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Commemorating 30 years of CEDAW

The Convention and the Committee: Reflections on their role in the
Development of International Human Rights Law and as a Catalyst for National
Legislative and Policy Reform*

Submitted by

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* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

A. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination against Women has a number of important dimensions. It is a manifesto with important symbolic status, a “Bill of Rights for Women”, as some have described it. It is also a development instrument, providing a framework for achieving the advancement of women and the development of their societies through the pursuit of gender equality. The Convention further provides a framework for public policy analysis and development, and a touchstone for advocacy and activism around issues of gender equality. Finally, of course it is a legally normative instrument, an international treaty that formally binds those States which have become parties to it, to carry out the obligations contained in the Convention to eliminate discrimination against women.

This paper is written from the perspective of an international and human rights lawyer, and its main focus is the role of the Convention and the practice of the Committee as a source of legal norms and policy standards at both the international and national levels. It does not purport to be a comprehensive survey even from those perspectives, and many of its examples are drawn from the Asia Pacific region, the region with which I am most familiar.

The paper seeks to:

- discuss the evolution of the Committee as a human rights treaty body and explore its contribution to major areas of international jurisprudence;
- explore some of the ways in which the Committee’s work and the Convention have provided a basis for legislative and policy development at the national level;
- identify opportunities for different stakeholders to strengthen the implementation of the Convention and enhance the realization of women’s rights through the use of the Optional Protocol.

B. A BRIEF OVERVIEW OF DEVELOPMENTS

It is useful to remind ourselves of where things stood thirty or even twenty years ago. Thirty years ago the Convention had just been adopted, and recently opened for signature (on 1 March 1980) but not yet entered into force; the Committee had of course not yet been established. The 1980s saw the increasing ratification of the Convention, and the establishment of the Committee, which met only once a year, so that its institutional development was slow. From that time there have been major changes: the Committee has moved from Vienna to New York and now finally to Geneva, the culmination of decades-long discussions that at last brings it firmly within the family of UN human rights treaty bodies and facilitates the process of harmonisation and cross-fertilisation between those bodies that has been difficult over the years; the additional meeting time allowed to the Committee on a regular and ad hoc basis over the years has permitted it to deal with the major backlogs in the consideration of State party reports that have dogged its work at various stages (notwithstanding the still patchy record of some States parties in submitting their reports on time or at all¹); the Committee’s elaboration of general recommendations has produced a significant body of jurisprudence that has begun to have an impact at the international and national levels; and the adoption and entry into force of the Optional Protocol to the

¹ See *Status of the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Secretary-General (A/64/342, paras 21-25)* for details of overdue reports as of August 2009.

Convention in October 1999 and December 2000 respectively, have added a new dimension to the Committee's work (and workload) through the individual communications and inquiry procedures, even though these procedures have received only modest use to date.

Equally striking are the developments beyond the formal institutional structures. Knowledge of the Convention and the Committee has grown internationally and nationally, and new generations of women's human rights activists have discovered the Convention and its potential for advancing the human rights of women. From a situation where there was little knowledge among national NGOs of the Committee and the reporting procedure and much of the non-governmental information the Committee received came via international NGOs such as the Minnesota-based International Women's Rights Action Watch (IWRAP) and the Kuala Lumpur-based IWRAP Asia Pacific, a proliferation of non-governmental organisations now engage with the reporting procedure under the Convention. This engagement has been facilitated by support from bodies such as UNIFEM and other international bodies working in conjunction with NGOs such as IWRAP Asia Pacific, though many others have contributed to facilitating the participation of NGOs in the work of the Committee.

At the national level, in many countries the occasion of a report to the CEDAW Committee has become an important time for evaluation of progress and difficulties in ensuring the human rights of women, and has served as an additional stimulus for activism around these issues. As in other areas, the availability of documentation has been revolutionised by the Internet: from a time when one had to attend a meeting to obtain relevant documentation or wait months for it to arrive by mail if the Secretariat has the time to dispatch it, both official and NGO documentation is available with little or no delay once it has been issued.

Equally importantly, the engagement of the academic community with the Convention and the work of the Committee has expanded significantly, with scholarly analyses of the Convention's conceptual underpinnings and flaws and the contributions and limitations of the Committee's work proliferating. Thirty, or even twenty, years ago, there were relatively few significant analyses of the Convention and the Committee that went beyond largely descriptive accounts; today the scholarly literature runs to hundreds of substantial contributions. Some of these have been important in stimulating the Committee and those working with it to address new issues or to think about old issues in new ways, as well as adding momentum to a greater inclusion of the incorporation of women's human rights in the "mainstream" human rights bodies.

These academic developments have been paralleled by a proliferation of documentation produced by international organisations, national governments and NGOs on the Convention. These range from guides to reporting under the Convention to detailed analyses of how the framework of the Convention and its detailed standards can be used to assess the adequacy of existing laws and practices in terms of equality goals.

All these developments represent stages that would perhaps be common in the evolution of an institution, but it should not be taken for granted that they were inevitable. The Committee (and its supporters) has often had to struggle – for resources, for institutional recognition, and, in the context of treaty body reform including inter alia proposals to merge the human rights treaty bodies, for continuing relevance and even for existence. The Committee has come under attack at the international level on occasion when it has taken on important but controversial issues; and in some countries the Convention and the Committee work have also come under assault in the context of national debates over ratification of the Convention or in

response to concluding comments or other statements by the Committee in relation to individual States parties.

The evolution of the Committee and its practice

The Committee and its practice have changed in major ways in the nearly three decades since the Committee commenced its work.² The Committee's development may be broadly classified into the following periods:

- *Establishment (1982-the mid-1980s)*:³ During these years the Committee commenced its work, but both the Convention and the Committee were still relatively little known. The Committee existed in geographical, institutional and substantive isolation from the Geneva-based human rights organs of the UN and the other treaty bodies, and was the poor cousin of the Commission on the Status of Women within the then Branch for the Advancement of Women. In this period the Committee established its procedures for reviewing reports and began to review the first initial reports of States; its membership included a significant number of Eastern European members and the influence of Cold War politics meant that conservative approaches tended to prevail over attempts to take expansive or innovative approaches to the Committee's work.
- *Consolidation (the late 1980s – early 1990s)*: During this period, CEDAW further developed its procedures for reviewing reports, as it faced an increasing number of reports resulting from more ratifications and the submission of periodic reports. The Committee began to develop a backlog and called on States Parties to provide it with additional resources and meeting time to help it to cope with its growing workload. There was increasing NGO interest in the work of the Committee. CEDAW began to be more aware of the work of the other treaty bodies, but it did not yet see itself as a full member of the family of international human rights treaty bodies. During this time the Committee initiated the development of a detailed and sustained jurisprudence of the Convention in the form of detailed general recommendations. Overall, however, its profile and constituency were still limited.
- *The period of the world conferences (the early 1990s – the Beijing conference)*: The early 1990s saw an increased momentum in efforts to put gender perspectives on the international human rights agenda.⁴ During this period there were a number of world conferences at which women's human rights activists made significant progress towards this objective. Of particular importance were the 1993 Vienna World Conference on Human Rights, with its reaffirmation that "the human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights",⁵ and the 1995

² The following paragraphs draw on Andrew Byrnes, "The Committee on the Elimination of Discrimination against Women" in Frédéric Mégret and Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 2nd ed, forthcoming).

³ See Elizabeth Evatt, "Finding a Voice for Women's Rights: The Early Days of CEDAW" (2002) 34 *George Washington International Law Review* 515.

⁴ See generally Felice Gaer, "And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights" in Carol Lockwood et al (eds), *The International Human Rights of Women: Instruments of Change* (1998) 1-89.

⁵ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, A/CONF.157/24, p 33, para. 18 (1993).

Fourth World Conference on Women in Beijing.⁶ The increased interest in gender issues and efforts to strengthen international mechanisms to address gender-based human rights violations against women brought with them an increased interest in CEDAW and in strengthening its supervisory role, in particular by the adoption of a complaints procedure. During this period CEDAW's secretariat moved to New York, CEDAW itself became much more aware of the developments elsewhere in the UN system and that it faced many problems in common with the other treaty bodies. During this period CEDAW's profile was significantly raised, and more NGOs began to contribute to the work of the Committee.

- *Post Beijing (mid-1990s -- 2000)*: Following the Vienna and Beijing conferences, human rights concepts became a central part of the work of the Division for the Advancement of Women, and CEDAW's importance increased within the institutional framework. The CEDAW secretariat was provided with additional resources to ensure that CEDAW was fully briefed on human rights developments. The Committee began to respond to increased NGO interest in its work and expanded the informal and formal opportunities for their input. It also began to place greater emphasis on the legal aspects of its work, in particular the development of its general recommendations. During this time the availability of information about the Committee and the Convention (especially through the Internet) increased significantly, as did the community of those following CEDAW's work. The efforts to draft an optional protocol to the Convention gathered pace, resulting in the adoption of the Optional Protocol by the General Assembly in 1999.
- *Post OP-CEDAW or CEDAW in the 21st century*: The increasing ratifications brought the Convention very close to universal ratification, the Committee began its work under the Optional Protocol, thus entering a new stage as a source of juridical interpretation of the Convention; and the Committee continued to become more closely integrated into the human rights framework of the United Nations, with close attention to developments elsewhere in the system, driven in part by the efforts towards harmonisation of the human rights treaty bodies, and the Committee's move to Geneva from the New York from the beginning of 2008. In this period the Committee also significantly enhanced the quality of its constructive dialogue with States parties, providing detailed country-specific guidance to States for better compliance with Convention obligations.

One of the features of the Committee's membership has always been that it has not been dominated by lawyers (particularly international lawyers), as have some of the other human rights treaty bodies. This has meant that a broad array of disciplinary expertise has been available to the Committee from among its members, an asset in addressing the many complex issues that arise in efforts to analyse and remedy discrimination against women. At the same time, the composition of CEDAW and its relative isolation for many years from the UN human rights bodies meant that the Committee was slow to come to a collective sense of its potential role as the monitoring body of an international human rights treaty, in particular the role that it might play in elaborating the content of the Convention as a juridical instrument. That aspect of the Committee's role has become important since the 1990s and is reflected in the form of the Committee's general recommendations and spurred on by the adoption of the Optional Protocol.

⁶ Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women, Beijing, September 1995*, A/CONF.177/20 (1995).

C. THE COMMITTEE'S SUBSTANTIVE JURISPRUDENTIAL CONTRIBUTIONS

In many respects the Convention represents the thinking of the time of its evolution, the 1970s, and of even earlier periods, given that some of its provisions take up the language of earlier instruments. Many of these concepts and provisions appear timeless – or at least as relevant today as they were when the Convention was adopted. Yet time moves on, throwing up new issues, and our conceptualization of and approach to old problems also evolves. Challenges have thus arisen as to how a Convention drafted thirty years ago can be applied in an appropriate manner to problems that have recently emerged or at least been recognised since that time (eg HIV/AIDs, the position of women with disability, LGBT issues, questions of extraterritorial application of the Convention), or how the conceptual flaws or limitations in the Convention can be remedied. This challenge can be overstated, as many of the issues and problems are the same as they were thirty years ago. But the answer lies partly in the broad language of the Convention that allows flexibility in its interpretation and its adaptability to new issues and understandings. It also lies in the power of the Committee to articulate the meaning of the Convention's provisions in relation to those issues – in many cases, it should be acknowledged, in response to the concerns of women's human rights advocates who have worked to put these issues on the international agenda and stimulated the Committee to respond to them.

The Committee has recognized the need to continue to develop the Convention in response to changing times, stating that the Convention is “a dynamic instrument” and noting its own contribution, with others, “through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women and the instruments for combating such discrimination.”⁷

The Committee's contribution in this regard can be seen in its different forms of output: in its engagement (“constructive dialogue”) with States parties in the reporting procedure (in particular, in its concluding comments and observations); in its statements on particular issues (ranging from issues of general applicability such as reservations, to specific situations, such as its recent statement in relation to the aftermath of the January 2010 earthquake in Haiti); in its general recommendations; and most recently its views under the individual complaints procedures of the Optional Protocol to the Convention and the reports of inquiries under that treaty.

The Committee's general recommendations

When the Committee commenced its work, it did not adopt concluding comments in the form of the focused summations of achievements and concerns and concrete recommendations that now exist. This is partly the result of a process of harmonization of responses of the treaty bodies, and as these are a critical resource for governments and for NGOs, they need to be focused. While the concluding comments/observations of the Committee are particularly important in their application to specific countries, they can also be relevant to understanding Committee's general stance on a range of issues,⁸ especially where there is no General

⁷ General recommendation No 25 (Article 4, paragraph 1, of the Convention (temporary special measures)) (2004).

⁸ The distillation of consistent positions from the Committee's concluding observations has become harder in practical terms as a result of the recent environmentally sensible decision that concluding observations should now only published as separate documents and should no longer be included in the Committee's annual report.

recommendation or case law on the subject. However, in terms of the overall development of a general jurisprudence of the Convention, the Committee's general recommendations have to date been more important and more useful.

It took some years for the Committee to move from brief general recommendations that took the form of short resolutions that might have been adopted by a political organ and addressed both organizational and substantive issues, to general recommendations that provided a detailed explication of particular provisions of the Convention or explained how the provisions of the Convention applied to cross-cutting themes (such as violence against women). This evolution reflects the Committee's growing awareness of its role as the monitoring body for an international *legal* instrument and the need to give content to many broadly worded provisions, as well as responding to developments in other treaty bodies.

As of March 2010 CEDAW had adopted 26 General recommendations, with others in the pipeline.⁹ Its early recommendations were brief and provided only limited guidance. That situation changed dramatically with the adoption of General recommendation No 19 on violence against women in 1992. Since that time, nearly all of the General recommendations adopted have been much more expansive and detailed (indeed some have suggested that on occasion they are too prolix to be useful legal or policy tools). The Committee has been concerned to set out in these documents, not just an analysis of the legal and policy measures that the Convention requires, but also to explain the context in which the Convention's provisions are to be interpreted and to develop the conceptual underpinnings of equality theory and the content of State obligation in that context. The most important elaborate pronouncements by the Committee in its General recommendations include:

- General recommendation No 19 (Violence against women)
- General recommendation No 21 (Equality in marriage and family relations)
- General recommendation No 23 (Political and public life)
- General recommendation No 24 (Article 12: Women and health)
- General recommendation No 25 (Article 4, paragraph 1: Temporary special measures)
- General recommendation No 26 (on women migrant workers).

The General recommendations are a rich resource of legal and policy guidance and it is hard to select highlights. However, three of the most important contributions made by the General recommendations are:

- the conceptualization of violence against women as a form of “discrimination against women” within the meaning of the Convention – most importantly in General recommendation No 19;
- the development under the Convention of the States parties' obligation of “due diligence”, namely to take all reasonable measures to ensure that women are not subject to discrimination by non-State actors – initially articulated by the Committee in the context of violence against women, but of more general application; and

However, it is unfortunate that they are not compiled electronically on an annual basis, for publication on the OHCHR website.

⁹ These include a General recommendations on article 2 of the Convention, on older women, and on economic consequences of marriage and its dissolution.

- the elaboration of the notion of non-discrimination and substantive equality that underpins the Convention – in a number of General recommendations but perhaps most importantly in General recommendation No 25 on temporary special measures under the Convention.

The breadth and flexibility of the interpretations of the Conventions adopted in the later General recommendations have proved wrong at least in part claims that the Convention was fundamentally flawed in its approach to equality, though that is not to say that it is by any means a perfectly conceived and drafted instrument.

The Committee’s jurisprudence under the Optional Protocol

An emerging area of importance, likely only to increase in significance, is the jurisprudence of the Committee under the Optional Protocol, in particular under the individual communications procedure. The inquiry procedure is still in its early days, with the report published of only one inquiry completed by the Committee,¹⁰ although the Committee has at least one other inquiry under way.¹¹ Even under the Optional Protocol, the number of cases decided is relatively modest, given that the Optional Protocol entered into force over 9 years ago. The expansion of the use of the Optional Protocol to increase the overall number of communications and also to include cases against other State parties which are not members of the Council of Europe (who have been the respondent State in all the cases in which the Committee has made public decisions and, it seems, the overwhelming group respondents overall), also needs to be pursued.

The Committee has made important contributions to international human rights law and the jurisprudence of the Convention in a number of important cases involving violence against women which have involved the death of women at the hands of partners or former partners. These cases have built on the analysis set out by the Committee in its General recommendation No 19 on violence against women, and have given content to the so-called obligation of “due diligence”, that is the obligation of the State party to take all reasonable measures to prevent the violation of the rights of a woman by a non-State actor. These cases have set a high bar in terms of the level of legislative protection and the practical implementation of the legal standards required, though the facts in those cases showed a consistent and sustained pattern of actual and threatened violence against the women concerned to which the State party should clearly have responded before rather than after the women’s deaths.

While these cases are important contributions to the elaboration of States parties’ obligations, at the same time the Committee’s broad statements of those obligations also give rise to some issues about the relationship of the obligations under the Convention to obligations under other human rights treaties, in particular the right not to be subject to arbitrary detention on the basis of presumed or predicted future conduct. The Committee has stated in a number of cases that in these contexts “the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity” and that the State should have detained the perpetrator as part of its obligation of due diligence in relation to the woman. While recognising the important interests in freedom from arbitrary detention and being grounded in the facts of these particular cases, the Committee’s findings represent an attempt to adjust the

¹⁰ CEDAW/C/2005/OP.8/Mexico.

¹¹ Domini M. Torrevillas , “CEDAW to look at Manila women's violations”, *The Philippine Star*, 20 October 2009, <http://www.philstar.com/Article.aspx?articleid=515826>.

relative priorities of the rights in question in such cases and presents challenging questions in that regard.

Follow-up and implementation of views adopted under the Optional Protocol

The violence cases have also led to important progress at the domestic level in terms of law, policy and administrative change, and in the development of the follow-up procedures of the Committee. Follow-up to decided cases finding violations is a critical element of the process and has given rise to some difficulties under other treaties. The Committee has had some success with its follow-up procedures, due in part at least to the willingness of States parties to cooperate. For example, in relation to Austria, the process has involved a continuing discussion with the State party (and the author/representative) which it seems will not be formally closed until the Committee is satisfied that the appropriate measures have been taken.¹²

As the Committee's body of case law grows and more decisions are adopted in which the Committee finds violations, the question of domestic implementation will assume greater importance. While much responsibility in this respect lies with the executive government and legislature, often the courts may need to be involved, if for example a court decision needs to be reviewed or reversed. Similar issues have arisen in relation to the implementation of the views of other human rights treaty bodies, as in many countries the decision of the treaty bodies have no formal legal status, and the successful complainant may therefore not be able to rely directly on the decision of the CEDAW Committee to make or reopen a case under domestic law.¹³ An instance of this can be seen in one of the cases against Austria, in which the Austrian Supreme Court stated in the context of a civil claim for compensation brought as a result of the case of *Şahide Goekce (deceased) v Austria*¹⁴ that the decision and recommendations of the CEDAW Committee were not relevant to the domestic court's decision, as the establishing of the facts and their legal assessment was solely a matter for the Austrian courts.¹⁵ The Committee may wish to explore with States parties to the Optional Protocol the possibility of legislation to permit its views to be taken account of by national courts where that is necessary to provide an adequate remedy to the complainant.

An increasingly demanding constituency?

As awareness of the role of the Convention and the Committee has grown and civil society has devoted resources to engaging with the reporting and other procedures at the international level, expectations of the Committee have grown. The Committee's work under the Optional Protocol has given rise to new opportunities to provide redress to victims of violations and to provide guidance for States parties and others as to what the provisions of the Convention require. At the same time, the Optional Protocol provides a new opportunity for commentators and activities to scrutinize and critique the work of the Committee. Constructive criticism is

¹² See, eg, *Report of the Committee on the Elimination of Discrimination against Women on its forty-second and forty-third sessions*, A/64/38, at 150 (*Yildirim v Austria*). See also the discussion in Rosa Logar, "Die UNO-Frauenrechtskonvention CEDAW als Instrument zur Bekämpfung der Gewalt an Frauen: zwei Beispiele aus Österreich", *Frauen Fragen* 1, 2009, 22, 34-36.

¹³ International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals*, in International Law Association, *Report of the Seventy-first Conference*, Berlin (London: 2004) 621, paras 29-43.

¹⁴ Communication No 5/2005.

¹⁵ Decision of 29 November 2007, 1Ob234/07d, para 2 (referred to in Logar, above n 12, at 35 n64)

of course desirable, and can contribute to the improvement of the Committee's jurisprudence and practice.

A number of cases decided by the Committee have been the subject of critical commentary, both from within and outside the Committee. The critiques have tended to suggest that the Committee, in some cases at least, has not been sufficient liberal or progressive in its interpretation of the procedural requirements for the bringing of claims or of the provisions of the Convention itself.

One such case is *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain*,¹⁶ which involved a claim of discrimination in relation to sex discriminatory rules relating to succession to titles of nobility. A majority of the Committee ruled the case inadmissible on procedural grounds, finding that the events in question had occurred prior to the entry into force of the Optional Protocol for Spain and that the claimed violation had not continued after that date. However, eight members of the Committee went further, ruling that the claim was incompatible with the provisions of the Optional Protocol on substantive grounds. They noted that it was undisputed in the case that "the title of nobility in question is of a purely symbolic and honorific nature, devoid of any legal or material effect" and concluded that the Convention's guarantees of equality did not extend to succession to titles of nobility, apparently because such hereditary entitlements were seen as inappropriate subjects for a claim of sexual equality.

The upshot of this view seems to be that the Convention does not embody a freestanding right to equality but that it has to be linked to a specific human right or fundamental freedom, of which a right to inherit a title of nobility was not one. One member of the Committee directly contested this view, arguing that while a title of nobility might have no legal or material consequences, the rules governing succession to such titles reflected historical and cultural attitudes of inequality of the sort at which the Convention was directed and that if "this right 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."¹⁷

Two recent decisions of the Committee that have concerned the law relating to family names in France might also be seen as reflecting a certain timidity or at least considerable caution on the part of the Committee in its interpretation of the Optional Protocol and the Convention. For example, in one of those, *G D and S F v France*,¹⁸ the Committee had before it complaints by two French women whose requests to change their family name on certain formal documents from their father's surname to their mother's surname had been rejected under the procedures provided for by French law for the consideration of such requests. In both cases the prevailing law and custom at the time of their birth had meant that the authors of the communication had acquired their father's family name as a matter of course. The families had broken up and the authors had been brought up by their mothers and identified with their mothers. The case was based explicitly on article 16(1)(g) of the Convention¹⁹ (to

¹⁶ Communication No 7/2005, decision on admissibility, 9 August 2007, CEDAW/C/39/D/7/2005 (individual opinions by Committee members Magalys Arocha Dominguez, Cees Flinterman, Pramila Patten, Silvia Pimentel, Fumiko Saiga, Glenda P. Simms, Anamah Tan, Zou Xiaoqiao (concurring)).

¹⁷ *Id* at paras 13.3-13.9 (individual dissenting opinion of Shanthi Dairiam).

¹⁸ Communication No 12/2007, decision on admissibility, 4 August 2009, CEDAW/C/44/D/12/2007.

¹⁹ "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation".

which provision France had entered a reservation upon ratification), though the Committee was also prepared to consider it under articles, 2, 5 and 16(1).

The Committee took the view that, notwithstanding the fact that there were still in theory opportunities for domestic relief, the domestic remedies had been unduly prolonged and were unlikely to bring relief. However, the majority of the Committee took the view that article 16(1)(g) “aims to enable a married woman or a woman living in a husband-and-wife relationship to keep her maiden name, which is part of her identity, and to transmit it to her children, and as such is of the view that its beneficiaries are only married women, women living in de facto union and mothers”.²⁰ Accordingly, as the authors did not fall into any of these categories but were claiming a violation as children, there were not “victims” for the purposes of the Optional Protocol.

The majority had held that the complaint “should be examined primarily” under article 16(1)(g),²¹ but after finding the complaint inadmissible on that basis, did not go on to consider whether the authors could be victims of violations of articles 2, 5 and 16(1), and how the French government’s argument that article 16(1)(g) was *lex specialis* in relation to family names might relate to such claims. The majority’s approach also meant that it did not have to consider whether the reservation was incompatible with the object and purpose of the Convention. This approach may be due in part to how the authors argued the case before the Committee. However, the conservative approach reflected in these findings is highlighted by a dissenting opinion by six members of the Committee.²² They argued that the authors could be viewed as victims of an alleged violation of article 16(1)(g),²³ as well as of articles 2, 5 and 16(1), and rejected the argument that article 16(1)(g) covered all matters relating to the retention and transmission by women of their maiden name (and thus that the claim was barred by the French reservation). Thus, the minority did not need to consider the compatibility of the reservation either. However, it did address the procedural and substantive issues under other articles, as well as placing the issue in a broader social context (in contrast to the more formalistic analysis of the majority). The minority concluded there had been a violation of the Convention.

The point of these examples is not so much to argue which views were more persuasive, though based on a reading only of the published Committee decision, there is much to be said for the dissents or minority opinions in each case. However, the important issue is that the Committee is being challenged both from within – in the form of dissenting and separate opinions – and from without in the form of academic and other commentary to articulate logical and persuasive reasons for its decision that are firmly ground in the treaty, general international law, and the social and political context which forms the backdrop to the Convention. It illustrates the trend of developing higher expectations and closer substantive scrutiny of the Committee’s work.

²⁰ Communication No 12/2007, CEDAW/C/44/D/12/2007, para 11.10.

²¹ *Id* at para 11.4.

²² Individual opinion by Committee members Dubravka Šimonović, Yoko Hayashi, Ruth Halperin-Kaddari, Silvia Pimentel, Violeta Neubauer and Saisuree Chutikul (dissenting).

²³ “[T]he test of victim status is whether the authors have been directly and personally affected by the violations alleged.” *Id* at para 12.5.

D. THE CONVENTION AS A FRAMEWORK OF REFERENCE FOR POLICY AND LEGAL ANALYSIS

Law reform work

The Convention and the Committee's practice under it have informed the work of law reform commissions on various occasions, underlining the importance of ensuring that ensuring consistency with international treaty obligations is part of the mandate of law reform bodies. The impact can range from providing the overall theoretical framework for an analysis of one or more areas of law, or provide a guiding rule or principle in relation to specific rules of law. A number of examples can be briefly mentioned.

Australian Law Reform Commission inquiry into equality before the law: In 1993 the Australian Law Reform Commission was given a reference under which it was to consider whether change should be made to Australian federal laws or their administration in the light of the obligations of that State under articles 2 and 26 of the International Covenant on Civil and Political Rights in relation to the equality of men and women, and in relation to the CEDAW Convention. The Inquiry was presided over for most of its duration by Justice Elizabeth Evatt, a former member and Chairperson of the CEDAW Committee and subsequently a member of the Human Rights Committee.

The concept of equality and non-discrimination contained in CEDAW were central to the framework of analysis adopted by the ALRC, and the individual provisions of the Convention provided a list of topics which the Commission drew on in its analysis of substantive law and practice. The Commission affirmed that "equality in law, as required by CEDAW, needs to be understood in a different and more substantial sense than merely equality before the law. Any understanding of equality must take account of the social and historical disadvantages of women and how that has affected the law." The Commission made a range of recommendations, some of which specifically referred to the Convention, others which were intended to implement its substantive obligations. These included a recommendation that the existing federal Sex Discrimination Act contain a general prohibition of discrimination in accordance with CEDAW article 1"²⁴ and that any inclusion of temporary special measures in the Act should reflect the CEDAW position that such provisions were not discrimination that could be justified, but rather not discriminatory and a means of achieving substantive equality.²⁵ Even though not all the recommendations of the Commission were implemented many were, and the CEDAW framework was important to the framing of the issues and the proposed legislative and policy responses.²⁶

Hong Kong Law Reform Commission review of the law of domicile: Another, smaller-scale example is provided by the Hong Kong Law Reform Commission in its review of the law relating to the law of domicile. The Commission considered the traditional common law rule according to which the domicile of married women followed the domicile of their husbands. The Commission had no hesitation in recommending abolition of the rule (already abolished in many common law jurisdictions), drawing on various international and domestic law sources, making particular mention of article 15(4) of the Convention and the Committee's

²⁴ ALRC, *Equality before the Law – Women's Equality (Part II)*, ALRC 69, para 3.1 and Recommendation 3.1

²⁵ *Id.*, Recommendation 3.7

²⁶ See also ALRC, *Equality before the Law – Women's Equality (Part II)*, ALRC 69, para 4.39 and n 101 (referring to CEDAW's *General recommendation No 19* on violence against women in relation to the importance of eliminating violence as part of the struggle to achieve equality for women).

General recommendation No 21 (Equality in marriage and family relations). The Law Reform Commission concluded, unsurprisingly, that in light of the CEDAW Committee's interpretation of article 15(4) in General recommendation No 21, it "seems clear that the common law rule as to the domicile of married women contravenes article 15(4)."²⁷ The law was reformed by the Domicile Ordinance (No 4 of 2008).

Philippines Magna Carta for Women: In 2009 the Philippines adopted An Act Providing for the Magna Carta of Women of the Philippines,²⁸ which drew extensively on the Convention, and was the result of a law reform effort involving international partners including the UNIFEM CEDAW Southeast Asia Programme and other UN agencies working with local partners.

Other examples of the use of the Convention and CEDAW's jurisprudence to scrutinize laws include the major regional project undertaken by UNIFEM Pacific and UNDP which examined the laws of nine Pacific Island states to evaluate their de iure compliance with the provisions of the Convention,²⁹ a 2009 UNIFEM-commissioned report reviewing 45 Gender Equality Laws and assessing these and five Southeast Asian laws against CEDAW standards,³⁰ and a wide-ranging 2009 UNIFEM review of Vietnamese law in the light of CEDAW standards.³¹ There are no doubt many other examples in which law reform bodies have drawn the standards of the CEDAW and the Committee's practice in exploring and designing options for law reform.³²

E. USE BY NATIONAL COURTS, TRIBUNALS AND COMPLAINT MECHANISMS OF THE CONVENTION AND CEDAW'S JURISPRUDENCE

There has been increasing use made of the Convention's provisions and the output of the Committee by national and international courts and tribunals, and other agencies with complaint jurisdictions. Much work has been done to collate and document such examples, both in compilations of cases³³ and general reports on the subject, most notably two reports

²⁷ Law Reform Commission of Hong Kong, *Report - Rules for Determining Domicile*, April 2005, 21-22, para 2.13 (footnotes omitted). The Commission recommended abolition of the rule (p 80, para 4.135), following its Sub-committee's recommendations in this regard: Law Reform Commission of Hong Kong Domicile Sub-committee, *Consultation Paper - Rules for Determining Domicile*, February 2004, 21-22, para 2.13.

²⁸ Republic Act 9170.

²⁹ *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries* (UNDP, UNIFEM 2007).

³⁰ UNIFEM, *Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries* (2009).

³¹ UNIFEM, *CEDAW and the Law: A Gendered and Rights-Based Review of Vietnamese Legal Documents* (UNIFEM, 2009).

³² See, eg the South Africa Law Reform Commission, *Issue Paper 19 (Project 107) Sexual Offences: Adult Prostitution*, Chapter 9 ("Adult prostitution"), at para 9.43-9.52, which refers to article 6 of the Convention and CEDAW's General recommendation No 19 on violence against women, as well as other CEDAW material. The final report of the Commission does not refer to the Convention, though it is mentioned in the preamble of the legislation proposed by the Commission. The Commission had drawn on the Convention and referred to General recommendation No 19 in the discussion paper that led to the formulation of the principles adopted in the final report: see *Discussion Paper 85 (Project 107) Sexual Offences: Substantive Law* (1999), paras 2.32.2-2.3.2.4

³³ See, eg, K Adams, R Emerton, A Byrnes and J Connors (eds) *International Women's Rights Cases* (Commonwealth Secretariat and Cavendish, 2005), and Asia Pacific Forum on Women, Law and Development, *A Digest of Case Law on the Human Rights of Women (Asia Pacific)* (APWLD, 2003). See also the *CEDAW Case Bank*, Global Justice Center, <http://www.globaljusticecenter.net/casebank/index.html>.

by the International Law Association in 2002 and 2004.³⁴ As the use of the Convention in litigation is the subject of another paper, only brief reference is made here to examples of references to CEDAW's jurisprudence in selected cases.³⁵

F. CHALLENGES AND OPPORTUNITIES – OLD AND NEW

Reservations

The question of reservations to the Convention has been much discussed by the Committee and commentators on the Convention, and has been the subject of considerable advocacy by NGOs. Many States have reviewed and withdrawn reservations over the years, often in response to CEDAW's persistence on the issue. Yet the integrity of the Convention is still under challenge from the existence of a number of wide-ranging reservations to the Convention by which some States parties purport to subject their acceptance of Convention obligations to existing constitutional or legislative arrangements or to particular traditional, customary or religious systems of law or belief.³⁶ The Committee³⁷ and a number of States parties³⁸ have made their position clear that such wide-ranging reservations – in particular insofar as they do not specify the nature of any compatibility – are problematic and in most

³⁴ International Law Association Committee on International Human Rights Law and Practice, *Interim report on the impact of the United Nations treaty bodies on the work of national courts and tribunals*, in International Law Association, *Report of the Seventieth Conference, New Delhi* (2002) 507-555; International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals*, in International Law Association, *Report of the Seventy-first Conference, Berlin* (London: 2004) 621-688.

³⁵ In *Vishaka v State of Rajasthan*, AIR 1997 SC 3011, at 3015 the Supreme Court of India not only referred to the General recommendation No 19 on violence against women adopted by the CEDAW Committee, but drew up rules to govern sexual harassment in employment (pending the enactment of legislation) which drew extensively on the wording of the General recommendation. In *Grüne Bewegung Uri v Landrat des Kantons Uri*, Judgment of 7 October 1998, the Swiss Federal Supreme Court (Bundesgericht) (BGE 125 I 21, at 34-35) referred to the CEDAW Convention and CEDAW's General recommendation No 7 (1988). In *Carmichele v Minister of Safety and Security and Another*, 2001 (10) BCLR 995 (CC) the South African Constitutional Court referred to CEDAW's General recommendation No 19 on violence against women, in particular its reference to the obligation of the State to take preventive, investigate or punitive steps in relation to private violations. In *R v Ewanchuk* [1999] 1 SCR 330, 169 DLR (4th) 193 the Supreme Court of Canada upheld an appeal against an acquittal of a person charged with sexual assault and substituted a conviction. Heures-Dubé and Gonthier JJ in a concurring judgment referred to CEDAW's General recommendation 19. In *Quilter v Attorney-General* [1998] 1 NZLR 523, at 553 the dissenting judge of the New Zealand Court of Appeal, Thomas J, (refers to CEDAW's general recommendation on the family (General recommendation No 21, paras 13 and 16) in his discussion of whether refusal to permit same-sex marriages was a violation of the guarantee of equality. In *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250 the Federal Court of Australia discusses at length, with reference to General recommendation No 25 and other sources, the concept of (temporary) special measures under the Convention and implementing Australian legislation. In Decision C-355/06 of 10 May 2006, the Constitutional Court of Colombia drew on CEDAW as part of its reasoning to hold that abortion could not be considered a crime in a number of circumstances. See also the discussion of decisions of the Supreme Electoral Tribunal and the Constitutional Chamber of the Supreme Court of Costa Rica in cases involving electoral quotas and a challenge to a failure to nominate women for certain public offices in International Women's Rights Action Watch Asia Pacific, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, Occasional Paper No 14, 26-31 (2009) (authored by Alda Facio).

³⁶ See *Multilateral Treaties Deposited with the Secretary-General*, [Chapter IV.8](#).

³⁷ See, eg., *Statements on reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, A/53/38/Rev.1, Pt II, paras 1-25.

³⁸ See *Multilateral Treaties Deposited with the Secretary-General*, [Chapter IV.8](#).

cases incompatible with the object and purpose of the Convention, in contravention of article 28(2) of the Convention and general principles of the law of treaties.³⁹

While the formal consequences of objections by States parties to such reservations is still not clear, particularly where an objecting State party specifies that the objection does not affect the entry into force of the Convention as between it and the reserving State, this continuing tension between these reservations and article 28(2) of the Convention has not prevented the Committee and the States parties in question from engaging in substantive dialogue during the reporting procedure, including in relation to the areas purportedly covered by such reservations. Notwithstanding this pragmatic approach to the issue of reservations, it is unfortunate that a significant number of States parties – including those who have joined in adopting resolutions in the General Assembly calling on States parties (including themselves) to remove reservations to human rights treaties⁴⁰ – continue to maintain reservations that on their face appear to reserve the right of the State party to act in a manner fundamentally at odds with the object and purpose of the Convention.

The Human Rights Council's Universal Periodic Review procedure

The establishment of the Human Rights Council and the introduction of the Universal Periodic Review procedure poses new opportunities and challenges for the implementation of the Convention and the role of the Committee. At the time of establishment of the UPR, there was some concern that the effect of a review by a political body such as the Human Rights Council could easily become politicised and that States might be less demanding in their scrutiny of other States' human rights performance than were the human rights treaty bodies and other mechanisms in their reviews. While there have been some problems with the UPR, the fact that the findings and recommendations of the treaty bodies are included in the summary of material form UN sources provided to the Council provides an important starting-point. The process offers a chance to the HRC to reinforce the recommendations of CEDAW (and thereby to strengthen domestic advocacy efforts in that regard), and for CEDAW to follow up UPR recommendations and undertaking by States parties in its review of reports following a UPR.

One example of the UPR reinforcing Convention standards and CEDAW's concluding observations may be found in the appearance of Vanuatu before the UPR in 2009. Among the 48 recommendations made by States to Vanuatu were a number in which they referred explicitly to the Convention or to CEDAW's recommendations to Vanuatu, and urged Vanuatu to take steps to fully implement the Convention and those recommendations at the domestic level.⁴¹ Vanuatu responded to these recommendations by characterizing them as "acceptable",⁴² creating the expectation that it will undertake steps to give effect to those recommendations. No doubt these matters will be followed up when it next appears before CEDAW and other bodies.

An example of the converse -- CEDAW's reinforcement of UPR recommendations and commitments -- appears in the review of the 6th periodic report of Japan at the Committee's

³⁹ See Vienna Convention on the Law of Treaties, arts 19 and 27.

⁴⁰ See, eg, GA resolution 62/218, para 6, and GA resolution 64/138, para 6.

⁴¹ *Report of the Working Group on the Universal Periodic Review: Vanuatu*, A/HRC/12/14, paras 9-12.

⁴² *Report of the Working Group on the Universal Periodic Review: Vanuatu – Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/12/14/Add.1.

44th session in 2009. At Japan's appearance before the UPR in 2008 a number of States had recommended that Japan establish a Paris Principles-compliant national human rights institution,⁴³ a suggestion which had previously been made by a number of treaty bodies (including CEDAW).⁴⁴ In its response to the review, Japan agreed "to follow up" this recommendation.⁴⁵ CEDAW took up this recommendation and Japan's commitment, and in its concluding observations urged Japan to "establish within a clear time frame an independent national human rights institution in accordance with the Principles, whose competencies should include issues related to the equality of women and men."⁴⁶

These examples illustrate the potential of the process for governments, with the encouragement of both the Human Rights Council and the treaty bodies (including CEDAW) to build a positive and complementary relationship between the two procedures in advancing the protection and enjoyment of human rights. It will be important to monitor and analyse the way in which the UPR and the treaty body processes interact, in order to ensure that this relationship continues to develop in this productive and reinforcing way.

Engaging with other stakeholders – National Human Rights Institutions and National Parliaments

Although the Committee has previously expressed views on the role that National Human Rights Institutions (NHRIs) and National Parliaments might play in the implementation and monitoring of the Convention, its recent concern with these two actors represents an important step forward in engaging with institutions in the State other than the Executive government.

Many NHRIs already have a gender mandate (though some may not, and few have an explicit Convention mandate). Where they are Paris Principles-compliant and thus relatively independent of the Executive, they can be an important actor in scrutinizing their government's performance, providing redress, initiating policy reform, and providing information to international mechanisms. The Committee, in its 2008 Statement on NHRIs,⁴⁷ has both sought to recruit NHRIs systematically as an ally and also to encourage them to apply Convention standards in their work (in particular the understanding of the concepts of equality contained in the Convention).⁴⁸ This should provide opportunities for domestic advocates to encourage their NHRIs to undertake more work in relation to Convention implementation and monitoring, or to persuade government to confer such a mandate on an NHRI if it does not already possess it.

The Committee has also now moved to systematize its approach to National Parliaments in a similar way (though it might also usefully have added State and provincial Parliaments in States with federal or devolved systems of legislative power, or even local governments). Of course, the role of Parliaments in implementing and monitoring the Convention has been long recognized, and the potential and modalities are described in the Inter-Parliamentary Union's 2003 *Handbook for Parliamentarians: The Convention on the Elimination of All Forms of*

⁴³ *Report of the Working Group on the Universal Periodic Review: Japan*, A/HRC/8/44, para 60(2) (2008).

⁴⁴ *Concluding comments on the fourth and fifth periodic reports of Japan*, A/58/38, paras 373-374

⁴⁵ *Report of the Working Group on the Universal Periodic Review: Japan, Addendum -- Conclusions and/or recommendations*, A/HRC/8/44/Add.1, para 1(a) (2008).

⁴⁶ CEDAW, *Concluding observations on Japan*, CEDAW/C/JPN/CO/6, para 24 (7 August 2009)

⁴⁷ *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*, Decision 40/II, A/63/38 (Part One), Annex II.

⁴⁸ *Id* at paras 3-4.

Discrimination against Women and its Optional Protocol. The Committee's recent Statement⁴⁹ is an important one, in that it encourages Parliaments to take a more active role nationally in promoting and monitoring implementation of the Convention, and in providing information to the Committee where appropriate. This Statement provides the occasion for domestic advocates to work to persuade their Parliaments to carry out more effective scrutiny and implementation of the Convention within the scope of their Parliamentary roles.

⁴⁹ *National parliaments and the Convention on the Elimination of All Forms of Discrimination against Women, Statement on the relationship of the Committee on the Elimination of Discrimination against Women with parliamentarians*, <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/Parliamentarians.pdf>.