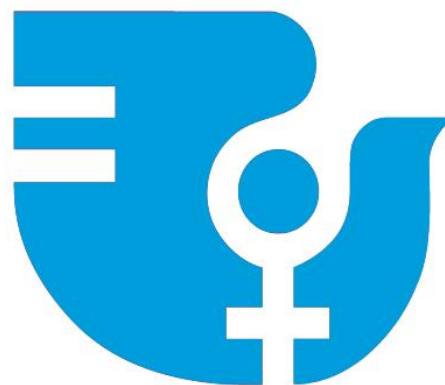


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# **The CEDAW Convention: de jure and de facto dichotomy**

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## ABBREVIATIONS

<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>NGO</b>	Non-governmental organization
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>UN</b>	United Nations
<b>UN Women</b>	United Nations Entity for Gender Equality and the Empowerment of Women

## ABSTRACT

The CEDAW Convention, which was adopted in 1979, recognizes a wide range of rights for women regarding non-discrimination and the eradication of gender violence. Together with CEDAW, its Committee and the Special Rapporteur on violence against women make sure that the scope of protection available to women at the normative level (*de jure*) is wide. However, when analyzing the enforcement mechanisms of CEDAW, which are the reporting procedure, the interstate procedure, the inquiry procedure and the individual complaints procedure, notorious limits of enforcement emerge (*de facto*). In addition, arguments such as the public/private divide or cultural relativism constitute further impediments for women in order to achieve full equality. Given these constraints, this paper develops four proposals that would contribute towards the goal of implementation.

Key words: *CEDAW, women, United Nations, non-discrimination, gender equality, implementation, de jure, de facto.*

## INTRODUCTION

The end of the Second World War led to the establishment of the United Nations (UN) by the UN Charter<sup>1</sup>, which is considered a milestone treaty in the history of human rights. It was signed the 26th of June 1945 and its Preamble set out the determination ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women’<sup>2</sup>. Gender equality was one of the goals of the UN and further agreements were reached in the following years, including the Convention on the Political Rights of Women in 1952<sup>3</sup>. In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or the Convention)<sup>4</sup> and women’s rights were recognized as human rights internationally<sup>5</sup>. This treaty led to additional developments, but there is still so much to be done in this regard. Full equality between men and women is not yet a reality, and gross violations of women’s rights on account of their gender continue to occur in the modern world<sup>6</sup>.

The main objective of this research is to reach a conclusion on whether the rights set forth in CEDAW (*de jure*) are effectively implemented in practice (*de facto*). A well-founded answer can only be reached through a critical analysis of the legal framework at the international level regarding the rights of women. References to relevant case law and secondary sources such as books or journal articles will be equally necessary. At last, if the final answer is affirmative, it will mean that there has been an effective transition between recognition and enjoyment of women’s rights. Conversely, if the answer is negative, new and effective methods will be required in order to achieve the goal of full gender equality in the near future.

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<sup>1</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>2</sup> Ibid, preamble.

<sup>3</sup> UN General Assembly, *Convention on the Political Rights of Women*, 20 December 1952, A/RES/640 (VII).

<sup>4</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, A/RES/34/180.

<sup>5</sup> Indhrani Sridharan ‘Practising Human Rights: A Feminist Perspective’ (Oxford University Press India 2002) 93.

<sup>6</sup> Rhona K. M. Smith, *Textbook on International Human Rights* (7th edn, Oxford University Press 2016) 372.

To provide a proper insight of the issue, this essay will focus on gender violence and its link with discrimination with reference to the work of CEDAW, its Committee, and the Special Rapporteur on violence against women. It will also address the enforcement mechanisms available and their real effectiveness, the public/private divide, and the due diligence standard. References to the reservations to the CEDAW, often justified by cultural relativism arguments, will also be useful in order to determine whether the existing legal framework is effectively implemented or not.

After the analysis exposed in the previous paragraph, and anticipating now that there are multiple gaps regarding implementation of CEDAW, four proposals for ensuring *de facto* enjoyment of women's rights will be developed. All of them deal with an increased coordination among the relevant actors that have the duty to implement the Convention.

## I. CEDAW, THE COMMITTEE, AND THE SPECIAL RAPPORTEUR

CEDAW was adopted in 1979 and entered into force in 1981. It is one of the most widely ratified human rights conventions with 189 States parties, after its recent adoption by South Sudan in 2015<sup>7</sup>. Its 16 substantive articles recognize civil, political, economic, social and cultural rights for women, and are a response to the necessity to establish a broader view of equality which would eradicate discrimination in the family, in the community and in the workplace, and the survival stereotypes and traditional practices detrimental to women<sup>8</sup>.

Article 17 CEDAW establishes the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which is the body that monitors the implementation of the Convention. It consists of 23 independent experts who are elected for a term of four years by the States parties<sup>9</sup>. Among its functions, the CEDAW Committee elaborates General Recommendations, with the purpose of aiding States parties in understanding their obligations under CEDAW in relation to specific aspects of it<sup>10</sup>. At this point, General Recommendation No. 19 is of special interest, because it defines gender-based violence as a form of discrimination<sup>11</sup>, stating that there is a ‘close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms’<sup>12</sup>. Consequently, article 1 CEDAW, which sets out the definition of discrimination, must be interpreted as including gender violence; meaning that it is possible to breach some provisions of the Convention regardless of whether they mention violence or not<sup>13</sup>.

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<sup>7</sup> UN Office of the High Commissioner for Human Rights website <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx)> accessed 20 January 2018.

<sup>8</sup> UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 22, Discrimination against Women: The Convention and the Committee*, 25 June 1993, A/CONF. 157/24 Part I, chap. III, 1.

<sup>9</sup> UN Office of the High Commissioner for Human Rights website <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/Mandate.aspx](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Mandate.aspx)> accessed 20 January 2018.

<sup>10</sup> CEDAW see note 4, art. 21.

<sup>11</sup> UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women*, 11th Session, 1992, CEDAW/C/GC/19, para. 1.

<sup>12</sup> *Ibid*, para. 4.

<sup>13</sup> *Ibid*, paras. 6 and 7.



In 1994, the UN Commission on Human Rights appointed a Special Rapporteur on violence against women<sup>14</sup>. The current Special Rapporteur is Dr. Dubravka Šimonović, who is requested to: seek and receive information on violence against women from different bodies; recommend measures at all levels to eliminate violence against women; work closely with the Human Rights Council, the treaty bodies, and the Commission on the Status of Women; and adopt a universal approach to the elimination of violence against women<sup>15</sup>.

CEDAW, its Committee, and the Special Rapporteur show that the scope of the protection of women from violence at the normative level (*de jure*) is wide, and provides appropriate tools to make sure that full equality between men and women is achieved. However, the question which now arises is whether the existing laws and standards are effectively implemented in practice (*de facto*).

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<sup>14</sup> UN Commission on Human Rights, *Resolution 1994/45*, 4 March 1994, 3.

<sup>15</sup> UN Office of the High Commissioner for Human Rights website <[www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx](http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx)> accessed 21 January 2018.

## II. ENFORCEMENT MECHANISMS AND THEIR EFFECTIVENESS

There are four enforcement mechanisms for the Convention: The reporting procedure, the interstate procedure, the inquiry procedure and the individual complaints procedure.

The reporting procedure is the only compulsory mechanism, and it requires that States must submit an initial report within one year after the entry into force of CEDAW for the State concerned<sup>16</sup> and thereafter periodic reports at least every four years<sup>17</sup> showing the level of implementation of their obligations under the Convention. After that, the Committee will make its concluding observations, where it presents the positive aspects but also the areas of concern and recommendations for the State concerned<sup>18</sup>. The value of this mechanism is that States parties get actively involved in the Convention, and that they are required to show a certain degree of accountability. Nevertheless, in practice, this system is not satisfactory, as ‘reports are often delayed, outdated, and ineffective in their exposition of steps undertaken to eliminate *de facto* discrimination against women’<sup>19</sup>.

The case of India is an example of the lack of effectiveness of the reporting procedure. CEDAW Committee’s Concluding Observations on India’s initial report in 2000, show that although India recognized a fundamental right to gender equality and a specific enabling provision on affirmative action in its Constitution<sup>20</sup>, the high incidence of gender-based violence against women was a major obstacle to the implementation of the Convention<sup>21</sup>. The Concluding Observations on India’s third report in 2007 were not much different, as it expressed that the State party was not

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<sup>16</sup> CEDAW see note 4, art. 18.1.(a).

<sup>17</sup> CEDAW see note 4, art. 18.1.(b).

<sup>18</sup> Smith see note 6, 76.

<sup>19</sup> Javaid Rehman, *International Human Rights Law: A Practical Approach* (Pearson Education Limited, 2003) 365.

<sup>20</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: India*, June 2000, CEDAW/C/IND/CO/1, para. 45.

<sup>21</sup> *Ibid*, paras. 52 and 68.

taking active steps to address the issue of gender-based violence<sup>22</sup>, and that a full and effective implementation of the Convention was indispensable<sup>23</sup>. Finally, the Concluding Observations on the combined fourth and fifth reports of India in 2014, reiterated many of the concerns and recommendations of the concluding comments adopted in 2007, such as the need to ensure that rape crimes are not committed with impunity<sup>24</sup>. As a result, it can be argued that the reporting procedure does not provide proper solutions in practice (*de facto*).

The interstate procedure is established by article 29 CEDAW. It allows States to complain about the failure by another State to comply with its obligations under the Convention, by referring a case to arbitration or to the International Court of Justice<sup>25</sup>. However, this enforcement mechanism can be opted-out by reservation when ratifying the Convention<sup>26</sup>, and has never been used as it is considered not sensible diplomatic practice.

The next two enforcement mechanisms are provided by the CEDAW Optional Protocol<sup>27</sup>, which was adopted in 1999 and entered into force in 2000; it has been ratified by 109 States. The inquiry procedure<sup>28</sup> enables one or more of the members of the Committee to visit a State party to the Optional Protocol to investigate a possible violation of the Convention. Nevertheless, the State party has to give its consent, the investigation must be instigated by a third party such as a Non-governmental organization (NGO), and it is possible to opt-out of this procedure<sup>29</sup>. Its effectiveness is proved by the fact that it has only been used once in relation to

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<sup>22</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: India*, 2 February 2007, CEDAW/C/IND/CO/3, paras. 8 and 9.

<sup>23</sup> *Ibid.*, para. 63.

<sup>24</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: India*, 24 July 2014, CEDAW/C/IND/CO/4-5, para. 10(a).

<sup>25</sup> CEDAW see note 4, art. 29.1.

<sup>26</sup> *Ibid.*, art. 29.2.

<sup>27</sup> UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, A/RES/54/4.

<sup>28</sup> *Ibid.*, arts. 8 and 9.

<sup>29</sup> *Ibid.*, art. 10.

Mexico, as a consequence for the abduction, rape and murder of women in *Ciudad Juárez*<sup>30</sup>.

The second mechanism included in the Optional Protocol is the individual complaints procedure, which permits individuals or groups of individuals claiming to be victims of a violation of any of the rights of the Convention, to submit a communication to the Committee<sup>31</sup>. Among its requirements, the State concerned must be party to the Convention as well as to the Optional Protocol<sup>32</sup>, and all domestic remedies must have been exhausted<sup>33</sup>. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR) jurisprudence database, the Committee has adopted views on 25 cases since the Optional Protocol entered into force; these concern different countries like Austria, Brazil, Georgia, Peru, Philippines, Spain or Turkey, among others<sup>34</sup>. Despite this fact, some authors suggest that ‘the number of violations founded (...) do not reflect the infractions which undoubtedly occur’<sup>35</sup>. This underutilization of the individual complaints system could be caused by the lack of awareness of this mechanism by the victims or their relatives.

The analysis set out above indicates the existing limits of the scope of protection available to women. In fact, these significant weaknesses of enforcement, are the reason why women do not always enjoy protection in practice (*de facto*).

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<sup>30</sup> UN Committee on the Elimination of Discrimination against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, 27 January 2005, C/2005/OP.8/MEXICO.

<sup>31</sup> CEDAW Optional Protocol see note 27, art. 2.

<sup>32</sup> *Ibid*, art. 3.

<sup>33</sup> *Ibid*, art. 4.

<sup>34</sup> UN Office of the High Commissioner for Human Rights jurisprudence database <[www.juris.ohchr.org/search/results](http://www.juris.ohchr.org/search/results)> accessed 21 January 2018.

<sup>35</sup> Smith see note 6, 77.

### III. PUBLIC/PRIVATE DIVIDE AND THE DUE DILIGENCE STANDARD

Classical international law theory is based on the separation between the public and the private spheres. While the public sphere is associated with the government and the economy, the private sphere contains the family and the relations between private individuals<sup>36</sup>. According to this distinction, when ‘the *pater familias* closes the door on his private family, (...) the State closes its gates to international scrutiny of its domestic affairs’<sup>37</sup>.

In contrast, General Recommendation No. 19, defines gender-based violence as:

‘Violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’<sup>38</sup>.

This definition suggests that gender violence can be exercised in both the public and the private sphere, i.e. either ‘within the family or domestic unit or within any other interpersonal relationship, (...) or by the State or its agents’<sup>39</sup>. In this respect, it has been argued that the public/private dichotomy was just a fictional construction made by the State to preserve its sovereignty from Public International Law<sup>40</sup>. Accordingly, article 2 CEDAW imposes a list of obligations on States that go beyond the public sphere. In particular, it requires States to:

‘Take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*’<sup>41</sup>.

This provision not only breaks with the traditional distinction between the public and the private sphere, but also obliges States to take active steps to implement the

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<sup>36</sup> Rachael Lorna Johnstone, ‘Unlikely bedfellows: feminist theory and the war on terror’ (2009) 9 Chicago-Kent Journal of International and Comparative Law, 4.

<sup>37</sup> Ibid, 6.

<sup>38</sup> CEDAW General Recommendation 19 see note 11, para. 6.

<sup>39</sup> UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28: Core obligations of States parties under article 2 of the Convention*, 47th Session, 2010, CEDAW/C/GC/28, para. 19.

<sup>40</sup> Christine Chinkin, ‘A Critique of the Public/Private Dimension’ (1999) European Journal of International Law 389-395.

<sup>41</sup> CEDAW see note 4, art. 2(e) (emphasis added).

Convention. As General Recommendation No. 28 states, ‘article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties, [it] also imposes a due diligence obligation on States parties to prevent discrimination by private actors’<sup>42</sup>. Therefore, States must implement regulations in areas such as education, employment, banking or housing<sup>43</sup>; as well as prevent, investigate, prosecute and punish any act of gender-based violence<sup>44</sup>.

Despite the clarity of that statement, there are still some countries that seem reluctant to adopt appropriate legislation to regulate the domestic sphere. For instance, the Democratic Republic of the Congo does not consider marital rape a prosecutable offense<sup>45</sup>. In fact, this was recently reported by the Committee in its Concluding Observations on the combined sixth and seventh reports of the Democratic Republic of the Congo. In this document, the Committee pointed out the ‘lack of legal provisions prohibiting domestic violence (...), and the absence of shelters, counselling and rehabilitation services for victims of such violence’<sup>46</sup>. Consequently, it urged the State party to prohibit domestic violence, including marital rape, and to provide for adequate sanctions<sup>47</sup>.

All States parties to CEDAW have a duty to take positive action to address violence against women<sup>48</sup>; this is what is known as the ‘due diligence standard’. As a general rule, the concept of ‘due diligence’ entails four categories: ‘prevent, investigate, punish and provide compensation’<sup>49</sup>. The first time this concept was adopted was in the *Velásquez-Rodríguez Case*<sup>50</sup>, where the Inter-American Court of Human

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<sup>42</sup> CEDAW General Recommendation 28 see note 39, para. 13.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, para. 19.

<sup>45</sup> Amber Peterman, ‘Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo’ (2011) 101(6) American Journal of Public Health 1060-1067.

<sup>46</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Democratic Republic of the Congo*, 30 July 2013, CEDAW/C/COD/CO/6-7, para. 21(c).

<sup>47</sup> Ibid, para. 22(e).

<sup>48</sup> Stephanie Farrior, ‘The Due Diligence Standard and Violence against Women’ (2004) 14(4) Interights Bulletin 150.

<sup>49</sup> Ibid.

<sup>50</sup> *Velásquez-Rodríguez v Honduras* [1988] IACtHR (Ser. C) No. 4.

Rights found Honduras responsible for Velasquez's disappearance as well as for the lack of punishment imposed on the perpetrators of his abduction and murder<sup>51</sup>.

The *Angela González Carreño v Spain Case*<sup>52</sup> can be analyzed as an example case regarding the relationship between domestic violence and the due diligence standard. This involved an individual complaint submitted to the CEDAW Committee. The author of the communication was a Spanish woman who was subjected to physical and psychological violence by her ex-husband (F.R.C.), during and after the marriage. A visiting regime let F.R.C. see their daughter (Andrea), who was under 18 and continuously rejected to spend time with her father. Despite the fact that the author filled more than 30 complaints, F.R.C. was only convicted once with a fine of 45 euros. On 24 April 2013, after a judicial hearing about the use of the family residence, F.R.C. told the author that he was going to 'take away what mattered most to her'. The next day, during one of the visits with his daughter, F.R.C. shot Andrea and then committed suicide. After these facts, no compensation was given to the author although she filed many claims<sup>53</sup>. In the Consideration of the Merits, the Committee found that Spain had infringed the rights of the author and her deceased daughter under the Convention<sup>54</sup>. It also recommended the State party to strengthen the application of the legal framework, and to provide mandatory training for judges and administrative personnel 'to ensure that the competent authorities exercise due diligence to respond appropriately to situations of domestic violence'<sup>55</sup>.

The situation set out above could have been avoided if the State party had provided an effective remedy when the author made the first complaints; this is one of the measures that the General Recommendation No. 28 highlights to 'ensure the practical realization of the elimination of discrimination against women and

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<sup>51</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61, para. 20.

<sup>52</sup> UN Committee on the Elimination of Discrimination Against Women, *Communication no. 47/2012: decision adopted by the Committee at its 58st session*, 20 June-18 July 2014, 15 August 2014, CEDAW/C/58/D/47/2012.

<sup>53</sup> *Ibid*, paras. 2.1 – 2.21.

<sup>54</sup> *Ibid*, para. 10.

<sup>55</sup> *Ibid*, para. 11(b)(ii) and 11(b)(iii).

women's equality with men'<sup>56</sup>. Some States are characterized by the lack of efficiency of their national tribunals and other public institutions, often with less personnel than required and a lot of work accumulated due to the insufficiency of economic resources. However, 'the cry of inadequate resources is not a valid response to claims of a failure to exercise due diligence to address violence against women'<sup>57</sup>. In other words, a State that does not allocate enough resources to address the problem of gender violence is in effect perpetuating it<sup>58</sup>.

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<sup>56</sup> CEDAW General Recommendation 28 see note 39, para. 36.

<sup>57</sup> Farrior see note 48, 151.

<sup>58</sup> Ibid.



#### IV. RESERVATIONS AND THE CULTURAL RELATIVISM ARGUMENT

Reservations are defined by the Vienna Convention on the Law of Treaties as a unilateral statement made by a State when ratifying a treaty, which purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State<sup>59</sup>. Any reservation incompatible with the object and purpose of a treaty is not allowed<sup>60</sup>. In the case of CEDAW over 50 countries have made reservations, a fact that places it as the UN human rights treaty with the largest number of reservations<sup>61</sup>.

Some of these reservations are made to article 5 CEDAW, although it is considered to be one of the core provisions of the Convention together with article 2. Under article 5, States are required to implement changes to social and cultural practices when these ‘are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’<sup>62</sup>, as well as to recognize ‘the common responsibility of men and women in the upbringing and development of their children’<sup>63</sup>. For instance, New Zealand and Niger have made reservations to article 5(a) on the basis of contradiction with existing customs and practices<sup>64</sup>. This is what is known as the cultural relativism argument.

Cultural relativism is a major factor in states’ unwillingness to fully implement the Convention. It means that where international human rights norms are in conflict with traditional standards or practices, culture must take precedence over universal

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<sup>59</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, art. 2(1)(d).

<sup>60</sup> *Ibid.*, art. 19(c).

<sup>61</sup> Marijke De Pauw, ‘Women’s rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW Convention’ (2013) 29(77) *Utrecht Journal of International and European Law* 51.

<sup>62</sup> CEDAW see note 4, art. 5(a).

<sup>63</sup> *Ibid.*, art. 5(b).

<sup>64</sup> Reservations, declarations, objections and derogations to CEDAW by New Zealand (*Bayefsky database*) <[www.bayefsky.com/pdf/newzealand\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/newzealand_t2_cedaw.pdf)> accessed 8 March 2018; Reservations, declarations, objections and derogations to CEDAW by Niger (*Bayefsky database*) <[www.bayefsky.com/pdf/niger\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/niger_t2_cedaw.pdf)> accessed 8 March 2018.

norms<sup>65</sup>. This argument has usually been used as an excuse to allow for practices that violate women's rights<sup>66</sup> and constitute a form of domestic violence<sup>67</sup>, such as female genital mutilation<sup>68</sup>, honour killings (killings of women by male members of a family regarded as a rite of passage into manhood)<sup>69</sup>, or witch hunting (killings motivated by a belief in superstition and evil spirit of women)<sup>70</sup>.

A State example in this regard is the case of Egypt; where culture is used as a justification for harmful traditional practices and violence against women<sup>71</sup>, including honour killings, marital rape<sup>72</sup>, and female genital mutilation<sup>73</sup>. Additionally, despite the wrongfulness of such acts, the State party has made a general reservation to article 2 CEDAW, whereby any contradiction between the Convention and the Islamic Sharia's provisions will give preference to the latter<sup>74</sup>, in order to make sure no responsibilities arise for such practices. However, this reservation should be regarded as incompatible with the object and purpose of the Convention<sup>75</sup>; an opinion which was also expressed by Germany and the Netherlands in their objections made upon ratification of CEDAW<sup>76</sup>. In particular, Germany stated that the reservation 'may not be invoked in support of a legal practice which does not pay due regard to the legal status afforded to women and

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<sup>65</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the intersections between culture and violence against women*, 17 January 2007, A/HRC/4/34, para. 42.

<sup>66</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its causes and Consequences on the cultural practices in the family that are violent towards women*, 31 January 2002, E/CN.4/2002/83, para. 1.

<sup>67</sup> *Ibid.*, executive summary para. 1.

<sup>68</sup> *Ibid.*, paras. 12-20.

<sup>69</sup> *Ibid.*, paras. 21-37.

<sup>70</sup> *Ibid.*, paras. 45-48.

<sup>71</sup> UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Egypt*, 5 February 2010, CEDAW/C/EGY/CO/7, para. 21.

<sup>72</sup> *Ibid.*, para. 24.

<sup>73</sup> *Ibid.*, para. 41.

<sup>74</sup> Reservations, declarations, objections and derogations to CEDAW by Egypt (*Bayefsky database*) <[www.bayefsky.com/pdf/egypt\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/egypt_t2_cedaw.pdf)> accessed 9 March 2018.

<sup>75</sup> CEDAW see note 4, art. 28.2.

<sup>76</sup> Reservations, declarations, objections and derogations to CEDAW by Germany (*Bayefsky database*) <[www.bayefsky.com/pdf/germany\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/germany_t2_cedaw.pdf)> accessed 9 March 2018; Reservations, declarations, objections and derogations to CEDAW by the Netherlands (*Bayefsky database*) <[www.bayefsky.com/pdf/netherlands\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/netherlands_t2_cedaw.pdf)> accessed 9 March 2018.

children in Germany in conformity with the articles of the Convention'<sup>77</sup>. This disapproval is one of the consequences of making reservations which are considered to be contrary to the object and purpose of CEDAW.

Every individual has a right to culture, but it cannot supersede the rights of women and girls to be free from discrimination and violence. In fact, 'no social group has suffered greater violation of its human rights in the name of culture than women'<sup>78</sup>. For this reason, it is important to listen to cultural relativism arguments with skepticism<sup>79</sup>, and ask what is the status of the speaker, in whose name is the argument being advanced, and what is the degree of participation in culture formation of the social groups affected<sup>80</sup>. Above all, culture is not static, so it is always bound to change<sup>81</sup>.

The Vienna Declaration and Programme of Action (VDPA)<sup>82</sup> adopted by the World Conference on Human Rights on June 1993, is in line with the arguments set out above. According to this document, which upholds the principles of the UN Charter and the Universal Declaration of Human Rights<sup>83</sup>, 'human rights are universal, indivisible, interdependent and interrelated'<sup>84</sup>, and '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'<sup>85</sup>. Therefore, it can be argued that those States parties which have entered reservations that challenge the central principles of CEDAW are, in effect, violating general international law<sup>86</sup>, as they are not only contrary to

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<sup>77</sup> Reservations, declarations, objections and derogations to CEDAW by Germany (Bayefsky database) <[www.bayefsky.com/pdf/germany\\_t2\\_cedaw.pdf](http://www.bayefsky.com/pdf/germany_t2_cedaw.pdf)> accessed 9 March 2018.

<sup>78</sup> Arati Rao and others, *Women's rights, human rights; International feminist perspectives* (Routledge 1995) 169.

<sup>79</sup> Ibid, 171.

<sup>80</sup> Ibid, 168.

<sup>81</sup> Ibid, 173.

<sup>82</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

<sup>83</sup> Ibid, 5.

<sup>84</sup> Ibid, 20.

<sup>85</sup> Ibid, 20.

<sup>86</sup> UN Women website, *Reservations to CEDAW* <[www.un.org/womenwatch/daw/cedaw/reservations.htm](http://www.un.org/womenwatch/daw/cedaw/reservations.htm)> accessed 11 March 2018.

the Vienna Convention on the Law of Treaties and the VDP, but also to customary international law.

As the VDP points out, ways and means of addressing the particularly large number of impermissible reservations to the Convention should be encouraged<sup>87</sup>. For now, the Committee on the Elimination of Discrimination against Women is the responsible body for reviewing reservations<sup>88</sup>, but further mechanisms have been proven to be required in the light of the slow progress that States are making on withdrawing reservations. Above all, ‘ratification of CEDAW is supposed to improve women’s rights across the board’<sup>89</sup>, and not to show an apparent image of commitment towards human rights while professing no intention to significantly implement them<sup>90</sup>. A more binding control on reservations would be useful in this respect.

The huge amount of reservations made by States parties to CEDAW makes its obligations seem less binding than those under other human rights treaties, and in turn limits women’s *de facto* enjoyment of their rights.

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<sup>87</sup> Vienna Declaration and Programme of Action see note 82, 38.

<sup>88</sup> Ibid.

<sup>89</sup> Linda M. Keller, ‘The impact of States parties’ reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (2014) Michigan State Law Review 325.

<sup>90</sup> Ibid, 326.

## V. PROPOSALS FOR ENSURING DE FACTO ENJOYMENT OF WOMEN'S RIGHTS

Fifty years ago, the Proclamation of Tehran adopted by the International Conference on Human Rights in 1968 noted that although the UN had made substantial progress in defining standards for the enjoyment and protection of human rights and had adopted many important international instruments, much remained to be done in regard to the implementation of those rights<sup>91</sup>. Almost two decades later, the World Conference on Human Rights reiterated that concern in the VDPA<sup>92</sup>. Unfortunately, at the present time many would argue that the international system is still lacking in implementation<sup>93</sup>.

Certainly, States play a primary role on ensuring implementation of women's rights, but when they show little intention to achieve *de facto* equality between men and women, International Law must intervene<sup>94</sup>. However, as human rights history has confirmed, new and effective methods are needed. The following pages develop four proposals that would contribute towards the goal of implementation.

### *Proposal 1: Increased coordination among UN organs*

One of the main problems of the UN human rights system is the absence of an effective coordination between the different Committees and the wide range of sub-organs that have been created as a result of the increasing codification of standards in international instruments. While the existence of several international organs which seek to enforce human rights is undoubtedly positive, it can also cause confusion to States as many treaty-monitoring bodies have concurrent jurisdiction<sup>95</sup>. Accordingly, the VDPA urged all UN organs, bodies and specialized agencies whose activities deal with human rights 'to cooperate in order to

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<sup>91</sup> International Conference on Human Rights, *Proclamation of Teheran*, 22 April to 13 May 1968, A/CONF.32/41 at 3, para. 4.

<sup>92</sup> Vienna Declaration and Programme of Action see note 82, 34.

<sup>93</sup> Smith see note 6, 391.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid, 80.

strengthen, rationalize and streamline their activities, taking into account the need to avoid unnecessary duplication'<sup>96</sup>.

The idea set out above, when applied to the human rights of women, means that steps should be taken to increase cooperation between organs such as the Commission on the Status of Women, the CEDAW Committee, the Working Group on the issue of Discrimination against Women in Law and in Practice, the Special Rapporteur on violence against women, or the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), among others<sup>97</sup>. This way, the specialist organizations would have a greater role to play. For instance, the CEDAW Committee's representatives could sit in meetings of the Commission on the Status of Women, or entities like UN Women could be invited to provide oral information to the CEDAW Committee before it considers a periodic report of a particular State<sup>98</sup>. In this case, UN Women's feedback would be beneficial to the CEDAW Committee since it would be able to elaborate its concluding observations with specific 'on the ground' information<sup>99</sup>. Another initiative is to encourage interagency mobility, a way to increase awareness of personnel who work in these institutions<sup>100</sup>.

This cooperation should also be applied between organs which protect human rights in a more generic way and the aforementioned ones. In this respect, a prime example of a UN agency that works to promote and protect all human rights is the OHCHR<sup>101</sup>. According to its Action Plan, if the OHCHR takes a more proactive and engaged role with the UN organs that promote women's rights and works more closely with them, implementation gaps are more likely to be addressed<sup>102</sup>.

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<sup>96</sup> Vienna Declaration and Programme of Action see note 82, 31.

<sup>97</sup> Ibid, 37.

<sup>98</sup> Smith see note 6, 81.

<sup>99</sup> Ibid.

<sup>100</sup> Remarks of Michelle Bachelet at the Plenary Session on 'Sustainability of Delivering as One in the framework of a new modality for international cooperation for development', Uruguay, 18 November 2011 <[www.unwomen.org/en/news/stories/2011/11/delivering-as-one-for-women](http://www.unwomen.org/en/news/stories/2011/11/delivering-as-one-for-women)> accessed 30 April 2018.

<sup>101</sup> UN Office of the High Commissioner for Human Rights website <[www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx](http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx)> accessed 1 May 2018.

<sup>102</sup> UN Office of the High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, May 2005, para. 89.

Finally, there should be a third level of cooperation between the treaty monitoring bodies of the other eight core international human rights treaties and the CEDAW Committee. For example, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights protect various rights, but also recognize the equal right of men and women to the enjoyment of all rights set forth in both documents<sup>103</sup>. This fact generates that the provisions of the Covenants overlap with what is stated by CEDAW, and therefore that the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the CEDAW Committee have to monitor the implementation of similar rights regarding women. As a result, there is a risk of States receiving slightly conflicting messages in the concluding observations that all these three bodies issue<sup>104</sup>. Increased cooperation between treaty body chairpersons would ameliorate this problem, and one way to do so is by sitting a member of one treaty-monitoring body as an observer on other treaty-monitoring bodies<sup>105</sup>.

### *Proposal 2: Increased coordination between UN organs and NGOs*

Non-governmental organizations (NGOs) play an important role in the promotion and protection of human rights, and due to this fact their coordination with UN organs is essential to ensure that the existing laws and standards on equality between men and women are effectively implemented in practice (*de facto*)<sup>106</sup>.

On the one hand, NGOs' collaboration would be particularly useful when States doesn't submit their reports on time, as NGO reports could inform the work of the UN body involved and help it issue its comments<sup>107</sup>. This is the case of the Committee on the Elimination of all Forms of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, which have issued comments

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<sup>103</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200(XXI), art. 3; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, A/RES/2200(XXI), art. 3.

<sup>104</sup> Smith see note 6, 167.

<sup>105</sup> Elizabeth Evatt, 'Ensuring effective supervisory procedures: The need for resources' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) pp 461-479 (as cited in Rhona K. M. Smith, *Textbook on International Human Rights* (7th edn, Oxford University Press 2016) 167).

<sup>106</sup> Vienna Declaration and Programme of Action see note 82, 29 and 44.

<sup>107</sup> Smith see note 6, 81.

based on information submitted by NGOs and specialized UN agencies in the face of non-submission of reports<sup>108</sup>. On the other hand, NGO's collaboration with UN bodies would be equally relevant when States submit their reports, because NGOs could simultaneously submit observations. Thus, States would be 'more honest and open about problems encountered in the knowledge that the monitoring body will also be receiving full reports from NGOs'<sup>109</sup>.

*Proposal 3: Increased coordination between UN organs and national institutions*

The Paris Principles establish that national human rights institutions have the responsibility to cooperate with the UN in the protection and promotion of human rights<sup>110</sup>. Among their functions, this kind of institutions publicly advocate for human rights, monitor their implementation within a specific State and consider complaints made by direct or indirect victims of human rights violations<sup>111</sup>. This means that they can directly interact with civil society and have a first-hand knowledge of the State's human rights situation. Therefore, their coordination with UN organs must be considered key to ensure implementation of women's rights. In order for this coordination to be successful, both sides should exchange information and experiences; this could be done by convening periodic meetings with representatives of national institutions under the auspices of the UN organ concerned<sup>112</sup>.

*Proposal 4: Dialogue and engagement with governments through UN organs, NGOs and national institutions*

The three cooperation proposals set out above are crucial to combat discrimination against women in practice, but it must be noted that responsibilities falling on UN organs, NGOs and national institutions are secondary to the primary role of the

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<sup>108</sup> Ibid, 166.

<sup>109</sup> Ibid.

<sup>110</sup> UN General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, 20 December 1993, A/RES/48/134, para. 3.(e).

<sup>111</sup> Smith see note 6, 392.

<sup>112</sup> Vienna Declaration and Programme of Action see note 82, 46.



State<sup>113</sup>. In other words, ‘it is mainly through action at the national level that international human rights obligations can be translated into reality’<sup>114</sup>. Implementation, therefore, requires first and foremost dialogue and engagement with governments. However, working closely with governments can be a difficult goal to achieve which will require UN organs, NGOs and national institutions to actively cooperate with each other<sup>115</sup>.

UN organs, NGOs and national institutions are responsible for assisting the government to promote women’s human rights<sup>116</sup> and to prevent, investigate and punish discrimination<sup>117</sup>. Nevertheless, sometimes States are reluctant to comply with their obligations under International Law and, consequently, to accept any help in this regard. It is clear that political will cannot be changed by law alone<sup>118</sup>, but in the 21st century, when economic development is a primary goal for governments, a strong argument to make them change their minds is that gender equality is a necessary foundation for a prosperous State<sup>119</sup>. In fact, the UN Sustainable Development Goal 5 indicates that ‘investing in education programmes for girls and increasing the age at which they marry can return \$5 for every dollar spent [and that] investing in programmes improving income-generating activities for women can return \$7 dollars for every dollar spent’<sup>120</sup>.

Another way of influencing governments to cooperate is by global opinion. Global opinion has been proven to be an important factor for States when deciding to ratify human rights instruments<sup>121</sup>. Examples in this respect are the cases of the Convention on the Rights of the Child and CEDAW; both with almost universal ratification<sup>122</sup>. Conversely, the Migrant Workers Convention took thirteen years

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<sup>113</sup> The OHCHR Plan of Action: Protection and Empowerment see note 102, para. 40.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid, para. 43.

<sup>116</sup> Vienna Declaration and Programme of Action see note 82, 46.

<sup>117</sup> Ibid, 22.

<sup>118</sup> Smith see note 6, 166.

<sup>119</sup> UN Sustainable Development Goals, Goal 5, 25 September 2015 <[www.un.org/sustainabledevelopment/gender-equality](http://www.un.org/sustainabledevelopment/gender-equality)> accessed 4 May 2018.

<sup>120</sup> Ibid.

<sup>121</sup> Smith see note 6, 164.

<sup>122</sup> UN Treaty Collection database <<https://treaties.un.org>> accessed 4 May 2018.

from adoption to entry into force<sup>123</sup>. However, in the particular case of CEDAW only half of its States parties have ratified the Optional Protocol<sup>124</sup>, and there are notorious problems of implementation of its rights in almost every State party. For this reason, global opinion should evolve so that governments step forward for the benefit of women and agree to cooperate with UN organs, NGOs and national institutions to achieve implementation.

Once the government has shown its receptiveness to start an effective cooperation with the UN organs, NGOs and national institutions involved, they can start proposing the range of tools they have at their disposal<sup>125</sup>. UN organs can help governments to eliminate all forms of discrimination against women in practice through technical cooperation, policy advice, cooperation in the process of reporting<sup>126</sup>, follow-up procedures after receiving recommendations of UN treaty bodies<sup>127</sup> and a stronger and sustained presence in the State<sup>128</sup>. A practical example of this cooperation could be to provide model laws to States in order to incorporate CEDAW effectively into domestic law; this way the Convention will stand a much greater chance of being enforced<sup>129</sup>.

NGOs and national institutions also have an important role to play in collaborating with States parties to CEDAW. As Yakin Ertürk noted, ex-Special Rapporteur on violence against women, NGOs have the responsibility to engage in a ‘cultural negotiation’ with community leaders, including religious leaders, in order to demonstrate the compatibility of culture and religion with the universal rights of women<sup>130</sup>. This could be achieved by understanding the root causes of violence, and proposing alternative practices and expressions of masculinity that are respectful of women’s rights, as well as explaining the dangers that some traditional

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> The OHCHR Plan of Action: Protection and Empowerment see note 102, para. 47.

<sup>126</sup> Ibid.

<sup>127</sup> Smith see note 6, 391.

<sup>128</sup> The OHCHR Plan of Action: Protection and Empowerment see note 102, para. 52.

<sup>129</sup> Smith see note 6, 175.

<sup>130</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its causes and Consequences: Towards an effective implementation of international norms to end violence against women*, 26 December 2003, E/CN.4/2004/66, para. 55.

practices entail for women's health<sup>131</sup>. Regarding national institutions, the Paris Principles state that they are responsible for contributing 'to the reports which States are required to submit to UN bodies and committees'<sup>132</sup>, and submitting to the government, Parliament or any other body of the State opinions, recommendations, proposals and reports 'on any matters concerning the promotion and protection of human rights'<sup>133</sup>.

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<sup>131</sup> Ibid.

<sup>132</sup> Principles relating to the Status of National Institutions (The Paris Principles) see note 110, para. 3.(d).

<sup>133</sup> Ibid, para. 3.(a).

## CONCLUSIONS

For the reasons set out in this paper, the conclusion reached is that, although the needs of women are generally adequately addressed in law (*de jure*), there are serious problems regarding the implementation of their rights (*de facto*).

CEDAW, the Committee, the General Recommendations, and the Special Rapporteur are all evidence that at the normative level there are lots of protections available. However, the enforcement mechanisms do not work as well as predicted, and are the first sign of the existing limits for the implementation of women's rights. The reporting procedure has been proved ineffective to provide proper solutions in practice, the interstate procedure has never been used, the inquiry procedure has just been used once, and the individual complaints procedure is underutilized for the lack of awareness of this mechanism by the victims or their relatives.

In addition, although there is evidence that gender-based violence is not only exercised in the public sphere but also in the domestic sphere, States continue using the public/private division as a justification for not taking appropriate measures to prevent, investigate and punish this kind of acts in accordance with the due diligence standard. The rationale behind these sort of arguments is that States want to preserve their sovereignty from International Law. Moreover, another impediment for women's *de facto* enjoyment of their rights is cultural relativism, which is the main reason for reservations.

International Law is based on consent, so it is improbable that the international legal framework on women's rights become more binding unless States agree to it. However, there are still measures available in order to grant the practical realization of gender equality and the eradication of violence towards women. Examples of these measures are the four proposals which have been developed in this paper: 1) increased coordination among UN organs, 2) increased coordination between UN organs and NGOs, 3) increased coordination between UN organs and national institutions and 4) dialogue and engagement with governments through UN organs, NGOs and national institutions.

On balance, there has been progress over the years regarding equality between men and women but far more remains to be achieved. The practical realization of the elimination of discrimination against women remains, for many individuals, an aspiration<sup>134</sup>. The key is to continue working in order to translate principle into practice, because gender equality is a necessary foundation for a peaceful, prosperous and sustainable world<sup>135</sup>.

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<sup>134</sup> Vienna Declaration and Programme of Action see note 82, 11.

<sup>135</sup> UN Sustainable Development Goals see note 119.

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