\textsuperscript{221} HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982), para. 2.
\textsuperscript{222} See, Ch. 1.
sponsored terror, which continues to cloud the imagination of the treaty bodies in applying the definition of torture beyond this context.

Positive findings of torture, for example, in each of the cases mentioned in this chapter still need to prove a connection between the act of abuse and the state; not to mention that the number of positive decisions can still be counted in single digits. For some feminist scholars, therefore, attempts at dismantling the public/private divide remain unsatisfactory and continue to exclude women from the full protection of the law. Under the UNCAT, torture must be perpetrated by either a public official, another person acting in an official capacity, or with an official’s consent or acquiescence (or at their instigation). In order to invoke state responsibility for ‘private’ harm, the CAT has, until its 2008 General Comment, strictly construed the ‘consent or acquiescence’ element as requiring actual knowledge (it is still unclear whether constructive knowledge would suffice) of the events in question, as well as a purposive refusal to act on the part of the public official or other person acting in an official capacity. Provided a government official is aware of, for example, a domestic dispute and refuses to act or does not take appropriate steps to protect the applicant, there is a human rights violation by ‘acquiescence’.

The CAT has not, however, been challenged greatly to secure this position, owing to the limited number of cases raising ‘private’ violations.

A further problem remains in relation to who qualifies as an ‘other person acting in an official capacity’ in Article 1. The CAT has required that the ‘other person acting in an official position’ exercises effective control of the territory in a state that does not have a central government. That is, to be a government de facto, if not the government de jure. By this reasoning, the CAT has ruled out a whole range of situations in which women (and men) seek protection from torture. Women subjected to abduction, rape, or

---

beating by rebel soldiers, for example, would not be protected by the torture provisions following this reasoning unless it could be proved that the rebel group had ‘effective control of territory’ and there was no central government. It limits this aspect of the UNCt provisions to only a few countries and situations worldwide, and therefore renders it virtually worthless in this regard. The public/private dichotomy remains a major stumbling block to women’s equal benefit of the protection of the torture prohibition, as does the state-based nature of international law. The extent to which the public/private–state/non-state division remains supports feminist critiques that statehood and sovereignty interfere with creative or reconstructionist interpretations of these provisions.\(^{224}\)

Non-state or private abuses are recognised under the ICCPR (and the ECHR) where the state fails to satisfy the evolving international law notion/duty of ‘due diligence’. The CAT’s 2008 General Comment also indicates that it is likely to expand its above-outlined approach along similar lines. Although the articulation of the duty of ‘due diligence’ is still relatively elusive, it has allowed women’s previously ‘private’ claims to become the responsibility of the state where it is either unable or unwilling to offer protection against such harm. At the level of international criminal responsibility, the ICTY and ICTR have both ruled that the ‘public’ official requirement of the UNCAT is not part of customary international law for the purposes of individual criminal responsibility.\(^{225}\) The Statute of the ICC has followed the same approach. International refugee law also accepts that, subject to the other elements of the refugee definition in


\(^{225}\) See, e.g., *Prosecutor v Jean-Paul Akayesu*, ICTR Case No. ICTR-96-4-T, 2 Sept. 1998; Case No. ICTR-96-4-T (AC), 1 June 2001, in which the Appeal Court stated: ‘outside the framework of the Convention Against Torture, the “public official” requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.’ See, also, *Prosecutor v Kunarac, Kovač and Vuković*, ICTY Case No. IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001; upheld on appeal, Case No. IT-96-23 and IT-96-23/1, 12 June 2002, paras. 482 and 496. See, further, *Prosecutor v Krnojelac*, ICTY Case No. IT-97-25-T (15 Mar. 2002).
the Convention relating to the Status of Refugees 1951,\textsuperscript{226} as amended by its Protocol 1967,\textsuperscript{227} where a claim to refugee status is based on the actions of a non-state actor as the source of the persecutory conduct, status will be granted if the state is ‘unable or unwilling’ to provide protection against that harm.\textsuperscript{228} What is still unclear, though, is how vigilant the state must be in taking steps to prevent these types of abuses, and it appears that only ‘reasonable’ steps must be taken.

Certainly, the ECtHR recognised that inadequate legislation and ineffective investigation would bring a state into violation of Article 3 of the ECHR for so-called date rape.\textsuperscript{229} In addition, the first decision of the Women’s Committee was framed as a case of discrimination (as no torture provision exists in the CEDAW) and it itemised a whole plethora of state responsibilities to protect women against domestic violence.\textsuperscript{230}

Such decisions are likely to be useful to other treaty bodies to give content and meaning to the notion/duty of ‘due diligence’, at least as far as cases of domestic violence are concerned. The Special Rapporteur on Violence against Women, Its Causes and Consequences has also attempted to set benchmarks or indicators to assess progress at the international level on violence against women.\textsuperscript{23} The specific obligations imposed upon states parties in Articles 2-15 of the UNCAT may also offer minimum standards and be useful guidance to other international and regional mechanisms.

\begin{footnotesize}
\begin{enumerate}
\item Convention relating to the Status of Refugees 1951, GA res. 429 (V), 14 Dec. 1950, 189 UNTS 137; entered into force 22 April 1954.
\item A.T. v Hungary, CEDAW 2/2003, Conclusions on the merits, II. General.
\end{enumerate}
\end{footnotesize}
E. CONCLUSION

From the perspective of proponents of gender mainstreaming, doctrinal inclusion, or the 'rape as torture' schools of thought, the above overview points towards much progress and, for some, a feminist triumph. There is, at a minimum, rhetorical acceptance that various forms of violence against women are human rights violations when they are as serious as torture in nature, impact, and effect. One limitation to this approach has been a lack of competence on the part of the members of the treaty bodies, who collectively continue to display difficulty in identifying and taking account of gender dimensions in case law, or who otherwise cannot agree by consensus on its relevance. This leaves female complainants vulnerable to the competence limitations of the treaty bodies. The committees generally show a willingness to recognise violence against women as torture, but they ultimately do not make it convincing, in particular because they fail to articulate their legal reasoning in sufficient detail. As noted in Chapter 2, the committees' working methods and style of decision-making do not assist outsiders in understanding fully the meaning and impact of their decisions, which in turn affects the legitimacy of their decisions and their acceptance by states parties.

On the other hand, the VAW = T strategy feeds into a system that distinguishes between the public and private spheres of everyday life, albeit with more ways available to satisfy the nexus requirement between the state and the harm. Like the VAW = SD formula outlined in Chapter 3, it fails to acknowledge that violence against women is a serious violation worthy in its own right of separate international legal regulation and condemnation. Instead, in order to be heard, women have had to fit their experiences into provisions with entrenched meanings. For women to be heard, they must establish

295 Ch. 4: Torture
either that what they have suffered is equivalent to these traditional understandings or that such treatment warrants the creation of an exception to the rule: the former reinforces sexual hierarchies manifest in the 'male' standard of international law, while the latter exceptionalises the experiences of women and in turn essentialises her into the stereotyped roles as victims of 'sexual non-political violence' or of culturally depraved acts. It places a double and therefore unequal burden on women who are disproportionately subjected to forms of harm that do not fit within the traditional construct of torture.

I now turn to the last of the three rights studied in this thesis: the right to life.
Chapter 5
The Right to Life

A. INTRODUCTION

The right to life is fundamental to the UN human rights system. Without it, all other rights would be ‘devoid of meaning’. In this chapter, I examine how this right has been interpreted and applied by the UN treaty bodies to respond to the particular context of violence against women. Of the three rights studied in this thesis, it has attracted the least attention and analysis by international feminist legal scholars, even though it is specifically relevant to women’s lives. In many national jurisdictions, in contrast, the right to life has been and remains a site of feminist struggle.

This chapter begins with an overview of how the right to life is conceived under international law generally, with a specific focus on Article 6 of the International Covenant on Civil and Political Rights (ICCPR). I then consider how it has been extended to apply to particular issues facing women. I ask whether it has been an effective guarantor of protection for women against violence. I find that the traditional structure of the international prohibition of Article 6 of the ICCPR favours men’s

---

experiences to the extent that they are more likely than women to be subjected to the death penalty, military conscription, or arbitrary deprivation of their lives by the state: the traditional subject matter of the prohibition. Women enter the picture as an exception to capital punishment as far as they represent the reproductive guardians of unborn children. At the same time, however, women are portrayed as being of a calibre of criminals who may be put to death by the state, rather than as being only victims of crime. This dichotomy weakens feminist arguments that women are portrayed only as victims under international law rather than as autonomous actors.\(^4\)

I also note that since the mid 1980s the interpretation of the right to life has progressed from a narrow view of traditional legal protection against arbitrary state killing to a broader view that requires states to protect individuals against the acts of non-state actors and to satisfy the basic ‘survival’ requirements of its citizens. This chapter finds that the modern elaboration of the right to encompass ‘quality of life’ (or dignity) issues has transformed it from a right that primarily pertained to men’s fears to one that also includes a host of concerns affecting women, including economic and social disadvantage. In terms of feminist strategy in the context of violence against women, the right to life presents many of the same problems as those at the national level, such as those around competing rights relating to reproductive freedom, privacy, and equality, and thus is contested ground. Not all of these issues have yet been dealt with fully by the treaty bodies. For these reasons, the right to life, centred around Article 6 of the ICCPR, is a complex tool for feminists, but it is a potentially more powerful right in the fight against violence against women than others studied in this thesis.

\(^4\) See, Ch. 1.
B. THE RIGHT TO LIFE UNDER INTERNATIONAL LAW

1. International instruments

The right to life is found in the *Universal Declaration of Human Rights 1948* (UDHR), which was later transposed to Article 6 of the ICCPR, albeit in longer form. Article 6 of the ICCPR provides:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 6 is a non-derogable right that has been characterised as a *jus cogens* norm of international law, but it is not unlimited. As discussed below, it is not an absolute guarantee but is subject to several limitations. In 1991, a Second Optional Protocol to

---

5 Universal Declaration of Human Rights 1948, GA res. 217 A (III), 10 Dec. 1948 (UDHR). Art. 3 provides: 'Everyone has the right to life, liberty and security of person.'

the ICCPR entered into force with the aim of abolishing the death penalty altogether.\(^7\)

The death penalty is one of the contested permissible exceptions to the right to life under international law.

In addition to Article 6 of the ICCPR, the *Convention on the Prevention and Punishment of the Crime of Genocide 1948* prohibits a specific form of arbitrary deprivation of life aimed at destroying, in whole or in part, a national, ethnic, racial, or religious group.\(^8\) The prohibition on genocide is also a peremptory norm of international law.\(^9\) Article 6(3) of the ICCPR reiterates the non-derogable status of genocide as specifically proscribed under international law. Genocide is also located as a crime under international humanitarian law\(^10\) and in the *Statute of the International Criminal Court* (ICC).\(^11\) Having taken on a specific legal meaning and being *lex specialis* within

---


\(^8\) Convention on the Prevention and Punishment of the Crime of Genocide 1948, GA res. 260 A (III), 9 Dec. 1948, 78 UNTS 277; entered into force 12 Jan. 1951. The crime of genocide is defined in Article II as: 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.'


the context of international criminal law/international humanitarian law, and having been well studied by feminist scholars, genocide does not form part of this thesis.\textsuperscript{12}

The \textit{International Covenant on Economic, Social and Cultural Rights} (ICESCR)\textsuperscript{13} does not contain a separate right to life equivalent to Article 6 of the ICCPR. However, ‘life’ is mentioned in various places, including in the right to an ‘adequate standard of living’\textsuperscript{14} and the right ‘to take part in cultural life’.\textsuperscript{15} Additionally, in respect of the special care and protection required for children, the ICESCR provides that they must be protected against economic exploitation or work that is dangerous to their health or life, or economic and social development.\textsuperscript{16}

The \textit{Convention on the Rights of the Child} (CRC)\textsuperscript{17} has arguably adopted the most progressive approach to the right to life, linking it to issues of survival as well as development.\textsuperscript{18} Article 6 of the CRC provides:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 6 is considered to be one of the four general principles of the CRC, alongside the principles of non-discrimination (Article 2), the best interests of the child as a primary


\textsuperscript{14} Art. 11, ICESCR.

\textsuperscript{15} Art. 15(1)(a), ICESCR.

\textsuperscript{16} Art. 10(3), ICESCR.


\textsuperscript{18} For an overview of the right to life, survival, and development in the CRC, see M. Nowak, \textit{The Right to Life, Survival and Development} (The Hague: Martinus Nijhoff Publishers, 2005).
consideration (Article 3), and the right to have a child's views respected (Article 12).\textsuperscript{19} Article 37 of the same treaty prohibits the imposition of capital punishment and life imprisonment without the possibility of release for offences committed by persons below 18 years of age, matching the protection in Article 6 of the ICCPR. The right to education in the CRC is also aimed at preparing children "for responsible life" in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin\textsuperscript{20} (my emphasis). The CRC further contains a special protection for children with mental or physical disabilities that they "should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community"\textsuperscript{21} (my emphasis). Article 10 of the Convention on the Rights of Persons with Disabilities 2006 (ICRPD)\textsuperscript{22} equally affirms that "every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others".\textsuperscript{23}

A specific right to life is also guaranteed to migrant workers and members of their families.\textsuperscript{24} In different variations, the right to life is also found in all the regional human rights treaties.\textsuperscript{25} A text for an International Convention on the Protection of All Persons

\textsuperscript{20} Art. 29(d), CRC.
\textsuperscript{21} Art. 23, CRC.
\textsuperscript{23} Many other provisions of the ICRPD refer to the participation of persons with disabilities in "all aspects of life": see, e.g., Arts. 8(1) (combating stereotypes and prejudice in all aspects of life); 26 (habilitation and rehabilitation); 29 (participation in political and public life); and 30 (participation in cultural life).
\textsuperscript{24} Art. 9, IMWC: "The right to life of migrant workers and members of their families shall be protected by law."
\textsuperscript{25} Art. 2, European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, 4 Nov. 1950, 213 UNTS 222; entered into force 3 Sept. 1953, as amended (ECHR), provides: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his [or her] life intentionally save in the execution of a sentence of a court following his [or her] conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to
from Enforced Disappearances has been agreed, but it has yet to enter into force. The right to life also takes shape in non-binding form in the UN Declaration on the Rights of Indigenous Peoples 2007, in which the right to life is framed as:

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Specific right-to-life provisions equivalent to Article 6 of the ICCPR are not, however, found in the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), or the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Despite the myriad provisions, the discourse in international human rights law on the right to life has tended to centre on Article 6 of the ICCPR. I will focus on how Article 6 of the ICCPR has been interpreted and applied as the first pronouncement of a general right to life, though influenced, and subsequently followed, by these other provisions.
2. International jurisprudence: The scope and meaning of the right to life

The right to life in Article 6 of the ICCPR is not drafted as an absolute prohibition on the taking of life. There are three purported limitations to the right. The first is that states are obligated to protect an individual's right to life in law, but not necessarily also in fact. This is now generally considered to be a minimal rather than the only obligation of Article 6. The second limitation is that Article 6 is considered to protect an individual against the arbitrary deprivation of life by the state. This restrictive view has been challenged by calls for the right to apply to 'quality of life' issues. Finally, the third constraint is that the provision is subject to a number of specified exceptions or limitations. These three purported limitations are dealt with in turn below.

(a) Protected by law?

The wording of Article 6 raises an immediate question of whether legal protection is sufficient to discharge a state's obligations. In 1969, Fawcett asserted that the right to life as contained in the ECHR does not protect 'life' per se; rather, it is concerned with the right to life as protected by law. He understood that the right to life would therefore not cover accidental deaths caused, in part, by a failure to impose speed limits on roads or to enact safety legislation for industrial work.³¹ Manfred Nowak argued similarly in his 1993 commentary on the ICCPR that '[a] violation of the duty of protection flowing from Art[icle] 6(1) [of the ICCPR] can be assumed only when State legislation is

lacking altogether or when it is manifestly insufficient as measured against the actual threat.\textsuperscript{32} That is, at its heart, the duty concerns \textit{legal} protection.

However, Nowak made clear in his 2005 commentary that the right includes positive measures and 'all-around effects', including on the horizontal level.\textsuperscript{33} Citing Articles 2(1) and (2) of the ICCPR, he claimed that the right imposed 'duties to take judicial, administrative or other measures'.\textsuperscript{34} Articles 2(1) and (2) relate to obligations of non-discrimination and for states to adopt 'legislative and other measures'. Nowak argued that the placement of the \textit{inherent} right to life in the first sentence of Article 6(1) has led the Human Rights Committee (HRC) to conclude that it must not be interpreted restrictively:

\begin{quote}
The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.\textsuperscript{35}
\end{quote}

It is now generally accepted by the HRC that the right to life requires more than protection in law. Article 6 imports both negative as well as positive obligations and the latter extend beyond the enactment of special laws.\textsuperscript{36} Citing a host of statements by various UN and regional human rights bodies, Bertrand Ramcharan has claimed that

\begin{footnotesize}
\begin{enumerate}
\item M. Nowak, \textit{U.N. Covenant on Civil and Political Rights: CCPR Commentary} (2\textsuperscript{nd} ed., Kohl: Engel, 2005), 122.
\item HRC, General Comment No. 6: The Right to Life (Art. 6) (1982), para. 5.
\end{enumerate}
\end{footnotesize}
this putative distinction between ‘the right to life’ (legal protection) and ‘life’ (all-encompassing) does not stand up.\textsuperscript{37}

\textit{(b) The arbitrary deprivation of life?}

The second limitation on Article 6 is the reference to the \textit{arbitrary} deprivation of life in Article 6(1) in the third sentence, which has been stated to protect individuals from interference by state organs, with the emphasis not on all deprivations of life, but only those deemed ‘arbitrary’.\textsuperscript{38} Not unlike its usage in respect of other human rights provisions, arbitrariness suggests elements of unlawfulness, injustice, capriciousness, and unreasonableness.\textsuperscript{39} However, its usage in Article 6 of the ICCPR was criticised at the drafting conference owing to its ambiguity, but it was explained that the term meant both ‘illegally’ and ‘unjustly’.\textsuperscript{40} The HRC’s first General Comment on Article 6 placed ‘paramount importance’ to this aspect of Article 6(1). The focus at that time in 1982 was entirely on the taking of life by the authorities, such as arbitrary killing by security forces.\textsuperscript{41} It is worth noting that several early communications involved women subjected to enforced disappearances at the hands of the state.\textsuperscript{42}


\textsuperscript{41} HRC, General Comment No. 6: The Right to Life (Article 6) (1982), para. 3: ‘The deprivation of life by the authorities of the State is a matter of the utmost gravity.’

\textsuperscript{42} See, Ch. 4.
Yoram Dinstein accepted the narrow approach and has said: ‘The right to life, in effect, is the right to be safeguarded against (arbitrary) killing.’\textsuperscript{43} He stated:

To be sure, homicide may be carried out through a variety of means, including starving someone, exposing a person to extreme temperature or contamination by disease. But, for example, the mere toleration of malnutrition by a State will not be regarded as a violation of the human right to life, whereas the purposeful denial of access to food, e.g. to a prisoner, is a different matter. Failure to reduce infant mortality is not within Article 6, while practicing or tolerating infanticide would violate the article.\textsuperscript{44}

The distinctions drawn appear to shift between negative and positive obligations, and between purposeful action and ‘blind’ omissions. However, when Dinstein applies his approach to examples, it appears to break down: why is ‘tolerating infanticide’ distinct from ‘failing to reduce infant mortality’? Is not failing to reduce infant mortality equivalent to tolerating it? Why is one arbitrary, but not the other? Both situations involve a state making an (arbitrary) decision not to address or to ignore/tolerate a particular social issue. Dinstein’s approach is cumbersome and unworkable. The only value to Dinstein’s approach appears to rest in the divide between civil and political rights (infanticide/killing) and economic, social, and cultural rights (infant mortality arising from poverty, famine, or malnutrition, all of which the state may be considered to have less control over).\textsuperscript{45} Przetacznik is also of the view that a distinction should be made between the ‘right to life’ in a strict sense, correlating to Article 6 of the ICCPR, and the ‘right to living’, which he considers to be the system of economic, social, and


\textsuperscript{44} \textit{Ibid.}, 115.

cultural rights in the ICESCR. Ramcharan dismisses this distinction, claiming that the 'right to living’ idea has never been satisfactorily explained.

While arbitrary killings by state authorities remain an important component of the right to life, if not the mainstay of the individual communications under Article 6, debate in the 1980s began to question the logic of ignoring the masses dying of disease, famine, or environmental catastrophes. Menghistu has argued that there are at least two main ways of depriving people of the right to life:

1. by execution, disappearances, torture, and various forms of cold-blooded murder;

2. by starvation and lack of fulfilment of basic needs such as food, basic health facilities, and medical care.

Menghistu states that 'it is meaningless to differentiate killing by an act of a state and by starving a person to death, because both forms of behaviour constitute the worst forms of cruelty'. So what has been the approach of the HRC and other treaty bodies?

In rejecting the long-worn distinction between these two sets of rights – civil and political rights on the one hand, and economic, social, and cultural rights on the other – many UN and regional human rights bodies have made pronouncements on the relevance of economic, social, and cultural rights to the right to life. The Commission on Human Rights stated in 1982 that the ‘safeguarding of this foremost right is an

---

49 Ibid.
essential condition for the enjoyment of the entire range of economic, social and
cultural, as well as civil and political rights.\textsuperscript{50} By 2005, this general position had
converted into explicit statements such as: 'The right to life encompasses existence in
human dignity with the minimum necessities of life.\textsuperscript{51}

The Inter-American Commission has rationalised that the fulfilment of the right to life
is dependent upon and interlinked with the physical environment.\textsuperscript{52} Likewise, the Inter-
American Court of Human Rights has held that the right to life:

\ldots is a fundamental human right, and the exercise of this right is essential for the
exercise of all other human rights. If it is not respected, all rights lack meaning.
Owing to the fundamental nature of the right to life, restrictive approaches to it
are inadmissible. In essence, the fundamental right to life includes, not only the
right of every human being not to be deprived of his life arbitrarily, but also the
right that he will not be prevented from having access to the conditions that
guarantee a dignified existence.\textsuperscript{53} \textit{[my emphasis]}

In an Advisory Opinion on the Juridical Condition and the Human Rights of the Child,
the Inter-American Court of Human Rights reiterated that the conditions of care of
children required by Article 4 (the right to life) of the American Convention on Human
Rights (ACHR) involve:

\[\text{not only]}\text{the prohibitions set forth in that provision, but also the obligation to
provide the measures required for life to develop under \textit{decent conditions}. The
concept of a \textit{decent life}, developed by this Court, relates to the norm set forth in
the Convention on the Rights of the Child, Article 23(1) of which states the
following, with reference to children who suffer some type of disability:

1. States Parties recognize that a mentally or physically disabled
child should enjoy a full and decent life, in conditions which

1(b) (adopted without a vote).
\textsuperscript{53}\textit{Villagrán-Morales et al. v. Guatemala} (the 'Street Children' case), I-A Crt. H. R. Ser. C., No. 63
(1999), judgment 19 Sept. 19999, para. 144 (case involving the execution of five street children and signs
of torture, including acid burns and eyes and ears cut off).
ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”54 [my emphases]

The Inter-American Court has further advised:

[Although the right to work cannot be confused with the right to life, work is a condition of a decent life, and even of life itself: it is a subsistence factor. If access to work is denied, or if a worker is prevented from receiving [his or her] benefits, or if the jurisdictional and administrative channels for claiming his rights are obstructed, his [or her] life could be endangered and, in any case, he [or she] would suffer an impairment of the quality of his [or her] life, which is a basic element of both economic, social and cultural rights, and civil and political rights.55

Under the ECHR, the right to life has generally been considered to have three main aspects: ‘[T]he duty to refrain, by its agents, from unlawful killing; the duty to investigate suspicious deaths; and, in certain circumstances, a positive obligation to take steps to prevent the avoidable loss of life.’56 In relation to the last, case law indicates that positive obligations have been found to be extensive.57

The right to life has also been seen as at issue in relation to environmental damage. Judge Weeramantry of the International Court of Justice stated in the Damube Dam case:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.58

55 Ibid., para. 28.
57 Ibid., referring to case law involving obligations to inform individuals about possible health consequences of nuclear tests (LCB v. United Kingdom, ECtHR, Applic. 23413/94, Judgment 9 June 1998, (1998) 27 EHRR 212); the obligation to establish effective deterrence mechanisms against unlawful killing (Oneryildiz v. Turkey, Applic. 48939/99, Judgment of the Grand Chamber 30 Nov. 2004, (2005) 41 EHRR 325); the obligation to ensure that vulnerable individuals in prison, such as patients with mental disabilities, are protected (Keenan v. United Kingdom, Applic. 27229/95, Judgment 3 Apr. 2001, (2001) 33 EHRR 903; and protections from dangerous but lawful activities by systems of regulation, supervision, and control (see, e.g., Guerra v. Italy, Applic. 14967/89, Judgment 19 Feb. 1998, (1998) 26 EHRR 357).
58 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) 1997 1ICJ 92 (Separate Opinion of Judge Weeramantry), at para A(b).
Not having articulated its position in the manner of the Inter-American Court or other judicial authorities, the HRC has nonetheless addressed under its non-restrictive interpretative approach such issues as the reduction of infant mortality and increasing life expectancy, especially by adopting measures to eliminate malnutrition and epidemics, unequal access to HIV/AIDS treatment, and issues of family planning and maternal health. Meanwhile, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that the UDHR emphasised 'an economic and social content of the right to life, or in other words the right to live, the right to a certain quality of life'. The CESCR has explicitly dealt with the issue of improving average life expectancy.

The Committee on the Rights of the Child (the Children’s Committee) has recognised, for example, that the right to health in the context of HIV/AIDS is central alongside the right to life, survival, and development in Article 6 of the CRC. It further stated:

Children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word. State obligation to realize the right to life, survival and development also highlights the need to give careful attention to sexuality as well as to the behaviours and lifestyles of children, even if they do not conform with what society determines to be acceptable under prevailing cultural norms for a particular age group. In this regard, the female child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information. Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, [to] life skills, and to preventive measures.

59 HRC General Comment No. 6: The Right to Life (Art. 6) (1982), para. 5.
64 Ibid., para. 11.
Although questions surrounding 'quality of life' ideas and how far the right to life extends are not agreed between international and regional bodies, it is generally accepted by the UN human rights treaty bodies that the right to life carries obligations in relation to economic, social, and cultural matters, and that the right is not confined to arbitrary state killing in a narrow sense, but involves positive obligations to protect against abuse by non-state or private actors. Ramcharan argues that the right to life protects each individual from 'all possible threats' and 'seeks each individual to: have access to the means of survival; realize full life expectancy; avoid serious environmental risks of life; and enjoy the protection by the State against unwarranted deprivations of life whether by State authorities or by other persons within society'.\textsuperscript{65} This jurisprudence indicates a shift from the early position of the UN to one that understands the interlinkages between economic, social, and cultural rights on the one hand and civil and political rights on the other. The view of Dinstein and others of confining the scope of Article 6 of the ICCPR, and their view on the right to life more generally, is no longer the dominant approach.

\textit{(c) Exceptions to the prohibition}

The sub-paragraphs of Article 6 of the ICCPR constitute the third limitation on its scope of application, in addition to any other exceptions enacted by law and not otherwise being arbitrary. It was not accepted by the drafters that the right to life would be absolute.\textsuperscript{66} In rejecting an absolute prohibition on the deprivation of life in any circumstances, a second view was that any exceptions should be defined within the provision itself. However, it was considered that any enumeration would be incomplete.


and might convey the impression that greater importance was attached to the exceptions than to the right.\textsuperscript{67} This is where the 'arbitrary deprivation of life' and 'protected by law' language crept in. The only explicit exception that was included is that of the death penalty.\textsuperscript{68} Of specific relevance for this thesis is the exclusion, contained in Article 6(5), of 'pregnant women' from capital punishment.

A number of further exceptions have developed and been read into the right to life – such as those around military conscription in wartime or compulsory military service.\textsuperscript{69} In relation to the latter, the argument proceeds that, provided compulsory military service is regulated by law, it would not be arbitrary within the meaning of Article 6(1).

It has subsequently been argued that, provided there are alternatives available to compulsory military service, it would also not interfere with religious rights for those who conscientiously object.\textsuperscript{70}

With these parameters in mind, however, the right to life has been typically applied in cases involving state counter-terrorism measures,\textsuperscript{71} subjection to the death penalty in violation of the provision,\textsuperscript{72} nuclear weapons,\textsuperscript{73} state killings or disappearances\textsuperscript{74} and

\textsuperscript{67} Ibid.
\textsuperscript{68} Art. 6(2), (4)-(6), ICCPR.
\textsuperscript{69} See, e.g., UNHCR, \textit{Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees}, UN Doc. HCR/GIP/04/06, 28 Apr. 2006, paras. 25 and 26.
\textsuperscript{73} HRC General Comment No. 14: Nuclear Weapons and the Right to Life (Art.6) (1984) (no UN Doc.), refers specifically to the threat posed by the manufacture, distribution, and production of weapons of mass destruction.
failure to properly investigate or prosecute such crimes,\textsuperscript{75} deaths in custody,\textsuperscript{76} deaths resulting from degrading treatment or excessive use of violence during the course of forcible deportation of aliens,\textsuperscript{77} violence or deprivation of food, water or medical treatment from prisoners or failure to prevent suicide in detention,\textsuperscript{78} and war and mass violence.\textsuperscript{79} The next section examines what these applications have meant for women.

\textit{(d) Feminist critiques of constructs of the right to life}

The first impression of Article 6 of the ICCPR, and the early approach of the treaty bodies and commentators alike, is of a right that contemplated the lives and bodies of men: men are disproportionately affected by the arbitrary deprivation of life by the state, by capital penalties, as soldiers in armed conflict, or as the principal subjects of policies and laws on military conscription and military service. Feminist scholars argue that, for women, the ‘right to life’ is understood in an entirely different context.\textsuperscript{80} During their lives, women and girls may be subjected to a range of life-threatening behaviour, including ‘honour’ killings, acid violence, bride burning, domestic violence, female infanticide, or death during labour or by reproductive complications or resulting from

\textsuperscript{78} See, e.g., CRC, Concluding observations on Cameroon, UN Doc. CRC/C/111 (2001) 71, para. 353.
\textsuperscript{79} HRC, General Comment No. 6: The Right to Life (Art. 6) (1982), paras. 2 and 4, in which the HRC noted the obligation on states parties to prevent war, genocide, and other forms of mass violence. See, further, Concluding observations on Togo, UN Doc. A/58/40 (Vol. I) (2002), para. 9.
infections from female genital mutilation or HIV/AIDS. That is, women are more likely to fear threats to their lives from non-state actors rather than the arbitrary deprivation of life at the hands of the state, or by negligence or neglect on the part of the state in respect, for example, of childbirth and reproductive health, poverty, famine, and economic disadvantage. That is, threats to women’s lives are largely excluded under the narrow approach to the right to life.

At first glance, therefore, women’s everyday lives seem largely absent from the scope of the protection except in so far as they otherwise satisfy its narrow interpretation. Article 6 of the ICCPR is, however, unique from the other rights studied in this thesis, as well as, arguably, those contained in other human rights treaties, in terms of its treatment and depiction of women. Most other provisions suffer from a lack of clear applicability to women’s lives and, at other times, a total ignorance of their concerns. Instead, under the exceptions to Article 6, women benefit from a heightened protection of their right to life as there are no exceptions that target their sex. That is, men are far more likely than women to fall within one of the permitted exceptions to Article 6. As outlined above, Article 6 provides that pregnant women must not be put to death, as an exception to capital punishment.

The pregnant-woman exception does not, however, recognise the value of women qua women, or even as mothers, but as reproductive bodies. The exception is intended primarily to protect the unborn child, whatever sex, and not the mother, who will no longer benefit from the exception once she has given birth. In this sense, the final

---

version of Article 6(5) differs from the original Yugoslavian proposal that sought to protect the mother even after the birth of the child.  

Without success, several other delegates during the drafting process argued in favour of an amendment similar to the Yugoslavian proposal, albeit still with the interests of the unborn child placed above those of the woman. They called for the effects of execution or the constant fear of it on the development of the unborn or newborn child to be taken into account.  

It is worth noting that the final version of Article 6 does not extend as far as international humanitarian law in which both pregnant women and mothers with dependent children are exempt from the execution of the death penalty, although as with the human rights guarantee, these too protect the mother only as far as she is of value to the unborn child or to the early nourishing or raising of that child.  

In spite of this, the final version of Article 6 can be taken as a rejection of the protective model that was previously employed under international law and that has been heavily criticised by some feminist writers as classifying all women as ‘vulnerable’ and in need of protection.

To the extent that women are valued in Article 6 only in relation to their roles as mothers and their bodies as reproductive vessels, the view of the drafters was not that of

---


86 See, Art. 76(3) of the Protocol I Additional to the Geneva Conventions 1977: ‘To the extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of death on pregnant women or mothers having dependant children, for an offence related to armed conflict. The death penalty for such offences shall not be executed on such women.’ Art. 6(4) of the Protocol II Additional to the Geneva Conventions 1977 similarly provides: ‘The death penalty shall not be ... carried out on pregnant women or mothers of young children.’ The Fourth Geneva Convention contains a raft of provisions giving special protection to expectant mothers (see, e.g., Arts. 14, 16, 23, 38(5), 50(5), 89(3), 132(2), 138); Geneva Convention (III) relative to the Treatment of Prisoners of War 1949, adopted 12 Aug. 1949, 75 UNTS135, entered into force 21 Oct. 1950 (Third Geneva Convention) includes some special protections for pregnant mothers (see, e.g., Annex I(B)(7) (transfer of pregnant women or those with infants or small children to a neutral country)); the First and Second Geneva Conventions contain only a single provision indicating that ‘[w]omen shall be treated with all consideration due to their sex’ (Art. 12(4), Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 Aug. 1949, 75 UNTS 31, entered into force 21 Oct. 1950; and Art. 12(4), Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea adopted 12 Aug. 1949, 75 UNTS 85, entered into force 21 Oct. 1950, respectively).

87 See, Ch. 1.
women as perpetual victims or as weak and subservient persons in need of special protection, but rather as perpetrators of crimes sufficiently serious to warrant the imposition of the death penalty. However, no specific mention is made to this particular exception to the death penalty in any of the HRC’s General Comments on Article 6, and no individual communication has been lodged or heard raising this issue, although it is occasionally referenced when such exceptions are missing from state legislation.

Nonetheless, Article 6 of the ICCPR has been a focus of feminist activism. Dina Bogecho, for example, outlines two reasons why Article 6 of the ICCPR is to be preferred to rights contained in the CEDAW in fighting for women’s reproductive rights. First, she argues that the CEDAW remains a controversial instrument, with many states parties entering reservations against Articles 11, 12, 14, or 16, or in other words, those rights relating to reproductive health. The second reason she gives for utilising the ICCPR over the CEDAW is the greater enforcement capacity of the HRC, although she bases her argument on the fact that the HRC has more experience rather than on any substantive evidence of a more sympathetic approach.

In terms of interpretations of Article 6 of the ICCPR that favour the inclusion of ‘quality of life’ issues, feminist concerns that the international human rights system marginalises economic, social, and cultural issues to the disadvantage of women are addressed. The right to life as initially conceived to prohibit arbitrary state killing ignored the suffering of millions of people from poverty, famine, hunger, ill-health, and disease. Feminist

---

91 Ibid.
scholars argue that these are among the issues of most relevance to women.\textsuperscript{92} I do not subscribe fully to this view (believing that the full range of rights are important to women, including political rights); however, I recognise that women’s socio-economic disadvantage perpetuates their unequal position in society and permits a system that treats them as second-class citizens. This in turn feeds into a system that tolerates or condones violence suffered by women. Under this rubric, the HRC has commented upon high infant and maternal mortality rates due to denial of access to health and family-planning services and low levels of education.\textsuperscript{93} UNICEF has documented that women aged between 15 and 24 in sub-Saharan Africa are more at risk of HIV infection than men of the same age, yet have far less knowledge about it.\textsuperscript{94} The Children’s Committee has also highlighted that children, both girls and boys, orphaned by AIDS may be at risk of falling prey to sexual and economic exploitation, including prostitution and trafficking.\textsuperscript{95} The Women’s Committee has noted that the right to life is impaired or nullified by gender-based violence.\textsuperscript{96} The Women’s Committee’s fact-finding mission to the Ciudad Juarez area of the Chihuahua region of Mexico stated: ‘[The practice of abduction, rape and murder] discriminates against women whose conduct may not conform to the accepted “moral code”, but who have an equal right to life [my emphasis].’\textsuperscript{97} The Women’s Committee has also referred to maternal


\textsuperscript{94} UNICEF, \textit{The State of the World’s Children: Women and Children The Double Dividend of Gender and Equality} (2007), Figure 1.3.


\textsuperscript{96} CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 7(a).

mortality,98 low life expectancy in relation to indigenous women,99 the lower life expectancy of women compared with men in some societies,100 and the control of sexually transmitted diseases and HIV/AIDS101 or its high prevalence among women.102 It has also 'highlighted the urgent need to ensure that globalization, policies and plans of action that facilitate international trade and the transition to market economic policies are gender-sensitive and improve the quality of life of women, who constitute more than 50 per cent of the population in almost all countries'103 (my emphasis).

As Menghistu notes: 'The right to life is meaningless without access to the basic and minimum material goods and services essential to sustain life.'104 Under this broad view of the right to life, states should be held accountable for acts of gross negligence, neglect, the misuse and abuse of resources, or other failures to prevent breaches of the right to life, including in its economic and social manifestations, and whether committed directly by state or non-state actors. This has positive ramifications for all persons, but it also allows scope for the committees to deal with the intersection of violence against women and threats to life with issues such as poverty, lack of access to health and family-planning services, and social disadvantage.

The final issue to be dealt with in this section is in relation to the beneficiaries of the right to life. When does life begin for the purposes of Article 6 of the ICCPR?

---

100 CEDAW, Concluding observations on Nepal, UN Doc. A/59/38 (2004), para. 212.
3. Rights bearers: When does life begin for the purposes of Article 6?

Article 6 of the ICCPR is silent as to when life begins. Because of irreconcilable positional differences between countries on abortion at the time of drafting the ICCPR, 'compromise dictated silence' on the issue of the starting point for the right to life.\(^{105}\) Consequently, Article 6 of the ICCPR does not address the issue of when life starts for the purposes of benefiting from international legal protection. At the time of drafting, it was submitted by Belgium, Brazil, El Salvador, Mexico, and Morocco that the protection of the life of the unborn child recognised in the pregnant-woman exception to the death penalty should be extended to all unborn children.\(^{106}\) This was opposed by other states on the ground that it would be impossible for a state to determine the moment of conception and therefore to undertake to protect life from that moment. Moreover, it was argued by delegates that the proposed clause would involve the question of the rights and duties of the medical profession.\(^{107}\) Nowak, however, asserts that it is clear from the travaux préparatoires that life in the making was not (or not from the moment of conception) to be protected.\(^{108}\) The divide over abortion and the right to life continues, evidenced by the exclusion of any recommendations in the follow-up meetings to the 1995 World Conference on Women in Beijing.\(^{109}\)

The position of the HRC has generally been that the right to life begins at the moment of birth rather than at conception. This is evidenced in the HRC's calls to states parties

---

107 Ibid.
to provide access to safe and legal abortions for female victims of rape. Neither has the HRC developed tests of ‘viability’ of the foetus like some national jurisdictions have.\textsuperscript{110} Illegal and clandestine abortions have also been identified as a major cause of maternal mortality and at issue in relation to Article 6.\textsuperscript{111} Human Rights Watch, for example, asserts that 13 per cent of all maternal deaths worldwide are attributable to unsafe abortions – between 68 000 and 78 000 deaths annually.\textsuperscript{112} The HRC has chastised states parties that do not provide family planning or other services that would avoid ‘clandestine and therefore life-threatening abortions’.\textsuperscript{113} In relation to Peru, for example, the HRC called for all the necessary measures to be implemented to ensure that women do not risk their lives because of the existence of restrictive legal provisions on abortion.\textsuperscript{114} Frequently, such issues are dealt with in the context of the torture prohibition rather than under the right to life.\textsuperscript{115} The HRC has not, however, delved into the details of how to regulate abortion; rather it has noted concern at the ‘severity of existing laws relating to abortion … especially since illegal abortions have serious detrimental consequences for women’s lives, health and well-being’.\textsuperscript{116} The HRC and the CESC have each called upon states parties to monitor female mortality rates closely, in particular by taking steps to reduce deaths from illegal abortion.\textsuperscript{117}

Mexico, for example, the CESC has noted that illegal abortion is the fourth highest

\textsuperscript{110} M. Nowak, \textit{U.N. Covenant on Civil and Political Rights: CCPR Commentary} (2\textsuperscript{nd}, Kohl: Engel, 2005), 154, referring to US jurisprudence that protection offered by Article 6 might begin when the foetus is able to survive on its own (viability testing).
\textsuperscript{113} See, e.g., HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, paras. 5 and 10. See, further, HRC Concluding observations on Colombia, UN Doc. A/52/40 (Vol. I) (1997), para. 287.
\textsuperscript{115} See, Ch. 4.
cause of death of women.\textsuperscript{118} Likewise, the Children’s Committee has referred to the issue of unsafe abortion and high rate of maternal mortality and the impact of punitive legislation on maternal mortality rates.\textsuperscript{119}

The HRC has further relied on a range of other rights to reinforce its position. In the absence of express provisions relating to reproductive rights in the ICCPR, the HRC has addressed the dangers associated with illegal or clandestine abortions under other provisions, such as rights to equality, privacy, or family life. For example, privacy rights have been invoked by the HRC in order to protect women’s reproductive functions where, for example, states impose a legal duty upon doctors and other health personnel to report women who have undergone abortions.\textsuperscript{120} The HRC has further stated that the rights in Article 7 may also be of relevance in such situations.\textsuperscript{121} It has argued that failure to provide access to legal abortion in particular situations results from discrimination.\textsuperscript{122} Other treaty bodies have adopted similar approaches. The CESCR has identified the unequal status of women in society and the persistent problem in some countries of a preference for sons as manifesting itself in the high incidence of induced abortions of girl foetuses that threaten the reproductive rights of women.\textsuperscript{123}

In \textit{Karen Llontoy v. Peru},\textsuperscript{124} the HRC was of the view that Article 7 of the ICCPR was breached when a 17-year-old Peruvian woman was forced to carry an anencephalic

\textsuperscript{119} CRC, Concluding observations on Chad, UN Doc. CRC/C/15/Add.107, 24 Aug. 1999, para. 30; CRC, Concluding observations on Guatemala, UN Doc. CRC/C/15/Add.154, 9 July 2001, para. 40.
\textsuperscript{120} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 20.
\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid.
\textsuperscript{123} CESC, Concluding observations on Republic of Korea, UN Doc. E/C.12/2001/17, para. 226.
foetus\textsuperscript{125} to term and to breastfeed the infant in the first four days of life before it died. The complainant was subsequently diagnosed with severe depression. The HRC did not specify whether her situation amounted to torture or another form of ill-treatment. The language of the HRC's view was framed in the context of a failure to provide the complainant with 'a therapeutic abortion', not necessarily a legal one.\textsuperscript{126} That is, both the legal and practical inaccessibility of a therapeutic abortion can constitute breaches of Article 7. On this basis, the HRC declared, disappointingly, that it was unnecessary to make a ruling on Article 6, even though it had noted that the evidence pointed towards the fact that the failure to provide an abortion 'may have endangered the author's life'.\textsuperscript{127} The decision further held that preventing her from accessing a legally entitled right to an abortion under Peruvian law in these circumstances breached her right to privacy under Article 17.\textsuperscript{128}

Even though the human rights treaty bodies have addressed the issue of abortion and reproductive rights in the context, \textit{inter alia}, of the right to life, none of the committees has expressly stated that the life of the unborn child is entirely unprotected. They have also not stated that there is a general right to abortion. Instead, they have carefully noted the interlinkages between the life and the health of the mother in calling for access to pre- and post-abortion services in particular situations.

The political divide between states on this issue is further reflected in regional laws. Like the right to life in the ICCPR, the ECHR and the ACHPR are silent on the starting point of the right to life (see above).

\textsuperscript{125} Anencephaly is a condition in which a foetus lacks most or all of the forebrain and such foetuses are born stillborn or die soon after birth.
\textsuperscript{128} The decision further held that the failure to provide a remedy that was timely breached Art. 2 and that there was further a breach of Art. 24 in failing to protect her health as a minor child.
The position of the European Commission on Human Rights was that there was no absolute prohibition on abortion. Case law suggested that Article 2 of the ECHR could not be interpreted to give higher priority to the foetus than to the mother’s life, partly based on the reasoning that there is no provision in the ECHR that limits the mother’s life. Like the ECtHR, both decision-making bodies have given a wide margin of appreciation to states on this question and have sought to strike a balance between the rights of the mother and the rights of the unborn child, although they note that any rights a foetus may have are implicitly limited by the rights of the mother. The ECtHR has had two occasions to address the issue of whether a foetus enjoys the protection of Article 2 as a ‘person’ under law, but it has skirted around the issue on both. In Open Door and Dublin Well Women v. Ireland, the ECtHR held that the government of Ireland was entitled to restrict the right to information under Article 10 of the ECHR (the information at issue was in relation to abortion services outside Ireland) under the permitted exception of ‘protection of morals’. The ECtHR did not rule whether the government was also entitled to restrict access to abortion materials on the basis of the ‘rights of others’ (being those of the unborn child).

The second case is Vo v. France, which involved an unwanted, induced abortion that occurred when a medical doctor mistook the applicant for another patient who was having a contraceptive device removed. In its decision, the ECtHR left open the question of whether a foetus is protected by the right to life. The Grand Chamber of the ECtHR found no breach of Article 2 by the failure of French law to provide a criminal

---

law remedy to the applicant for the unintentional destruction of a foetus. The Grand Chamber held that this was not a requirement of Article 2 in every case. In other words, the question of who is protected by the right to life in the ECHR is ‘in the margins’ of states’ discretion.

Under the African Charter, the Protocol on the Rights of Women specifically provides in the context of reproductive health: ‘States Parties shall take all appropriate measures to: protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.’ The position under African human rights law is to impose a positive obligation upon states to provide for therapeutic abortions in the circumstances set out. Framed as a positive obligation, it is not clear whether abortions for other reasons would breach this provision for falling outside the enumerated reasons, or alternatively, whether they would breach the right-to-life provision in the African Charter. Provided they are regulated by law and not otherwise arbitrary, it would seem that the right to abortion could be extended in the African context. Like in the European context, there is no express statement that the foetus is unprotected per se or that all forms of abortion are permitted in all circumstances. As far as a foetus can be held to benefit from the right to life in the African context, this right is circumscribed by the listed permissible exceptions. Moreover, African states have indicated that the physical and mental health rights of women trump those of an unborn foetus.

In contrast, states of the Americas agreed to clarify explicitly that, in their view, the right to life starts generally from ‘the moment of conception’. Reflecting the Catholic

133 Art. 14(2)(c), Women’s Protocol to the ACHPR.
tradition of the region, the final wording of Article 4(1) of the American Convention on Human Rights (ACHR) provides:

Every person has the right to have his [or her] life protected. This right shall be protected by law and, in general, from the moment of conception. No-one shall be arbitrarily deprived of his [or her] life.\textsuperscript{134}

However, even in the Americas, the language of 'in general' gives scope for individual states to adopt an alternative position, or to insert exceptions to the general position. In the 'Baby Boy' case, the Inter-American Commission of Human Rights, for example, held that Article 4 of the ACHR primarily protects against the arbitrary deprivation of life and therefore does not protect the foetus absolutely. The fact that the drafting conference of the American Declaration of the Rights and Duties of Man 1948,\textsuperscript{135} which was at issue in the case, chose not to include explicit language that would protect the child from the 'moment of conception' was sufficient for the Commission to conclude that there could be no assumption as to the coverage of the right.\textsuperscript{136} Lars Adam Rehof argues that this case indicates that there would be very few cases in which a 'provoked abortion' (by which he means induced termination as opposed to a miscarriage) would violate the right to life.\textsuperscript{137}

Taken together, the international and regional jurisprudence points to a general position at international law that the right to life generally starts at birth rather than at conception. However, in none of the jurisdictions has it been categorically stated that the unborn child has no rights under the right-to-life guarantees. Instead, the rights of pregnant women to undergo abortions for reasons of threats to health and life have been

\textsuperscript{134} Art.4(1), American Convention on Human Rights.
\textsuperscript{136} IACHR, White and Potter v. United States (the 'Baby Boy' Case), Case No. 2141 (United States of America), Res. No. 23/81, 6 Mar. 1981.
widely endorsed. While I generally agree with this position as far as it advances women’s rights, in particular in the context of unwanted pregnancies, including as a consequence of rape, and the correlative issues of unsafe and clandestine abortions that take the lives of thousands of women every year, two issues that affect women appear to be left unresolved. The first is that of sex-selective abortions, in which millions of girl children are removed from society prior to birth, and the second issue is that of domestic violence against pregnant women that results in miscarriage. These issues are discussed below in the next section, which deals with the effectiveness of utilising Article 6 of the ICCPR (and other right-to-life guarantees) in the context of violence against women.

C. VIOLENCE AGAINST WOMEN AS A BREACH OF THE RIGHT TO LIFE

The ultimate cost of violence against women is death. Protecting a woman’s right to life is, therefore, fundamental to the enjoyment of all other rights and should form part of an integrated feminist strategy against violence. However, the right to life as a contested concept is a complex tool for feminists and therefore does not always represent an effective guarantor against all forms of violence.

1. Benefits of the right to life

As noted in the introduction to this chapter, the right to life is a fundamental right upon which all other rights are based. Therefore, it is symbolically and substantively important under international law. Threats to the right to life summon images of the most serious forms of violence that threaten the lives of women, and therefore such acts
ought to attract powerful disapproval by the international community. This argument is not dissimilar to that mounted in respect of the torture prohibition, which has been praised by feminist scholars for its peremptory status under international law (see Chapter 4). However, unlike the torture prohibition, the right to life does not carry the same rigid ideas or prescribed definitions as to what constitutes a breach of its provisions. The right to life is a far more fluid notion than the torture prohibition, and although early discourse focused on arbitrary killing by government officials, there has long been a sense that the right should not be restrictively interpreted.

In line with this non-restrictive view of Article 6 of the ICCPR, the HRC has addressed a range of forms of violence against women. For example, it has called on states to ensure ‘that laws relating to rape, sexual abuse and violence against women provide women with effective protection’.\textsuperscript{138} The HRC’s General Comment on equality between women and men, issued in 2000, called on states in their reporting under Article 6 to include information regarding birth rates, pregnancy and childbirth-related deaths, gender-disaggregated statistics on infant mortality rates, family-planning measures to prevent unwanted pregnancies and avoid life-threatening clandestine abortions, female infanticide, widow burning, and dowry killings.\textsuperscript{139} It further provided that the HRC ‘wishes’ to have information on the particular impact on women of poverty and deprivation, although it was not couched in obligatory terms.\textsuperscript{140} The HRC has stated in at least one state party report that ‘... violence against women remains a major threat to their right to life and needs to be more effectively addressed’.\textsuperscript{141} In addition, the HRC has noted that ‘[t]he subordinate role of women in some countries is illustrated by the

\textsuperscript{139} HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 10.
\textsuperscript{140} Ibid.
\textsuperscript{141} HRC, Concluding observations on Colombia, UN Doc. A/52/40 (Vol. I) (1997), para. 287.
high incidence of pre-natal sex selection and abortion of female fetuses. It has also been acknowledged that 'women are particularly vulnerable in times of internal or international armed conflicts ... [to] rape, abduction and other forms of gender based violence'. States parties have been called upon, variously, to adopt measures to improve accessibility to health services, including emergency obstetric care, and family-planning services for women, and to review abortion laws to bring them into conformity with the ICCPR, to adequately train health workers, to strengthen sex education programmes to avoid unwanted pregnancies, and to ensure that women are not forced to undergo clandestine abortions that endanger their lives. The HRC has raised concern about female genital mutilation and 'honour crimes' in relation to Article 6, in addition to Articles 3 and 7. The World Health Organization has calculated that up to 70 per cent of female murder victims are killed by their male partners.

The HRC has also addressed the issue of female infanticide, that is, the sex-selective killing of girls at or soon after birth. The HRC has held it to be an infringement of the right to life where the state fails to prevent it or to prosecute those individuals responsible. Female infanticide is now well documented as a manifestation of the unequal status attributed to girls in many societies. According to the United Nations Population Fund, up to 60 million girls and women are missing from Asian populations. Amartya Sen has suggested that the figure is over 100 million, caused in

---

142 HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 5.
143 Ibid., para. 8.
144 UNICEF, *The State of the World's Children: Women and Children The Double Dividend of Gender Equality* (2007), Figure 1.3.
147 For a general overview and statistics on female infanticide, see [http://www.gendericide.org](http://www.gendericide.org). It is particularly prevalent in India and China.
part by low literacy, education, and lack of economic opportunities for women.\(^{149}\) In its Concluding Observations on Paraguay, the HRC criticised lenient laws regarding infanticide.\(^{150}\) Similar issues have now been raised by the Women’s Committee,\(^{151}\) the Children’s Committee,\(^{152}\) and the CESCR.\(^{153}\) Female infanticide and the malnutrition of girls have been compared with forms of female genocide.\(^{154}\)

Comparable regional human rights systems have elaborated criteria to determine a state’s responsibility under the right to life in the context of domestic violence. In *Kontrova v. Slovakia*, the ECtHR stated that the right to life in Article 2 of the ECHR entails a positive obligation on states to ‘take appropriate steps to safeguard the lives of those within its jurisdiction’. Although the Court took into account ‘the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources,’\(^{155}\) there remained a primary duty to put in place effective criminal law provisions to deter the commission


\(^{150}\) HRC, Concluding observations on Peru, UN Doc. CCPR/C/79/Add.48 (1995), para. 16.

\(^{151}\) See, e.g., CEDAW, Concluding observations on Yemen, UN Doc. A/57/38 (Part III) (2002), para. 390 (concern for the discriminatory nature of the Penal Code of Yemen which provides that a husband or other male relative who kills his wife in relation to adultery is not charged with murder); CEDAW, Concluding observations on Mexico, UN Doc. A/57/38 (Part III) (2002) 205, para. 439 (the disappearance and murders of women in the Cuidad Juarez region of Mexico and the apparent lack of investigations); CEDAW, Concluding observations on Brazil, UN Doc. A/58/38 (Part II) (2003) 93, para. 126; Slovenia, A/58/38 (Part II) (2003) 109, para. 214; Samoa, A/60/38 (Part I) (2005) 9, paras. 56 and 57 (high rates of maternal mortality); CEDAW, Concluding observations on Brazil, UN Doc. A/58/38 part II (2003) 93, para. 127; Paraguay, A/60/38 (Part I) (2005) 44, paras. 287 and 288 (health risks associated with clandestine or unsafe abortions); and CEDAW, Concluding observations on Turkey, UN Doc. A/60/38 part I (2005) 58, paras. 367 and 368 (‘honour’ killings)


\(^{153}\) See, e.g., CESCR, Concluding observations on Guinea, UN Doc. E/C.12/1996/6 (1997), para. 193 (steps needed to be taken to improve life expectancy).


\(^{155}\) *Kontrova v. Slovakia*, ECtHR Applic. No. 7510/04, Judgment 31 May 2007; final version 24 Aug. 2007, para. 50. The applicant in this case had filed a criminal complaint against her husband accusing him of assaulting and beating her with an electric cable. She also stated that there was a long history of physical and psychological abuse by her husband. Some days later she went with her husband to the District Police Station and withdrew the complaint. The authorities took no further action. There was a further incident some weeks later and then the husband shot and killed her two children and himself. In fact, one of the police officers assisted the complainant to alter her complaint so that it referred only to minor incidenes and required no further action.
of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. While noting that the authorities have a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, the Court held that this must not amount to ‘an impossible or disproportionate burden’ on the authorities and not every claimed risk to life entails a Convention requirement to take these steps. The positive obligation arises where the ‘authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’ Nonetheless, the Court determined that the police had specific obligations including accepting and registering the applicant’s criminal complaint; launching a criminal investigation; commencing criminal proceedings against the applicant’s husband; keeping a proper record of the emergency calls; advising the next shift of the situation; and taking action in respect of the allegation that the applicant’s husband had a shotgun and had made violent threats with it.

In a 2009 decision, the same Court likewise found a violation of the applicant’s mother’s right to life who was killed by the applicant’s ex-husband, as well as the life of her mother, in addition to violations of the prohibition on torture (Art. 3, ECHR) and non-discrimination on the basis of sex (Art. 14, ECHR). In relation to Article 2, the Court in Opuz v. Turkey held that the authorities had not pursued existing legal remedies available, and that the criminal system had no deterrent effect, and there was even

156 Ibid., 50.
157 Ibid., 53. See, also, Branko Tomasic v. Croatia, ECHR, Applic. No. 46598/06, Judgment 15 Jan. 2009, which followed the same line of reasoning as Kontrova. In this case, the applicant alleged that her de facto husband had made repeated threats against her and her one year old daughter, including that he had a bomb that he would throw at her. Following complaints made by her, he was detained and criminal proceedings were instigated against him. A psychiatric assessment found that he was suffering from a profound personality disorder. He served his sentence but shortly after his release he murdered his wife and daughter and then took his own life.
tolerance of this kind of behaviour. In addition to this, the ECtHR found the existence of prima facie evidence that domestic violence mainly affects women in Turkey and that the general and discriminatory judicial passivity in Turkey created a climate of impunity, amounting to a violation of Article 14 in conjunction with Articles 2 and 3:

Research showed that, despite Law no. 4320, when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. Delays were frequent when issuing and serving injunctions under Law no. 4320, given the negative attitude of the police officers and that the courts treated the injunctions as a form of divorce action. Moreover, the perpetrators of domestic violence did not receive dissuasive punishments; courts mitigated sentences on the grounds of custom, tradition or honour.¹⁵⁸

Apart from the implication of the right to life in circumstances involving direct threats to life arising from physical or sexual violence, the inclusion of economic and social factors as components of the right to life renders the international system of human rights even more relevant to the varied lives of women. This inclusion has breathed new life into the right to life and expanded its relevance to millions of people living in poverty. For international lawyers, however, there is some concern that this approach has made the right to life an all-encompassing right, and it raises questions about the relevance of a number of ICESCR rights, such as the right to an adequate standard of living. In other words, there is now substantial overlap between the two treaties. Legal purists might argue that this undermines the specific role of each treaty; meanwhile, this approach complements the UN’s own indivisibility approach to human rights that human rights are ‘equal, interdependent and mutually reinforcing’.¹⁵⁹ Because of these broad interpretations, the right to life has the capacity to include a wide range of ‘quality of life’ issues. It can therefore be a useful tool to deal with the interlinkages between violence and threats to life caused by poverty, lack of education, and sex discrimination.

2. Concerns with the right to life

Frequently, however, the right to life is absent in discussions on what are clearly life-threatening acts or practices. Domestic violence, for example, is regularly discussed as an issue of inequality, violence per se, or degrading treatment, but not necessarily as a threat to life. For an act to threaten one’s life, it also invokes ideas of seriousness that may put the threshold level out of reach for a range of violent acts committed against women that may be harmful but not life-threatening. The treaty bodies have not had to deal with this question in an individual communication. What is clear is that there has been a tendency by complainants to utilise other rights rather than the right to life. Similarly, the treaty bodies have been content to make a ruling under other provisions and then to leave aside the question of the right to life.¹⁶⁰

In addition, ambiguities surrounding who benefits from the protection of the right to life – e.g. an unborn child? – means that it remains a contested right. The right-to-life-abortion debate that dogs national politics in the US and elsewhere is also present at the international level, and the ambiguous position on who is a ‘person’ under international law highlights the difficulties of utilising this right in at least two specific circumstances of violence perpetrated against women and girls, outlined below.

¹⁶⁰ E.g., recent case of Alicja Tysiac v. Poland, ECHR, Applic. No. 5410/03, Judgment of 20 March 2007, in which the denial of abortion leading to predicted blindness was discussed in relation to the right to privacy and family life in Article 8 ECHR rather than Articles 3 (which was raised but not discussed) or 2 (which was not raised, although arguably could have been argued in relation to ‘quality of life’ from blindness).
(a) Sex-selective abortion – right-to-life dialogue

The increasing concern over sex-selective abortions highlights the complexity of the right-to-life-abortion dialogue. The practice of sex-selective abortions (or, for that matter, pre-implantative sex determination) is set to rise with modern diagnostic technologies being more widely available. Sex-selective abortion is an issue relating to the perception of women as second-class citizens in many societies. Its prevalence is worse in societies that have imposed strict population control policies, such as China and India,161 or where the social and economic value placed on boy children is higher than for girl children.162 The payment of dowries upon marriage also feeds into the ‘cost’ of having girls. If this issue is left unregulated, it is also likely to rise in modern societies where couples seek to self-select their family composition. Under the CEDAW, express reproductive rights are included as giving the woman the right to control over the number and spacing of children.163 It has been argued that this right does not, however, include the choice of sex of offspring.164 Pre-natal sex selection is expressly included as prohibited conduct in the Cairo and Beijing Declarations.165 The Children’s Committee has also addressed the issue of ‘son preference’, which it indicates is manifested by neglect, less food, and little health care for girl children. It has also raised concern that a situation of inferiority for girl children favours violence and sexual abuse in the family, as well as problems associated with early pregnancy and marriage. In some cases, the Children’s Committee has stated that it had led to such

163 Art. 16(e), CEDAW.

334 Ch. 5: Right to Life
traditional practices as female genital mutilation and forced marriage. While abortion may be justified under international law in specific situations as outlined above, sex-selective abortion is more complicated. As noted above, under the ICCPR, the right to life is generally accepted as beginning at birth. Therefore, an unborn child may not be a direct beneficiary of the UN system of protection.

For example, if an unborn child is not recognised as a human being for the purposes of international law, then the practice of sex-selective abortion and any harm done to the foetus would not be strictly prohibited. As the law stands, it is generally considered by the treaty bodies that the right to life is exercisable after birth, not before. This would mean that the issue of sex-selective abortion would fall to be considered as a violation of the mother’s rights, but it would not raise right-to-life issues unless the mother’s life is also at risk as a consequence of the procedure. Behind this issue are questions of force, coercion, and inequality. It also raises issues of sex discrimination, privacy, and reproductive freedom, and sits at the junction of group versus individual rights.

However, there has been no pronouncement that the right to life does not protect the life of the foetus in any way, shape, or form (here the protection of unborn girls is at stake), but so far, the protection of the mother’s life has trumped any rights of the foetus. April Cherry questions whether the practice of sex-selective abortion to rid families and therefore society of ‘the burden’ of girls reveals the weaknesses in choice rhetoric.

167 Cf. children who are brought to term indirectly benefit during pregnancy to the right to health under the ICESCR and other instruments.
168 E.g. it could be regarded as degrading treatment or even torture to force a woman to undergo an abortion. Similarly, because the abortion is carried out only against women and its attendant complications – physical and emotional – are primarily experienced by women, forced abortion could be considered to be a form of discrimination on the basis of sex. As discussed in the preceding chapters, there are also difficulties with using these norms to protect women from violence.
She considers that the problem of sex-selective abortions should compel feminist critics to re-evaluate doctrines of choice and privacy in the area of reproductive rights. She situates the issue as a question of individual women versus women as a group. She reflects on whether these concepts of choice and non-interference ‘empower women, or allow men or the state to secure their own misogynist, familial, or population control agendas’. The issue also sits uncomfortably at the intersection of Western and Asian feminisms. The former have argued that any regulation of reproductive freedom, including limiting the choice of sex of offspring, infringes a woman’s autonomy and her reproductive choice. Asian feminists have argued instead that account needs to be given to the cultural context in which women are generally subordinate to men and in which they do not therefore exercise ‘freedom’ in making such choices. Others argue that sex selection permits the perpetuation of stereotyped notions of what having a child of a particular sex entails.

These issues have not, however, prevented the treaty bodies from treating the issue of sex-selective abortion as a human rights issue. In fact, it would seem that silence on the question of whether a foetus enjoys the protection of the right to life enables the treaty bodies to deal with such issues as sex-selective abortion. At a minimum, terminating a pregnancy based solely on the grounds that the foetus is female would violate the prohibition on sex discrimination, which has been held to be a fundamental right. Under the non-discrimination paradigm, the Children’s Committee has raised issue with sex discrimination in India that has led to an unequal sex ratio, and it has called upon India to ensure the implementation of its Pre-Conception and Pre-Natal Diagnostic

---

171 Ibid.
174 See, Ch. 3.
Techniques (Prohibition of Sex Selection) Act 1994.\textsuperscript{175} The CESCR has identified the unequal status of women in society and the persistent problem of ‘son preference’ in some countries, which manifests itself in a high incidence of induced abortions of girl foetuses and which threatens the reproductive rights of women.\textsuperscript{176} Nonetheless, the committees have not generally dealt with this issue as a right-to-life question.

Ultimately, the right-to-life-abortion debate has not been fully resolved at the international level, and the ambiguity it leaves makes the effectiveness of the right to life contingent.

\textit{(b) Domestic violence against pregnant women that results in miscarriage}

A second issue that has yet to be dealt with by the treaty bodies in any depth under the right to life is that of domestic violence against pregnant women that results in miscarriage. In the United States, for instance, murder of pregnant women has been found to be the leading cause of death of women between 1991 and 1999.\textsuperscript{177} As noted in Chapters 3 and 4 of this thesis, domestic violence has featured as a human rights issue – as torture or sex discrimination – but the issue of induced, involuntary, or forced abortion or miscarriage caused by domestic violence has not been dealt with to any great extent in the context of the right to life. As the issue of when the right to life begins has not been fully settled under international law, it presents problems in this context.

\textsuperscript{175} CRC, Concluding observations on India, UN Doc. CRC/C/137 (2004) 75, paras. 411-412.
\textsuperscript{176} CESCR, Concluding observations on Republic of Korea, UN Doc. E/C.12/2001/17, para. 226.
In *Vo v. France*, the ECtHR confronted the issue of involuntary abortion caused by medical negligence and held that the state had no responsibility for failing to provide criminal remedies for the mother in this case.\(^{178}\) The case of *Roberto Zelaya Blanco v. Nicaragua*\(^ {179}\) before the HRC mentioned that the wife of the applicant was beaten, causing a miscarriage, but there was no analysis of this aspect of the case. Although domestic violence perpetrated against women is covered by international law – e.g. torture, discrimination, threat to life – the extent to which the right to life can deal with the loss of the child, deprivation of motherhood, or issues of reproductive choice has not been fully considered by the treaty bodies. It remains an issue that appears to fall into the gaps in international jurisprudence.

### D. CONCLUSION

Despite the contentious jurisprudence at international and national levels on the right to life, and the differing political views on when life begins in particular, the human rights treaty bodies have managed to overcome some initial feminist concerns about its inapplicability to women’s lives. First, it is no longer solely concerned with the arbitrary deprivation of life by state officials, although this is still the mainstay of individual communications under Article 6 of the ICCPR.\(^ {180}\) Threats to and deprivation of physical integrity are clearly within the protection offered by Article 6, including by non-state actors where the state fails in its duties of due diligence. In the context of domestic violence, for example, the ECtHR has led the way and although this approach has yet to be taken up before the human rights treaty bodies, partly because of mandate limitations such as the CEDAW not containing a right to life provision so framing such violations

---


\(^{179}\) See, *Roberto Zelaya Blanco v Nicaragua*, HRC 328/1988, which was also discussed in Ch. 4.

under an equality paradigm, there is scope for similar decisions to be made by the other treaty bodies, as applicable. In addition to issues of physical integrity, the treaty bodies have taken up a range of 'quality of life' issues under the right to life, building on the approach of the Inter-American system, such as socio-economic deprivation, maternal mortality rates, and HIV/AIDS. The public/private dichotomy appears also to have been merged under the right-to-life rubric, with less distinction being made as to who is responsible for the harm – whether the state, the rebel group, the multinational company, the medical profession, or the individual. Ultimately, the state has responsibility for regulating behaviour by law and for preventing and protecting citizens from threats to life. The 'dignified life' or 'quality of life' paradigm that is increasingly being accepted by international and regional bodies should prohibit the neglect of girls through their being deprived of the essentials of life as a result of 'son preference', leading in turn to underdevelopment, lack of fulfilment, or sale into forced labour or sexual slavery, and early death.

Second, there is a sense that women's health and life trump the rights of the unborn – that is, the silence surrounding the starting point of the right to life gives women a right to life that cannot be limited by the life of another – thereby protecting women's reproductive freedoms, which in turn affect both her life and her quality of life. Nonetheless, this silence also leaves other issues unresolved, such as sex-selective abortions in which the female sex as a demographic are under threat rather than individual girls per se, or the further protection of pregnant women against abuse and murder – in relation to themselves, their motherhood, as well as their offspring. Furthermore, the individual nature of the human rights system does not necessarily provide an adequate response to collective threats.\footnote{There are of course other ‘collective’ avenues under international human rights law, such as crimes against humanity and genocide.} At present, these types of issues

339 Ch. 5: Right to Life
are dealt with more in relation to torture and cruel, inhuman, or degrading treatment or punishment.

Nevertheless, the right to life does not suffer from many of the barriers to effectiveness as do the other rights studied in this thesis. The right to life is not, for example, subject to rigid definitions like the torture prohibition; and acts threatening life are considered to be particularly serious, if not fundamental to all other rights, as compared to the weaker language of sex discrimination. In addition, the fluidity and broad nature of the right to life means that women are not subjected to a double burden. Under the right-to-life paradigm, women would need to show that any violent act was of a serious nature as to threaten their life, or alternatively, that their life was threatened by the failure of government policies to reduce poverty or socio-economic disadvantage; the latter being more difficult to prove than the former. The threshold of seriousness also carries problems of excluding from protection a range of lesser forms of violence, but even in these circumstances some action has been held to be required as evidenced in the jurisprudence of the ECHR in Kontrova, Tomasic and Opuz, outlined above.

Of the three rights studied in this thesis, the right to life appears to be an integral one in any strategy to combat violence against women, despite the many questions that remain about its full scope and application. As noted, one of its main limitations is that it is reserved for the most serious threats of violence rather than encompassing all forms of physical, psychological, economic, or sexual violence. As the primary right upon which all other rights are based, framing violence against women under a right-to-life paradigm acknowledges that the ultimate price paid by women for direct violence against them as well as state tolerance of that violence is death. This is a vital first step towards acknowledging the human rights dimensions of women's lives. The right to life
thus needs to be one of the rights included in any strategy to combat violence against women, but on its own it does not and cannot fill all the gaps in the human rights framework.
Conclusion:

Conundrums, Paradoxes, and Continuing Inequality

A. INTRODUCTION

This thesis has examined how women’s experiences and concerns of violence are incorporated into specific provisions of international human rights treaty law. Two main feminist strategies were identified: the first was the conceptualisation of violence against women as a form of sex discrimination and the second was the creative reinterpretation of existing provisions to apply to the experiences of women. The latter discussion focused on the rights to life and to be free from torture or other cruel, inhuman or degrading treatment or punishment. These strategies have developed for a number of reasons, not least owing to gaps in the international legal framework reflected in the failure of the international community to agree an explicit treaty or provision guaranteeing women protection from violence, preferring instead to opt for a non-binding declaration and a ‘mainstreaming’ strategy that requires all UN bodies to ask ‘the gender question’ in relation to all instruments, mechanisms, laws, policies, and programmes. This study was interested in what these two strategies mean in reality for female victims of violence, as well as what they tell us about where feminist scholarship and the four main feminist critiques of international law outlined in Chapter 1 are today. What have these inclusion strategies meant for female victims of violence? What have
they meant for the feminist critiques outlined in Chapter I? Are these feminist critiques still relevant, or can they be set aside as finally resolved? Has there been any real progress in women's equality since the adoption of the UN Charter?

As pragmatic responses to gaps in the law and the marginalisation of women from mainstream human rights mechanisms, I have acknowledged that these inclusion or 'gender mainstreaming' approaches have yielded some historic conceptual and substantive breakthroughs, not least the recognition of violence against women as an issue of human rights and also the partial collapsing of the public/private dichotomy of international law. However, they also have their shortcomings, centred on the fact that attaching violence against women to existing norms does little to dismantle existing power structures and has resulted de facto in the unequal treatment of women under international law. That is, the real conundrum of 'feminist inclusion strategies [is the] [reproduction of] unequal relations of gender power.'\(^1\)

A common thread of the treatment of the three rights studied in this thesis is that women's experiences are seen as an exception to the main or general understandings of those particular provisions. That is, women are seen as a deviation from that standard and as an exception to the rule. This is the first of the unintended consequences of the inclusion or 'gender mainstreaming' strategies. That is, women are still not (yet) full citizens for the purposes of benefiting from human rights protection, and thus the system perpetuates sexual hierarchies.

---

The second consequence of working within the mainstream is the reality that being held to the same standards as men *de jure* results in women’s subjection to additional (and therefore unequal) legal burdens *de facto*. Female litigants must ‘fit’ their experiences of violence into male-defined criteria, which in turn reflect and reinforce a system that treats women unequally. It conjures up the old Aristotelian equality model of identical treatment, with the ‘male’ standard centrestage. Put another way, women are required to convince international adjudicators that what has been done to them is worthy of international attention, by either (a) equating it to harm normally perpetrated against men and incorporating their experiences into provisions designed with the experiences of men in mind (as already noted, this reverts to applying an Aristotelian or formal model of equality); or (b) justifying why their experiences ‘deserve’ the establishment of an exception to the rule and thus treating women and their experiences as ‘exceptional’. This in turn reignites the protective focus of international law (by emphasising women’s victimhood) and the correlative stereotyping of ‘women’ as passive victims, as objects rather than subjects of law, as mothers or wives operating in the private, or as the ‘Exotic Other’.2 Women are not treated as persons in their own right or as equal human beings under either of these approaches. Thus, the ‘conundrum’ of the inclusion or ‘gender mainstreaming’ approach is that it continues to treat women unequally under international law, supports the gender bias in the system, and prevents any deeper transformation. International law may no longer exclude women entirely from mainstream human rights, an exclusion that characterised the UN’s first 50 years, but have entered a stage of rhetorical inclusion; yet equality is still to be achieved.

These strategies therefore serve to reinforce feminist criticisms of the international system outlined in Chapter 1, rather than to respond to them. It begs the question

---

whether these feminist critiques can in fact be resolved by operating within the mainstream. As some factions of the feminist project have sought to operate within the mainstream, the existing system of patriarchal values and processes is reinforced and any proposals for deeper transformation are sacrificed in order to be included. Vanessa Munro has posed further dilemmas: ‘can one criticise rhetorically powerful strategies that have secured reformist currency (such as rights discourse) without being relegated as a perpetual outsider?; can one, as Audre Lorde puts it, dismantle the master’s house with the master’s tools?’\(^3\) Zoe Pearson and Sari Kouvo describe the position that feminist scholarship has reached in relation to international law as somewhere between ‘resistance’ and ‘compliance’; ‘That is, feminist scholarship aims at deconstructing international law to show why and how “women” have been marginalised; at the same time feminists have been largely unwilling to challenge the core of international law and its institutions, remaining hopeful of international law’s potential for women.’\(^4\) Karen Engle makes a similar point: ‘No matter how hard we push on the core, though, we never attack its essence. We are afraid that if we push too hard, it might dissolve and become useless to us.’\(^5\) These positions cause one to reflect upon the long-term cost of working within the mainstream. A further question that arises amid these dilemmas is whether we should accept Janet Halley’s invitation to ‘take a break from feminism’?\(^6\) Before returning to these questions, let’s first reflect on the findings of this study in particular.


2. FEMINIST NARRATIVES ON INTERNATIONAL LAW AND HUMAN RIGHTS REVISITED

1. The absence of women and women's voices

This first feminist critique of the human rights treaty system outlined in Chapter 1 was the absence of women and women's voices from mainstream human rights, or at least the 'ghettoization' of women's concerns into separate or sidestream forums. The research for this thesis reveals that women continue to make up less than 50 per cent of the membership of the treaty bodies, and around 20 per cent if the treaties on women and children are excluded.7 Women are thus denied equal representation on the treaty bodies, in itself a human rights violation, and this fails to live up to the UN Charter's ambitions that women would take an equal seat in its principal and subsidiary organs.8 Despite criticisms from other branches of feminist thought of the liberal feminist agenda of equal participation, it is still an important unfulfilled objective for women's equality at the international level.

A second observation of this thesis is that women underutilise the human rights individual petitions procedures generally and in relation to violence against women in particular, which calls for more research into how admissibility criteria and communications procedures affect female victims. In addition, while input regarding women's concerns into state party reports is much improved, feedback to states by the committees is often vacuous and rhetorical so that it fails to provide any helpful guidance to states, and women and violence against women are in many ways simply

---

7 See, Ch. 2.
8 Art. 8, UN Charter.
‘add-on’ references. The ‘template-style’ comments provided by the part-time committees to states parties regularly contain inadequate explanations and directions that may otherwise bring about real and lasting change at municipal levels. This is a general problem, but any improvements to this would assist in understanding the reasoning of the committees on questions of gender also. Progress towards a unified standing treaty body would offer hope of real engagement with state party performances as a full-time committee would have the time and expertise to do so, and states parties may take (or be able to take) their reporting obligations more seriously. Moreover a single treaty body would be better placed to issue consistent general comments across treaty obligations. More on proposed reform follows below.

Ultimately until women have equal and regular access to the treaty bodies and other international redress mechanisms, any advances made by way of interpretation will be at best theoretical. Moreover, until such interpretations become consistently applied across the treaty bodies, women will be reluctant to come forward, being unable to rely on consistent and accepted treaty body practice. Furthermore, women are faced with the prospect of having to assert their rights on several fronts – by using the categories, for example, of torture, arbitrary killing, or sex discrimination – rather than under a coherent and comprehensive framework. The fractured and ad hoc nature of such an endeavour means that female victims of violence are easily sidelined, and women’s voices silenced.

2. Human rights are ‘men’s rights’

The second feminist critique put forward in this thesis was that human rights treaties contain norms that are predominantly applicable to men’s experiences and are framed
around the fears of men rather than those of women. As noted above, engagement with these norms also does little to dismantle the existing power structures of the system. As we have seen, no normative amendments have been passed at the international level that alter this historical position.\textsuperscript{9} The express language in human rights instruments has barely changed since 1945.

The torture prohibition is, for example, still predominantly applied in the context of physical ill-treatment perpetrated by government or quasi-government officials against political dissidents or prisoners. This perception of torture has been further entrenched in the context of the post-September 11 security environment and the conflicts in Iraq and Afghanistan.\textsuperscript{10} Despite the fact that various forms of violence against women have been subsumed under the torture rubric, at times to great effect, the approach treats women's claims as 'exceptions to the rule' and it further props up the existing system. Likewise, the mainstay of the right to life continues to centre on the arbitrary deprivation of life by the state, further evidenced by the recent agreement of a new treaty outlawing disappearances.\textsuperscript{11} Although the meaning of the right to life has expanded to include issues of violence against women and 'quality of life' issues in some jurisdictions, with great benefit to women, it is a complex tool for feminists owing to disagreements, \textit{inter alia}, over abortion.\textsuperscript{12} Of the three rights studied in this thesis, however, it will be a necessary part of any strategy to eradicate violence against women, reflecting as it does the ultimate cost of violence against women. Discrimination under international law is most criticised on the grounds of race, not sex, with the former


\textsuperscript{10} See, Ch. 4.


\textsuperscript{12} See, Ch. 5.
prohibition having achieved the status of *jus cogens*, but not the yet latter, although there have been some intimations that sex discrimination is also a peremptory norm of international law and these developments should be celebrated and reinforced.\(^\text{13}\) Equality guarantees have also largely been applied following a sameness/difference ideology, in which concepts of oppression, disadvantage, and sexual hierarchies have been given limited attention. All in all, women continue to be required to frame their grievances within existing masculine-centric provisions, albeit with greater success than previously.

In addition, as already noted, the feminine pronoun is missing from many of the major human rights treaties, and even though more recent instruments use both the masculine and feminine forms,\(^\text{14}\) little practical effect has been felt. The use of the masculine pronoun in the earlier instruments has not, however, prevented the relevant committees from reflecting upon and incorporating women’s experiences, although strenuous lobbying by women’s groups, pressure by female members within these committees, and the Women’s Committee’s leading role, have all been needed for the shift in position. Nonetheless, the agreement of such treaties undermines arguments that using both pronouns is overly cumbersome or legalistically otiose.

The first main concern about the inclusion of women’s experiences of violent acts within traditional human rights canons (that is, under ‘men’s human rights’) is that interpretative dialogue begins from the traditional core (that is, men’s experiences of violence) and works its way outwards. As many feminist scholars have already noted,

\(^{13}\) See, Ch. 3.

men are the standard of international law, and if women are included at all, they are seen as a deviation from that standard.  Because of this, women are more likely to allege traditional or non-gender-specific forms of violence against themselves or other persons when invoking the individual communications mechanisms. There have been few claims, for example, alleging rape or other forms of sexual violence brought by women, whether perpetrated directly by the state or indirectly through their omissions or negligence. One reason why this may occur is because women do not readily identify what has happened to them within the masculine terminology of human rights provisions. A woman may not, for example, identify the rape she has suffered as a form of torture. Moreover, even when women bring cases under these traditional constructs, their cases are rarely publicly acknowledged or scrutinised. This supports MacKinnon’s argument that when women are subjected to the same harm as men, the harm that they suffer is ignored in international discourse altogether. This serves in turn to reinforce gendered hierarchies of the law, as well as to entrench gender stereotypes of women as victims of particular forms of violence, most notably sexual violence. It does little to change perceptions of women from ‘vulnerable victims’ in need of protection to individuals with agency and deserving of empowerment.

A second obstacle to women’s inclusion within mainstream human rights norms is that the treaty bodies have not abandoned the idea that standards of ‘reasonableness’ are gender-neutral and objective. The Special Rapporteur on violence against women, its


causes and consequences, has more recently set about to develop a set of 'indicators' to
direct and assess state party performance, and this may play a role in downplaying the
centrality of these 'fuzzy' and undefined concepts to the elaboration more specific and
concrete obligations.

Related to this is the third identified problem with the inclusion strategies that, in the
context of individual communications, decisions rarely give sufficient weight, if any, to
the subjective circumstances of particular women or apply a contextual analysis. At
most, the concepts of sex and/or gender are mentioned as somehow relevant, without a
clear explanation of how or why, but mostly any discussion of them is missing. As
noted in the Introduction to this thesis, the terms of sex and gender are not well
understood and are regularly used interchangeably. Shying away completely from using
such language is likely to distort case outcomes for women. What is needed instead is
for the language of sex/gender to take its proper place in the context of the case in
question, alongside other 'social stratifiers,' such as race, religion, culture, socio-
economic status, sexuality, or education. In addition, a woman's personalised
experiences that may not conform to expected trends or stereotypes must also be given
weight, thus recognising that not all women experience violence in the same way. This
is a step along the road to a dialogue that transcends gender and other social stratifiers,
and moves closer to recognising women as persons or individuals. It also puts the
seriousness of the harm to the victim as the central feature, rather than whether their
experience meets outsider's expectations. The feminist methodology of Isabel Gunning
in 'world travelling' could be beneficial here to educate decision-makers on their own
role and impact within the process. Without such a contextualised analysis, decision-
makers can overlook potentially important facts relevant to her situation because they

---

are looking for trends, stereotypes, and 'accepted/acceptable' behaviour. More on how to improve contextual decision-making below.

A fourth concern, and perhaps the greatest challenge, of these interpretative strategies is they do little to dismantle existing structural inequalities of the international human rights system. There have been no changes, for example, in the admissibility criteria of the treaty bodies or in the system of nomination and election of treaty body members. As noted above, participating in the same system as men without redefining its boundaries reinforces its structural inequalities, and as identified in relation to all three rights studied in this thesis, it adds legal burdens on women by inserting additional legal criteria. Incorporating women's rights within traditionally conceived [read: male] harms promotes a female-to-male progression of equality. The sexual hierarchy is thus reinforced, rather than dismantled. For women's harms to be taken seriously, the international system suggests that they must be equivalent to those of men (which causes problems where no comparator is available) or so exceptional that they are accepted by men as 'deserving' of the carving out of an exception to the rule. This in turn exceptionalises the experiences of women, even where the violence they suffer may be universal, systemic, and everyday.

3. The public/private dichotomy

While there has been acceptance that violence against women is an affront to women's physical and moral integrity and to their dignity as human beings, there is far less agreement as to a state's responsibility for that violence. None of the interpretations of the norms studied in this thesis appropriately dismantles the public/private divide, which I identified as the third feminist critique of the international human rights system.
Treaty bodies have used a range of methods to attribute so-called ‘private’ violence to the state, most notably by holding a state accountable for its failure to exercise due diligence to prevent such violence, to investigate, prosecute, and punish offenders, and to offer remedies to victims. The main problems with the test of due diligence is that it is not yet determined with any certainty, there is no clear criteria, and it is not an absolute standard. It is far from an absolute prohibition against violence akin to that of, for example, torture, genocide, or slavery. It thus treats violence against women in a different manner to the most serious human rights violations, relegating it to perhaps an equivalence with the limited fundamental freedoms of expression, religion, or movement.\(^{19}\) It aligns violence against women with qualified or limited rights rather than peremptory or non-derogable ones. In many ways, due diligence could also be associated with the weaker standard usually associated with the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*\(^{20}\) of ‘progressive implementation’, although even this requires some immediate steps to be taken.\(^{21}\) Under due diligence, in comparison, states are required to take only reasonable steps to eradicate violence against women in order to escape liability,\(^{22}\) with many of the same attendant problems outlined above in relation to the application of the same terms in relation to equality. A starting point for such scepticism is that the due diligence test emerged in cases raising no gender questions. That is, there was no conscious effort to articulate new standards

---

\(^{19}\) See, Arts. 19, 18, and 12, ICCPR respectively.


for women's claims. To date, the effect of the concept of due diligence has been insufficiently studied by feminist scholars.\textsuperscript{23}

The treaty bodies have highlighted a range of preventative measures to combat violence against women, but these have yet to be couched in obligatory language. Under the notion of due diligence, it is unclear what would constitute reasonable measures or, for that matter, what would constitute a reasonable omission or failure in respect of different forms of violence against women. As discussed in Chapters 1 and 3, although reasonableness is a commonly employed legal concept, it is interpreted and applied not in a vacuum but within a social and cultural context and thus is vulnerable to sexism and prejudice. Feminist scholars in other areas of law are right to have criticised the application of 'reasonable person' tests as easily coopted by the male dominated system in which they are applied.\textsuperscript{24} The concept of due diligence permits and accepts that non-state violence against women is not per se within the scope of international law. Rather, it falls within international law indirectly. Non-state acts of violence against women are not considered directly within the scope of international law unless they satisfy a threshold level of failed state behaviour in circumstances where there is no reasonable justification for that failure. On a theoretical level, therefore, the concept of due diligence based on the standard of reasonableness seems inadequate as the benchmark for the protection of women from non-state violence, not least because it is unclear how to measure such failure.

\textsuperscript{23} See, as an exception: C. Benninger-Budel (ed.), \textit{Due Diligence and its Application to Protect Women from Violence} (Leiden and Boston: Martinus Nijhoff Publishers, 2008).
\textsuperscript{24} See, Ch. 1.
4. Essentialised women

Although gender factors are rarely absent from human rights discourse, the effect of all this attention on women generally and violence against women in particular is that women can become ‘essentialised’ in the process. Even though feminist scholars are now well aware of this paradox, the treaty bodies continue to locate women primarily within traditional perceptions of women and women’s roles, and downplay their roles and responsibilities in other spheres of life. This may be attributed partly to the fact that the sidestream instruments such as the CEDAW do not contain mainstream human rights provisions, such as rights to life, to liberty and security of person, or to torture; and some of the mainstream treaties, such as the UNCAC, do not provide sex non-discrimination guarantees. A single unified treaty body may overcome some of these problems associated with this diffuseness, which is discussed further below.

The treaty bodies, for example, generally fail to take account of harm suffered by women prisoners, political activists, or politicians; if they do, it is in passing. Women-specific treaties that are available also concentrate on gender-related violence rather than violence against women more broadly. Regional violence against women treaties also focus solely on gender-based violence and fail to treat women as multi-dimensional beings who operate in both public and private worlds. Feminist scholarship and activism, too, can be criticised for feeding this essentialisation of women as victims of ‘private’ male violence. Feminist strategies to date have very much reflected Radhika Coomaraswamy’s suggestion that such images of woman as ‘mothers’ and ‘victims’ can be powerful lobbying tools (see Chapter 1). Herein lies the paradox. By ignoring their long-term attachment to these ‘essentialist’ images of women, feminist scholarship can render women to such inferior and subservient positions indefinitely and make any
analysis that takes account of the whole of a woman’s experiences more remote. The focus at the level of international law on gender-related violence against women serves to reinforce stereotypes about the statuses, roles, responsibilities, and capabilities of women in law and in society at large. As already pointed out above, it posits them as ‘victims’ or ‘the weaker sex’ in need of protection rather than empowerment. All this attention on gender-specific forms of violence has the capacity to undermine women’s autonomy, self-determination, and dignity as, first and foremost, human beings. The stereotyping of women under international law also results in the stereotyping of men, who are perceived as the binary opposite to women.

There has also been unequal attention given to the lives of women in the global South compared with the global North, reinforcing some feminist claims that international human rights law perceives ‘Southern’ or ‘Third World’ women as ‘victims’ or ‘others’ in need of Western/Northern rights and ‘saving’. At the same time, the system tends to ignore violence perpetrated against women in the global North. While I do not advocate that the treaty bodies turn their attention away from violations committed against women from the global South, as they are real concerns for many women, or against violence against women more generally, the treaty bodies must not ignore the many violations perpetrated against women in the global North, including, for example, domestic violence, spousal murder, sexual harassment, and prisoner violence. The treaty bodies, in their work, need to rebalance the perception of women across regions to match the varied realities of women’s lives. In addition, more focus should be given to women’s public roles and the violence they suffer in that domain. This is needed not only to reconfigure the public image of women, but also to break down gender-based stereotypes that are held by society at large as well as by international decision-makers.
whose decisions can be and often are affected by their own perceptions of the roles and status of women in particular communities and societies.

Even applying the label ‘private’ to harms that are more likely to affect women than men can reinforce the view that women’s concerns are less important than those suffered by men in the ‘public’ realm. The public/private distinction is in any event a false dichotomy, as the state is involved in all areas of life, whether by direct intervention, legal regulation, or policy choices not to intervene. Violence against women ought not to be seen as a personal aberration but as a public attack on equal human beings. After all, political motivation is an unnecessary criterion on which to establish other human rights violations. For example, the political views of victims and their violators are not relevant to other harms such as arbitrary execution, torture, or inhuman treatment.\(^{25}\) So why does international law cling to such requirements in recognising women as subjects of the law?

Labelling gendered violence as private also sends a message to women that it is their problem, that they are to blame for it, and that they are alone in resolving it. Realising that women are united across cultures, communities, and countries in being subjected to violence in similar as well as different forms confirms the view that violence against women is not personal or private but very much a universal problem that requires universal redress. Rooted in patriarchal domination, it is clear why the international community, as represented through states that are in turn dominated by men, struggle to call violence against women an international human rights issue per se. As Charlotte Bunch has stated: ‘Violence against women is a political act: its message is “stay in

your place or be afraid". Taking violence against women seriously translates into taking women seriously.

C. PARADOXES, CONUNDRUMS AND FEMINIST STRATEGIES: WHAT NEXT?

The real conundrum of pursuing women’s equality within the existing configuration of the international human rights legal system is that the price of accommodating women’s concerns and experiences within existing human rights provisions is the reinforcement of the unequal treatment of women before the law. This thesis has described a human rights system that only partially recognises violence against women as a human rights violation by its attachment to other human rights, or in other words, indirectly. At the same time the system reinforces sexual hierarchies in which men are the standard against which women are judged and women are, at best, seen as a deviation from the standard. That is, while the goals of gender inclusion are being achieved, gender inequality is being reasserted. Within this discourse too, women become ‘essentialised’ into the most extreme form of victim of sexual violence. Because of this, strategising next steps comes up against many theoretical and practical problems.

1. Structural reforms

As described in Chapter 2 of this thesis, the human rights treaty body system has many problems and is in need of reform, in part because of inadequate protection of women’s rights and in part because of general procedural and structural problems that affect its

---

efficiency and competence. **Simplification, professionalisation, and judicialisation** are the three key components in my two-stage reform proposal.

**Stage 1** in my reform agenda would require moving towards a **single unified professional standing human rights treaty body**. The proliferation of treaty bodies (as opposed to treaties) is a cause of disgruntlement among states, and over the long term the treaty bodies are likely to be rendered less and less relevant the more cumbersome and ineffective they become, as well as owing to competing international and regional forums for human rights prevention and response. The proliferation of treaty bodies is also a concern for female (and other) complainants and their advocates who must navigate the myriad mechanisms and choose the most suitable one; no easy task given the overlapping mandates and various approaches of different treaty bodies to particular legal issues, especially those relevant to women. This system also feeds into arguments about the arbitrariness and abstractness of human rights. Fear of being sidelined under a reformed system must be balanced against what women will gain under an integrated and (hopefully) more efficient system. Of course, women's full participation within any reformed system will be achieved only with the support of intensive lobbying by women's groups and non-governmental organisations, adequate structural safeguards for the inclusion of balanced gender representation and gender expertise, and improved access for female victims.

A single unified treaty body would have at a minimum **two chambers**: one dealing with state party reporting, the other dealing with individual communications. The latter ought to include a specialist panel or sub-chamber that can be activated for particularly

---

27 This might be compared with initial views on the success of the Universal Periodic Review (see, www.ohchr.org). At least as far as the UPR is concerned, states are required to respond publicly to the recommendations that they are to adopt and those that they are to reject, with reasons. This has not been the practice in relation to the treaty bodies in which all recommendations are of equal weight and therefore little moves forward.

360 Conclusion
difficult or serious cases raising gender or women’s concerns and made up of specialists in this area.\textsuperscript{28} An appeal chamber ought also to be considered.

The longer-term view (or \textbf{Stage 2}) is to move towards an \textbf{international human rights court}, with horizontal application in serious or systematic cases of human rights violations, including abuses committed by, \textit{inter alia}, corporate organizations, non-state armed groups, religious institutions, international organisations, or other private actors. Although the International Criminal Court (ICC) is a horizontal rights regime, it is typically invoked in the limited context of international or internal armed conflict, and does not apply to the wide range of human rights violations facing women during peacetime or which are not necessarily perceived as part of a ‘widespread or systematic attack’,\textsuperscript{29} although it does have the potential to interpret some situations as filling this criteri.a. Moreover, the ICC assigns decisions on whether to prosecute to an independent prosecutor, or to the state under the complementarity regime of the ICC,\textsuperscript{30} with primary attention being paid to the most serious and high-level offenders. Although female victims can and have participated in these proceedings, for example as witnesses and victims, they are passive subjects in the process — that is, they cannot exercise litigation rights in their own name but are reliant on the prosecutor or the state to act. Such a system can serve to disempower women by making them ‘objects’ rather than ‘subjects’ of international law; and it also operates to make international (as opposed to national) criminal law remote from their daily lives. In contrast, an international human rights court would allow women to bring actions in their own names and to be active participants as subjects of international law.

\textsuperscript{28} This could also occur for other special groups or for particularly difficult cases on specific provisions, although there would need to be some clear guidance to limit the abuse of the process as it could lead to the unified treaty body dissolving into a series of smaller specialist bodies in practice and thus defeating the purpose of unification.

\textsuperscript{29} Note that crimes against humanity may be committed in peacetime, but there has yet to be a case at international law: Art. 7, ICC Statute.

2. Procedural reforms

Reform of the working practices of the treaty bodies is also needed, starting with a push for states to put forward more women for nomination and election to the treaty bodies. Incorporating language calling upon states to consider ‘balanced gender representation’ in the composition of the treaty bodies in all new treaties is an important and necessary first step.\textsuperscript{31} For existing treaties that already contain such provisions, they must be implemented.

However, language alone is inadequate on its own to achieve the goal of gender equality. Policy guidance and pressure from the UN General Assembly, the UN Human Rights Council, and all other arms of the UN must also be garnered. The adoption of a resolution on the equivalent of ‘temporary special measures’ to increase the representation of women on mainstream treaty bodies would be welcomed, including a campaign to encourage states to nominate and elect more female members. I have suggested in Chapter 2 that nomination processes at the municipal level be open, transparent, and democratic (even in democratic states this is not always the case). In addition, a rotating nomination system should be instituted in which a state party that has already nominated a male member would be required to put forward a female member the next time; and that the treaty bodies also operate rotating gender chairs on their various sub-committees and for key positions.

\textsuperscript{31} It is necessary as the ECHR has discovered. The ECHR held in an advisory opinion that policy directives requiring the inclusion of the under-represented sex on the composition of all nomination lists was challenged and found to be wanting as not entrenched in the Convention itself. The Court found that ‘in not allowing any exception to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention.’ See, Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 Feb. 2008, para. 54, as cited in A. Mowbray, ‘The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights’ (2008) 8 Hum. Rts. L. Rev. 549, 558-559.
In terms of state party reporting, the treaty bodies have made considerable progress, attributable in part to a number of initiatives. The Lists of Issues that are transmitted to states parties, for example, have regularly included questions about women’s rights, although form over substance remains a concern in government responses. The new Harmonized Guidelines on state party reporting and the ‘common core document’, which identifies discrimination as a shared concern across the treaty bodies, are positive changes. Nonetheless, it remains to be seen whether states parties will treat the core common document as static and update it only rather limitedly, thereby reducing rather than increasing the importance given to common issues, including sex discrimination. In addition, movement towards agreeing ‘Indicators’ for states’ compliance with their human rights obligations must equally centre issues of non-discrimination and equality.

In terms of individual communications, further empirical research is needed into the effects of the admissibility criteria on women’s ability to access the treaty bodies. This thesis has highlighted in Chapter 2 a number of concerns with the ‘litigation’ arm of the UN human rights system, not least that it is underutilised by female claimants. The criticisms of the petition system feed into feminist claims that litigation-style processes do not suit women and that alternative dispute resolution processes are preferred. Despite these concerns, the individual communications system can play an important role towards the full protection and empowerment of women. Admittedly judicial processes are not the only source of remedy or redress, but they are part of the process of ending impunity. Additionally, jurisprudence developed by the treaty bodies (drawn from, inter alia, individual cases) has the potential to filter into other international courts and tribunals, and ultimately to trickle down to national and operational levels (and vice versa). Nonetheless, the benefits of the existing quasi-judicial system have yet
to be fully realised by women, partly because of inherent difficulties in the system itself (such as questions over the effectiveness of non-binding decisions and long waiting periods), but equally because of obstacles to women’s access arising from, *inter alia*, high rates of illiteracy, poor political participation and empowerment in municipal systems, and/or a lack of legal assistance. Improvements are also needed in decision-making processes and reasoning, outlined below, so women (and others) are able to rely on consistent and (the perception of) non-arbitrary decision-making.

A number of the recommendations I have made above could be formulated into combined General Comments/Recommendations or harmonised internal guidelines across all the treaty bodies, including statements on: women’s participation in the treaty bodies; the admissibility criteria and women’s access to the individual communications system; the adoption of gender-sensitive interpretation techniques, drawing on the work of feminist scholars such as Bartlett, Charlesworth, and Gunning outlined in the Introduction to this thesis; and on other working practices. Above all, a joint General Comment/Recommendation on violence against women would be welcomed as a preliminary step in order to synthesise the varying approaches and to consolidate the jurisprudence. Treaty body members should also be offered ongoing briefing (training) sessions and seminars on women’s rights, gender, and feminist theory, as well as specialist areas such as reproductive rights, violence against women, the rights of displaced and stateless women, and issues of sexuality, disability, and age. In regard to the latter, the Women’s Human Rights and Gender Unit within the OHCHR has already commenced the practice of sharing its expertise with the treaty bodies, as

---

32 E.g. The UN Trust Fund in Support of Actions to Eliminate Violence against Women, administered by UNIFEM, prioritises funding to projects that aim to implement and strengthen national and local initiatives, policies, and action plans. Although this Fund could theoretically be a source of further support for applications to the individual communications mechanisms (framed within the context of supporting national systems) or to improve state party reporting via alternative or ‘shadow’ reports of national and local non-governmental organisations, it is not specifically geared towards international action. See, [http://www.unifem.org/gender_issues/violence_against_women/trust_fund.php](http://www.unifem.org/gender_issues/violence_against_women/trust_fund.php) (last accessed 20 Oct. 2008).
has the United Nations High Commissioner for Refugees, including by the production of thematic reports drawing upon gender-sensitive international and national jurisprudence.\textsuperscript{33}

3. Individual litigation and contextual reasoning: Humanising women

Although institutional and procedural reforms are part and parcel of any overall improvement of women’s participation and inclusion within the UN system, they will not resolve the problem of poor interpretation and application of human rights norms to women’s experiences, and so steps still need to be taken in this area. Far from simply adding gender to its consideration of women’s claims, international decision-makers must now move beyond perceiving human beings as two discrete, monolithic categories of women and men for the purposes of applying human rights rules, and instead endorse a contextual analysis to gender, gender relations, and gender equality. As noted in the Introduction to this thesis, there are several helpful feminist techniques that expose and question the claim of international law to objectivity, impartiality, and universality, such as Kathleen Bartlett’s ‘asking the woman question’ and ‘feminist practical reasoning’ and Isabel Gunning’s ‘world travelling’. The treaty bodies need to more concertedly apply them. However, these methods could benefit from some updating.

In particular, gender and gender relations must be understood as fluid, variable, and multiple, rather than as unchangeable, static, and singular.\textsuperscript{34} International ‘litigation’


\textsuperscript{34} International ‘litigation’
must start from the position of *individual* women and consider their *individualised or personalised* experiences in the enjoyment, as well as the violation, of their human rights; rather than the starting point being general assumptions about women and their experiences. That is, decision-makers must take into account both objective and subjective factors of a particular case, including but not limited to questions of gender as recognised by the Human Rights Committee in *Vuolanne v. Finland*\(^3\) but rarely repeated, and successfully employed by the majority of the European Court of Human Rights in *Aydin v. Turkey*.\(^4\) That is, the treaty bodies need to continue to adopt and strengthen a contextual analysis in which they start by asking ‘the woman question’\(^5\) within her socio-political-economic-gender context.

Applying a ‘contextual analysis’ to law pushes decision-makers to reflect on how women’s experience violence on an individual level as well as globally fit within the international system, and to slowly bring about a cultural shift in the decision-making of the treaty bodies, some of which has already started. A contextual analysis permits decision-makers to free themselves from the shackles of established or traditional gender-based stereotypes that hinder their ability to think contextually, and to start seeing individual women as human beings within the reality of their own variable lives. It is about seeing women within their particular lives, rather than making generalisations about women as a group.\(^6\) A contextual analysis ought also to take account of the intersection of gender with other identity-based characteristics such as race, religion, ethnicity, or sexuality. Intersectionality can act as a counter-balance to ‘essentialising’


\(^4\) See, Ch. 3.

\(^5\) See, Ch. 3.

\(^6\) See, Introduction to this thesis.

\(^7\) As noted elsewhere in this thesis, grand statements about the position of women may be necessary at a political level, but at the level of litigation and individual case law, a much more nuanced approach is needed to reverse entrenched stereotypes about women.
women. However, if it is undertaken cursory, it is likely to produce and compound new stereotypes by accumulating new ‘victim’ categories, such as those based on gender/race, gender/caste, gender/class, gender/religion, gender/sexuality, or gender/ethnicity. Decision-makers must avoid this trap.

In order to carry out contextual intersectional reasoning, decision-makers must in particular listen to women and what they say about themselves, which would necessarily include their personal experiences of violence, even if those experiences do not fit neatly into specific categories or, as Littleton states, what is being said about them. This might entail asking questions such as: How was she personally affected by the act or omission in question? How did it impact upon her life? Did it put her in a worse or more disadvantaged position than before the violence vis-à-vis her position, within her family, job, society, social standing, etc.? What have been the consequences of that violence for her, in terms of family relations, social relations, economic position, employment, psychological trauma, physical harm, etc.? And some deeper questions about why the act was taken against her: What was the political and economic context in which such action was taken (or not taken)? Were there any structural factors — whether infrastructural, legal, or related to social and cultural power — that permit violence to continue with impunity? What laws and policies were in place to avoid it, or to protect against it, or which permitted it or enabled it to occur? That is, what part, if any, did inequality and discrimination play in the violence in question? Ultimately, it is hoped that international decision-making and discourse may reach a point where better-informed decisions and commentary are made that reflect the seriousness of the harm to individual women and its real impact on their lives, rather than whether or not their circumstances fit neatly within accepted gender-based and other stereotypes. Improved

39 See, Ch. 1.
interpretative techniques will also benefit other disadvantaged persons, as well as men who do not conform to expected gender-based behavioural rules or who are subject to gender-related violence.

Interpretation as an inclusion strategy, as evidenced throughout this thesis, is restricted by the wording of particular texts and the in-built biases (including the exclusion of women) in those texts, the definitions given to particular terms, the expertise and creativity of decision-makers, and the culture and working practices of the decision-making apparatus. Improved interpretative techniques have an essential role to play but are inadequate on their own. The human rights system must, therefore, be further advanced and improved. Interpretative inclusion (or gender mainstreaming) is an incomplete and somewhat fragile strategy to rely upon without more, rooted in what can essentially be summarised as the exclusionary structures of the treaty bodies and the treaties themselves.

4. Proposal for a protocol on violence against women

Under the above outlined structurally reformed system, a further step towards the elimination of violence against women would be the agreement of a protocol on violence against women to be attached to one of the human rights instruments, logically to the CEDAW, but it could also be attached to the ICCPR. Throughout this thesis, it has been shown that interpretation is at best a corrective mechanism to fix the errors of the original human rights framework. In this way, protection from violence is not conceptualised as a right in and of itself, but something less than that, equivalent perhaps to an accessory or corollary right.
As already stated, attempting to ‘fit’ violence against women within so-called masculine norms is pursued for valid, strategic purposes. As an interim strategy, interpretative inclusion must be continued, and as mentioned above, to be strengthened by broader understandings of gender, gender relations and gender equality, the application of contextual reasoning, and by taking account of other identity and personal characteristics of individual women.

However, this thesis has been premised on the fact that the absence of an explicit treaty right against violence requires lawyers and decision-makers to engage in ‘imaginative interpretation rather than a literal reading of [the] texts’. 41 It thus relies on the ability and willingness of individual decision-makers of the still male-dominated treaty bodies, to apply some of the gender or contextual reasoning techniques outlined in this thesis. And, while there has now been some significant progress in this regard, it is still piecemeal, arbitrary, and slow.

There are some real barriers and concerns about introducing yet another human rights instrument, not least arguments about proliferation. In addition, many arguments against such a treaty or protocol have been raised in the past. It has been asserted for instance that viewing each act of violence against women as a human rights violation ‘devalue[s] the special stigma attached to a violation of [international human rights law]’. 42 Such arguments are situated within long-standing sexist frameworks that have systematically excluded women from the full protection of human rights law, as outlined in Chapter 1 of this thesis. How is it possible that violence systematically perpetrated against half the

41 Anne Gallagher makes this point in relation to the expansion of the slavery provisions to include contemporary forms, such as trafficking for sexual slavery and prostitution: A. Gallagher, 'Contemporary Forms of Female Slavery', in Kelly D. Askin and Doreen M. Koenig (eds.), Women and International Human Rights Law (New York: Transnational Publishers, 2000), vol. 2, 487, 500.
world’s population could devalue an international legal system aimed at the protection and advancement of the human rights of all persons? It is precisely the equal protection goals of international human rights law that make addressing violence against women a requirement of international law. Such statements are only possible under an international legal system that unequally represents the interests of particular groups within the system (read: men). Previously, these arguments had been raised more broadly to argue against international law being concerned with so-called ‘private’ acts of violence at all.  

Still other arguments suggest that singling out ‘private’ violence against women as being a human rights violation breaches the universality principle by treating such acts differently to other private acts perpetrated against other people. In response, it must be argued that international human rights law can only claim universal application if it reflects and takes into account the experiences and concerns of all persons, not just the experiences of some (read: men). Identifying particular classes of persons for special attention, including, inter alia, women, children, indigenous peoples, and minority groups, who have been disadvantaged under the existing system of patriarchal domination, is not antithetical to the principle of universality. In fact, it is the cornerstone or purpose of human rights protection. Besides, there is much precedent already in the work of international law. There are already treaties on race, women, children, and persons with disabilities. A protocol on violence against women would recognise the specific gap in the women’s rights framework. To suggest that outlawing such violence would be to single out and therefore to advantage a particular group (here:


women) is to adopt a narrow view of equality as assimilation, rather than equality as equal dignity and respect and the elimination of oppression/domination, disadvantage, or hierarchy.\textsuperscript{45} Moreover, the narrow view ignores the fact that the system has not been applied equally between women and men, and that the status quo of focusing on only state violations ignores the experiences of half the world's people.

Agreeing a protocol outlawing violence against women will not be free from constraints. In particular, it could serve to overemphasise the power of law and deflect attention from the many non-law-based remedies available.\textsuperscript{46} Any treaty provision will result from political negotiation and compromise, and will be reliant on good faith interpretation to set its parameters and a readiness on the part of women to rely on and to utilise the law. That is, any new treaty will only be as strong as the political will to uphold it and based on the actions of states parties to the CEDAW, it is likely to be faced with extensive reservations (provided these are permitted in the text itself, about which I would suggest that reservations not be permitted to core provisions). Existing treaties at the regional level that cover violence against women are not, for example, without shortcomings.\textsuperscript{47}

There are a myriad of questions that would need to be considered to ensure that any proposed protocol is as effective as possible. These questions are not necessarily distinct to a protocol on violence against women, as many are very much part of the hurdles to agreement of any international instrument, but they would nonetheless impact on it.

\textsuperscript{45} See, Ch. 3.

\textsuperscript{46} As noted in the Introduction to this thesis, non-law-based measures have been outside the scope of this thesis, but they remain important complementary approaches to addressing violence against women.

These would include where in international law to locate any prohibition,\textsuperscript{48} how to define violence (noting the difficulties outlined in the Introduction to this thesis), and the remedies to be provided. Would many states ratify such a treaty? And if there are only a few, what impact would that have on the ‘inclusion’ of women’s injuries within the human rights corpus? What would a protocol add to the work of the treaty bodies, noting that violence against women has already been subsumed within much of their work?

At a minimum, any agreed protocol would need to adopt a broad reading of violence against women,\textsuperscript{49} include a non-exhaustive listing of both traditionally conceived ‘male’ rights (e.g., prohibition against torture, the right to life) and traditionally conceived women’s injuries (e.g., female genital mutilation, domestic violence, sexual violence, etc.), and set out the obligations of states parties, the latter giving some guidance to the concepts of ‘reasonableness’ and ‘due diligence’ as they are now applied.\textsuperscript{50}

The advantages of a separate protocol outweigh concerns that it may remain unimplemented in some states or be subject to extensive reservations, such problems being inherent to the general human rights system rather than unique to women’s rights. An international protocol also matches commitments made to this issue at regional levels. And although the CEDAW already categorises violence against women as a form of sex discrimination, it does not make violence against women prohibited conduct per se. A protocol on violence against women would state loudly that violence against women is in and of itself a violation of a woman’s human rights. Furthermore, the

\textsuperscript{48} Should any amendment be a separate treaty, a protocol, or a single provision? Should it be attached to an existing mainstream treaty or to the CEDAW? Should it have its own treaty body, or be subsumed within an existing treaty body’s work? If the latter, which treaty body? These raise mainstream-side-stream and treaty proliferation questions.

\textsuperscript{49} See, Introduction to this thesis.

\textsuperscript{50} A possible starting point might be the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequence, \textit{Indicators on Violence against Women and State Response}, above n. 17.
protocol would act as a benchmark for action by states parties and replace the current ad hoc and incremental approach to defining a state’s obligations in this regard although it would need to be sufficiently broad in its general terms to ensure it can evolve and remain dynamic. Moreover, it would represent a symbolic victory to women, recognising women’s equal right to human rights protection against violence within the existing system. It would complement, rather than replace, existing treaties. It would also be more than symbolic as it would hopefully avoid some of the pitfalls of ‘fitting’ women within existing provisions, which this thesis has shown to be particularly problematic, not least the reinforcement of the unequal treatment of women under the law.

D. CONCLUSION

There is no doubt that the UN human rights treaty bodies and the UN system more broadly now consider violence against women to be an important issue of international concern. Female genital mutilation, forced marriages, rape, sexual violence, physical violence, domestic violence, maternal mortality, incest, the neglect of girls, sex-selective abortions, female infanticide, and dowry killings, have all been recognised, rightly, as being of concern to human rights. There has been much progress since Laura Reanda observed in 1981 that human rights mechanisms do not deal specifically with the human rights of women except in a marginal way or within the framework of other human rights issues.51 Today, violence against women is of more than peripheral interest to the treaty bodies. For the Women’s Committee, in particular, it has become their number one agenda priority. Each of the treaty bodies questions states parties on their performance in relation to women’s equality and violence against women. In

addition, women’s human rights are no longer the preserve of the Women’s Committee but have filtered into the work of the other treaty bodies to a greater or lesser extent, albeit statements made are still rather vacuous at times conforming as they do to a template methodology, as discussed in Chapter 2. It can now be said that, at least in terms of quantity, women’s rights are no longer in the ‘ghetto’ of international human rights law, but they do remain on the margins in terms of quality.

The second of Reanda’s observations is, however, still applicable. The human rights treaty bodies continue to operate within a framework of ‘other human rights issues’. In fact, this is all that is required by the mainstreaming agenda, and highlights its fundamental weakness. Although the international community agreed a Declaration on the Elimination of Violence against Women, it has not been transferred into a binding human rights obligation.

The failure to agree a binding treaty that expressly prohibits violence against women supports feminist critiques of the 1980s and 1990s that women are unequal subjects under the law; that human rights norms are ‘defined by the criterion of what men fear will happen to them’; and that the content of the rules of international law privilege men to the extent that if women’s interests are acknowledged at all, they are marginalised. Leaving women’s right to live free from violence to ‘soft law’ instruments or to interpretative discourse supports the view that ‘[t]he very choice and categorisation of subject matter deemed appropriate for international regulation reflects

male priorities. The 1991 ECOSOC resolution recommended the development of an international instrument addressing violence against women, but this has never been fully achieved. A non-binding Declaration and a General Recommendation of the Women’s Committee (and now by some of the other committees), although laudable, are insufficient to respond to all the challenges put to the international community in, for example, the Nairobi Forward-looking Strategies or the Beijing Platform for Action.

The issue of violence against women is again on the UN’s human rights agenda, and has emerged as a policy priority. The UN Secretary-General issued a comprehensive report in late 2006, the General Assembly issued a declaration in 2007, and many NGOs and UN agencies have taken up the issue in a variety of contexts. While acknowledging the potential shortcomings of the doctrinal expansion approach, including concerns over the proliferation of treaties and that it is far easier to agree a new instrument than to implement an old one, a protocol on violence against women ought nonetheless to be drafted, negotiated, and agreed at the level of international law.

57 CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7.
60 UN Secretary-General, In-depth Study on All Forms of Violence against Women, UN Doc. A/61/122/Add.1, 6 July 2006.
It is thus far from time to ‘take a break’ from feminist theory at the level of international law. Instead, we need to continue the engagement with the mainstream, and to further this discourse to a point where the lines between the margins and the mainstream are merged. Shouting from the periphery can disintegrate into an unproductive ‘us’ and ‘them’ debate, and can relegate women to being on the margins imperpetuity. As Bunch stated in 1995: ‘Challenging prevailing concepts of, and reinterpreting the movement for, human rights from a feminist perspective is not merely a matter of semantics. It is about the lives and deaths of individual women everywhere, every day.’ The measures outlined in this Conclusion will hopefully move the women’s human rights agenda further towards the full equality, protection, and empowerment of women. Feminist theory and analysis has got us this far, and thus should not be abandoned, yet continuous reevaluation remains important as this thesis has shown. We need now to further explore the next stages in the development of women’s human rights, and to build on the momentum and commitment already established in large measure thanks to feminist theorising on international law.

---

63 See, above n. 6.
Selected Bibliography

BOOKS


Carin Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Leiden and Boston: Martinus Nijhoff Publishers, 2008)


Raija Hanski and Martin Scheinin (compilers), *Leading Cases of the Human Rights Committee* (Turku, Finland: Åbo Akademi University, 2003)


Karen Knop, Diversity and Self-Determination in International Law (Cambridge: Cambridge University Press, 2002),


Judith Lorber, Paradoxes of Gender (New Haven, CT: Yale University Press, 1994)


Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven, CT: Yale University Press, 1979)

Catharine A. MacKinnon, Test the West: Gender Democracy and Violence (Vienna, 1994)

Theodor Meron, Human Rights in Internal Strife: Their International Protection (Cambridge: Grotius, 1987)


Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989)


**BOOK CHAPTERS**


382


384


386


Ngaire Naffine, ‘Sexing the Subject (of Law)’, in Margaret Thornton (ed.), Public and Private: Feminist Legal Debates (Melbourne: Oxford University Press, 1995) 18


388


Frances Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’, in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007) 68


John V. White and Christopher L. Blakesley, ‘Women or Rights: How Should Women’s Human Rights be Conceived and Implemented?’, in Kelly D. Askin and Dorean M. 390


**JOURNAL ARTICLES**


Clair Apodaca, ‘Measuring Women’s Economic and Social Rights Achievement’ (1998) 20 *HRQ* 139


Katharine T. Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv. L. Rev. 829


Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 J. Legal Educ. 3


Kay Boulware-Miller, ‘Female Circumcision: Challenges to the Practice as a Human Rights Violation’ (1985) 8 Harv. Women’s L. J. 155


Eva Brems, ‘Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse’ (1997) 19 HRQ 136

392


Andrew Byrnes, ‘Changing Reality: All Roads lead to Equality?’ (2003) 97 ASIL Proceedings 60


Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 Amer. J. Int’l L. 613

393


394


395


Melissa Farley, ‘Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder’ (1998) 8 Feminism & Psychol. 405

Aaron Xavier Fellmeth, ‘Feminism and International Law: Theory, Methodology, and Substantive Reform’ (2000) 22 HRQ 658


Jane Flax, ‘Postmodernism and Gender Relations in Feminist Theory’ (1987) 12 Signs 621


Angela P. Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 Stan. L. Rev. 581


Beth Herzfeld, ‘Slavery and Gender: Women’s Double Exploitation’ (2002) 10 Gender & Dev’t 50


Jasminka Kalajdzic, ‘Rape, Representation, and Rights: Permeating International Law with the Voices of Women’ (1996) 21 Queen’s L. J. 457


399


Catharine A. MacKinnon, ‘From Practice to Theory, or What is a White Women Anyway’ (1991) 4 Yale J. L. & Feminism 13


400

Theodor Meron, ‘Enhancing the Effectiveness of the Prohibition of Discrimination against Women’ (1990) 84 Amer. J. Int’l L. 213


Catherine N. Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the former Yugoslavia’ (1995) 17 HRQ 649


Ursula A. O’Hare, ‘Realizing Human Rights for Women’ (1999) 21 HRQ 364

Joe Oloka-Onyango and Sylvia Tamale, ““The Personal is Political,” or Why Women’s Rights Are Indeed Human Rights: An African Perspective on “International Feminism”” (1995) 17 HRQ 691


402


Steven C. Poe, Dierdre Wendel-Blunt and Karl Ho, ‘Global Patterns in the Achievement of Women’s Human Rights to Equality’ (1997) 19 HRQ 813

Adamanitia Pollis, ‘Cultural Relativism Revisited: Through a State Prism’ (1996) 18 HRQ 316


403

Suzanne Sherry, ‘The Gender of Judges’ (1986) 4 Law & Inequality 159


Margaret Thornton, ‘“Otherness” on the Bench: How Merit is Gendered’ (2007) 29 Sydney L. Rev. 391


Brigit Toebes, ‘Sex Selection under International Human Rights Law’ (2008) 9 Medical L. Int’l 1


Jennifer 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


Alexi N. Wood, ‘A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective’ (2001) 12 Hastings Women’s L. J. 347


BOOK AND CASE REVIEWS


STUDIES, THESES, AND PAPERS

Amnesty International, Human Rights are Women’s Rights, AI Index: 77/01/95, 1995


Carla Ferstman, *Reparations for Gender-Based Violations in International Law*, Panel Discussion on Gender-Based Violence and International Law: Torture, Reparations, and the Role of NGOs, University of Westminster Centre of International Law and Theory, 11 May 2007 (on file with the author)


Hae Bong Shin, ‘Retrieving Gender-Legitimacy in International Law: Trends and Prospects of Gender Perspective’, 2004 Annual Conference of the Australian and New Zealand Society of International Law


SELECTED UNITED NATIONS DOCUMENTS
(in date order)

1. General


UN, Programme of Action of the United Nations International Conference on Population and Development, held at Cairo, 5-13 Sept. 1994


UN, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev.2/Add.1, 6 May 2005


Fourth Inter-Committee Meeting, Revised Draft Harmonized Guidelines for Reporting under the International Human Rights Treaties including Guidelines for a Common Core Document and Treaty-Specific Targeted Documents, UN Doc. HRI/MC/2005/3, 1 June 2005


OHCHR, Complaints Procedures, Fact Sheet No. 7/Rev.1 (undated)

OHCHR, Combating Torture, Fact Sheet No. 4/Rev.1 (undated)

2. UN Treaty Body General Comments or General Recommendations

The Human Rights Committee

HRC, General Comment No. 4: Equality Between the Sexes (Art. 3) (1981), UN Doc. HRI/GEN/1/Rev.1

HRC, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1982)

HRC, General Comment No. 9: Humane Treatment of Persons Deprived of Liberty (Art. 10) (1982)
HRC, General Comment No. 18: Non-Discrimination (1989), UN Doc. HRC/GEN/1/Rev.5

HRC, General Comment No. 19 (1990): Protection of the Family, the Right to Marriage and Equality of Spouses (no UN Doc.)

HRC, General Comment No. 20: Torture and Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7) (1992) (no UN Doc.)

HRC, General Comment No. 24: General Comment on Issues relating to Reservations made upon Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant (1994), UN Doc. CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994

CEDAW, General Recommendation No. 25: Temporary Special Measures (Art. 4(1)) (2004), UN Doc. HRI/GEN/1/Rev.7

HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10

HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2) (2004), UN Doc. CCPR/C/21/Rev.1/Add.13

The Committee on Economic, Social and Cultural Rights

CESCR, General Comment No. 3: The Nature of States Parties Obligations (Art. 2(1)) (1990), UN Doc. E/1991/23

CESCR, General Comment No. 5: Persons with Disabilities (1994), UN Doc. HRI/GEN/1/Rev.6

CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000), UN Doc. HRI/GEN/1/Add.6

CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3) (2004), UN Doc. E/C.12/2005/3

The Women’s Committee

CEDAW, General Recommendation No. 4: Reservations (1987) (no UN Doc.)

CEDAW, General Comment No. 9: Statistical Data concerning the Situation of Women (1989)

CEDAW, General Recommendation No. 12: Violence against Women (1989), UN Doc. HRI/GEN/1/Rev.7

CEDAW, General Recommendation No. 18: Disabled Women (1991), UN Doc. HRI/GEN/1/Rev.7
CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7

CEDAW, General Recommendation No 20: Reservations to the Convention (1992), 20 Sept. 1992 (no UN Doc.)


**The Committee against Torture**


**The Committee on the Elimination of All Forms of Racial Discrimination**

CERD, General Recommendation XIV: Definition of Discrimination (Art. 1(1)) (1993), UN Doc. A/48/18

CERD, General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7

CERD, General Recommendation XXVII: Discrimination against Roma (2000), UN Doc. A/55/18

CERD, General Recommendation No. 30: Discrimination against Non-Citizens (2004), UN Doc. HRI/GEN/Rev.7/Add.1

**The Children's Committee**


CRC, General Comment No. 7: Implementing Child Rights in Early Childhood (2006), UN Doc. CRC/C/GC/7/Rev.1, 20 Sept. 2006