

# GENERAL HUMAN RIGHTS INSTRUMENTS AND THEIR RELEVANCE TO WOMEN

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## **Introduction**

The purpose of this paper is to examine the general human rights standards — frequently described as the “mainstream” human rights standards — and their relevance to women. At the outset, I would like to put the material I am about to discuss into some form of context and secondly, I would like to point to a number of problems which have been identified as presenting obstacles so far as the application of the general human rights standards to women is concerned. These obstacles, which are evident at the international level, will recur as themes in our discussion of the domestic application of the general standards of human rights for the benefit of women.

Since the beginning of this decade it has been increasingly recognised that the vision of human rights and the mechanisms that exist to concretise this vision, although framed as available to women and men on the basis of equality, have profited women less than men. In response to this recognition, many human and women’s rights activists have worked to redefine the meaning of human rights to encompass the specific experiences of women. This work has been repaid by remarkable advances over the last few years:

- In June 1993, at the Vienna World Conference on Human Rights the international community openly acknowledged that the body of international law and mechanisms established to promote and protect human rights has not properly taken into account the concerns of over half the world’s population. States formally recognised the human rights of women as “an inalienable integral and indivisible part of human rights” and expanded the international human rights agenda to include gender specific violations.<sup>1</sup>
- In December 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women.<sup>2</sup> This Declaration categorises gender-based violence

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<sup>1</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/CONF.157/24, at 33, para 18 (1993), 32 ILM 1661.

<sup>2</sup> Declaration on the Elimination of Violence against Women, GA Res 48/104 (1994), 1 IHRR 329. The text of the Declaration is also reproduced in Jane Connors and Andrew Byrnes, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Commonwealth Secretariat and International Women’s Rights Action Watch, 2nd ed 1996).

against women as an issue of human rights generally and one of sex discrimination and inequality in particular.

- In March 1994, the United Nations Commission on Human Rights agreed to appoint its first gender specific human rights mechanisms, the *Special Rapporteur on violence against women, its causes and consequences*.<sup>3</sup>
- In September 1994, the international community underscored the importance of the right to health, including reproductive choice for women, at the International Conference on Population and Development in Cairo.<sup>4</sup>
- In September 1995, the Beijing Declaration and Platform for Action, adopted at the United Nations Fourth World Conference on Women, confirmed women's rights as human rights and the human rights of women and the girl-child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms. The Platform underlined the human rights implications of violence against women, particularly in armed conflict and focused on violation of the human rights of women resulting in refugee flows and the vulnerability of refugee women to further violations of their human rights.<sup>5</sup>

Work to bridge more fully the acknowledged gap between women and the mainstream human rights framework has not stopped at these very visible advances, but has also included resolutions manifesting political commitment passed by the General Assembly, the Economic and Social Council, the Commission on the Status of Women and the Commission on Human Rights, and the revision of working methods by a number of key human rights treaty bodies. It also included the formulation, in 1995, of guidelines to incorporate a gender perspective into the international human rights system.<sup>6</sup>

### **The limitations of the existing international human right system**

These developments are clearly pleasing. At the same time, they do raise my second preliminary inquiry: what are the factors which have seemed to prevent the international human rights system — framed as available without discrimination on the basis of sex, as we shall see — from

<sup>3</sup> CHR Res 1994/45, UN Doc E/CN.4/1994/132, at 140 (1994). In 1997 the mandate of the Special Rapporteur was renewed for a further three years: CHR Res 1997/44.

<sup>4</sup> *Report of the International Conference on Population and Development*, UN Doc A/CONF.171/13 (1994).

<sup>5</sup> Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (1995), 35 ILM 401.

<sup>6</sup> For a recent review of the steps taken towards integration of women's human rights into the human rights activities of the United Nations, see Anne Gallagher, "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System" (1997) 18 *Human Rights Quarterly* 283. See generally *The United Nations and the Advancement of Women 1945-1996*, The United Nations Blue Books Series, vol VI (New York, United Nations, rev ed 1996).

working effectively to improve the situation of women? These factors can be summarised as follows:

- The process by which human rights were conceptualised and defined did not involve significant participation by women. This may explain why the definition of substantive human rights rarely incorporates an element of gender. Indeed, core human rights are defined “gender neutrally” and so prevent an immediate recognition that equal treatment of persons in unequal situations will frequently operate to perpetuate rather than alleviate injustice.
- Many issues of central concern to women — underdevelopment, illiteracy, the adverse impact of structural adjustment programmes, gender segregation, systematic violence — have not been defined as human rights issues or made the subject of legally binding norms. Principal human rights bodies and procedures have thus failed to address these issues.
- International human rights law effectively excludes many actions occurring at the hands of non-state actors and those which take place in the private sphere — in particular, that most private of spheres — the family. This has served to exclude the numerous violations which are committed against women in their communities, their workplace and in their own families from the purview of international human rights.
- Both *de jure* and *de facto* discrimination against women and other violations of their rights — in areas such as family law, nationality, bodily integrity, freedom of expression and liberty of movement — are justified by governments on the basis of culture, religion and ethnicity. These justifications not only obscure violations against women, but inhibit firm responses from the international human rights framework.

While these factors are worthy of detailed examination, I mention them here merely to provide a backdrop to my discussion of how the general framework has responded to women’s concerns. Necessarily, these factors are of relevance to a determination of whether the response of international bodies can be improved.

### **The guarantees of non-discrimination on the basis of sex**

The principle of non-discrimination on the basis of sex (defined and applied with reference to men) is specifically included in the United Nations Charter<sup>7</sup> and the Universal Declaration of Human Rights.<sup>8</sup> It is

<sup>7</sup> Charter of the United Nations, adopted on 26 June 1945, entered into force 24 October 1945, articles 2, 3 and 55.

<sup>8</sup> See in particular article 2 of the Universal Declaration of Human Rights, GA Res 217A (III), adopted on 10 December 1948.

also guaranteed in the International Covenant on Civil and Political Rights (ICCPR)<sup>9</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>10</sup> which each contain in article 3, in almost identical terms, a special provision binding States parties to ensure the equal rights of men and women in the enjoyment of the rights enumerated in the instrument.<sup>11</sup>

Both covenants also include a general non-discrimination article, which includes "sex" among the prohibited heads of differential treatment.<sup>12</sup> The ICCPR, moreover, incorporates in article 26 a guarantee of equality and equal protection before the law which guarantees individuals equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>13</sup> The non-discrimination norm is also found in the Convention on the Rights of the Child (the Children's Convention)<sup>14</sup> and is elaborated most fully in the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention).<sup>15</sup> Each of these instruments, and most particularly the Children's Convention and the Women's Convention, contain specific provisions relating to the human rights of women and/or the girl-child. Neither the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)<sup>16</sup> nor the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention)<sup>17</sup> contain any reference to the principle of non-discrimination on the basis of sex.

<sup>9</sup> 999 UNTS 171.

<sup>10</sup> 993 UNTS 3.

<sup>11</sup> Article 3 of the ICCPR [ICESCR] provides:

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights [all economic, social and cultural rights] set forth in the present Covenant."

<sup>12</sup> Article 2(1) of the ICCPR provides:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 2(2) of the ICESCR provides:

"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>13</sup> Article 26 of the ICCPR provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>14</sup> Convention on the Rights of the Child, GA Res 44/25, UN Doc A/44/49 (1989), at 166, reprinted in 28 ILM 1448 (1989). Article 2(1) of the Convention provides:

"States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

<sup>15</sup> 1249 UNTS 13.

<sup>16</sup> 1465 UNTS 85.

<sup>17</sup> 660 UNTS 195.

### *The role of the human rights treaty bodies*

Monitoring of the implementation by States parties of their obligations under each of the treaties is the work of expert committees which are usually provided for under the terms of the individual treaty.<sup>18</sup>

The monitoring of States parties' performance occurs in a number of ways. First, each treaty body is empowered to examine the reports that States parties are obliged to submit under the respective treaties. This examination initiates dialogue between the Committee and the State party and provides a forum for the elaboration of the meaning of substantive rights in the individual treaties. Following its discussion with the State party, each treaty body also formulates "concluding observations" relating to individual State reports, thus allowing it to make specific suggestions for improvement. Each is also empowered to formulate "general comments" or "general recommendations", which usually take the form of detailed explanations by the relevant treaty body of the content of a particular right established by the convention or of the impact of these rights in a particular context, thereby contributing to the development of an international jurisprudence of human rights.

Three of the treaty bodies – the Human Rights Committee, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture (CAT) — are able to receive and act upon allegations of violations made by individuals against State parties and/or by States parties against other States parties — provided the relevant State party has agreed to subject itself to such a procedure. It is hoped CEDAW will soon have such a procedure.<sup>19</sup>

The specific gender integration mandate of the United Nations is relatively recent, but a number of the treaty bodies have developed a significant jurisprudence relating to women. The Human Rights Committee, the oversight body of the ICCPR, has been advantaged by the existence of the First Optional Protocol to the Covenant,<sup>20</sup> which permits it to examine complaints from individuals alleging violation of human rights. Under the treaty, discrimination on the basis of sex is

<sup>18</sup> See generally the chapters on each of the treaty bodies in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992). A revised and updated edition of this volume is scheduled to appear in 1998. See also Michael O'Flaherty, *Human Rights and the UN Practice before the UN Treaty Bodies* (London, Sweet & Maxwell, 1996).

<sup>19</sup> On the development of an Optional Protocol, see generally Andrew Byrnes, "Slow and Steady wins the Race? The Development of An Optional Protocol to the Women's Convention", paper presented at *Panel on Compliance with the International Human Rights of Women*, American Society of International Law, 91st Annual Meeting, Washington, DC, 9-12 April 1997; Andrew Byrnes and Jane Connors, *ASIL Newsletter*, June-August 1996, 10; and Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination against Women?", 21(3) *Brooklyn Journal of International Law* 679 (1996); and Elizabeth Evatt, "The Right to Individual Petition: Assessing its Operation before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination" in *Proceedings of the 89th Annual Meeting of the American Society of International Law* (1995) 227. Latest information on the current draft and developments can be obtained from the website of the UN Division for the Advancement of Women: <http://www.un.org/DPCSD/daw/>.

<sup>20</sup> 999 UNTS 301.

prohibited and equality in the enjoyment of rights set forth in the convention is guaranteed. Non-discrimination or special provisions on the basis of sex is mentioned in articles other than articles 3 and 26, for example, relating to derogation of rights in times of public emergency (article 4), the death penalty (article 6), family (article 23), the rights of the child (article 24), public life (article 25) and as noted earlier, equality before the law and equal protection of the law (article 26).

Other articles to which a gender perspective may be especially important include the right to life (article 6), torture (article 7), slavery (article 8), liberty of movement and choice of residence (article 12) and recognition as a person before the law (article 16).

The Human Rights Committee<sup>21</sup> stands above the other treaty bodies, with the exception of the Committee on the Elimination of Discrimination against Women (CEDAW), in its willingness to deal with the concept of discrimination and to extend the prohibition of discrimination to other rights protected in the Covenant. It has formulated a general comment on the meaning of non-discrimination<sup>22</sup> and is currently working on expanding its very early and rather limited comment on article 3.<sup>23</sup> A number of its other general comments show a level of gender sensitivity, eg *General comment 19(39)* on marriage and the family adopted in 1990.<sup>24</sup> Gender discrimination has featured as an issue in a number of the complaints the Committee has resolved — on the whole to the advantage of women — under the Optional Protocol.<sup>25</sup> The Committee regularly questions States about the *de facto* and *de jure* position of women, and amended its reporting guidelines in 1995 to request States parties to provide gender-specific information in this respect.<sup>26</sup>

<sup>21</sup> For a comprehensive discussion of the Covenant and the jurisprudence and practice of the Committee up to 1993, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, N P Engel, 1993). See also Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, Clarendon Press, 1991). Torkel Opsahl, "The Human Rights Committee" in Philip Alston (ed), *The United Nations and Human Rights* (Oxford, Clarendon Press, 1992) 369 at 422-423.

<sup>22</sup> Human Rights Committee, *General comment 18(37)*(adopted in 1989), UN Doc HRI/GEN/1/Rev.2, at 26 (1996).

<sup>23</sup> *General comment 4(13)* (adopted in 1981), UN Doc HRI/GEN/1/Rev.2, at 4 (1996). See "Follow-up action on the Conclusions and Recommendations of the sixth meeting of persons chairing the treaty bodies", UN Doc HRI/MC/1996/2 (1996).

<sup>24</sup> *General comment 19(39)*, UN Doc HRI/GEN/1/Rev.2, at 28 (1996).

<sup>25</sup> *Aumceruddy-Cziffra v Mauritius*, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)* (New York, United Nations, 1985), vol 1, at 67 [hereinafter *Selected Decisions*, vol 1], (1985) 67 ILR 285, 2 HRLJ 139; *Lovell v Canada*, Communication No 24/1977, *Selected Decisions*, vol 1, at 83, 68 ILR 17, 2 HRLJ 158; *Zwaan de Vries v Netherlands*, Communication No 182/1984, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 (1990) [hereinafter *Selected Decisions*, vol 2], at 209; *Ato del Avellanal v Peru*, Communication No 202/1986, *Report of the Human Rights Committee in 1989*, UN Doc A/44/40, Annex X.C, at 411; *Broeks v Netherlands*, Communication No 172/1984, *Selected Decisions*, vol 2, at 196; *Vos v Netherlands*, Communication No 218/198, UN Doc A/44/40, Annex XI.G, at 232; *J A M B-R v Netherlands*, Communication No 477/1991, UN Doc A/49/40, Annex X.J, at 294, (1994) 1(3) IHRR 39.

<sup>26</sup> For the revised guidelines of the Committee, see Guidelines regarding the Form and Contents of Periodic Reports from States parties, UN Doc CCPR/C/20/Rev.2 (1995), and Guidelines regarding the Form and Contents of Initial Reports from States parties, UN Doc CCPR/C/5/Rev.2 (1995).

Nonetheless, there is a certain element of inconsistency in the Committee's approach. Many of its general comments – for, example, those dealing with torture and the right to bodily integrity,<sup>27</sup> the right to life,<sup>28</sup> and freedom of thought, conscience and religion<sup>29</sup> — fail to examine substantive rights through the lens of gender, and thereby preclude the elaboration of the meaning of substantive rights to provide States and domestic decision-makers (including judges) with guidance as to the measures required to ensure women equal opportunity in the enjoyment of rights. Moreover, where complaints under the Optional Protocol are concerned, the Committee is more comfortable with facially discriminatory provisions, which generally it will have no hesitation in finding to be a violation of the ICCPR. It is less willing to look behind complex or apparently neutral legislation, such as social security provisions which may involve indirect discrimination. However, the Committee is clearly committed to incorporating gender in its work and is taking serious steps to do so.

The Committee on Economic, Social and Cultural Rights (the Economic Committee) is charged with overseeing the implementation of the ICESCR.<sup>30</sup> As is the case with the ICCPR, the ICESCR contains a specific prohibition of sex-based discrimination (article 2) and extends this to all rights protected under the Covenant (article 3). Special provision relating to discrimination on the basis of sex also made in two other articles: right to equal remuneration (article 7) and in relation to marriage and the family (article 10). Other articles of particular relevance to women include the right to work (article 6), the right to social security (article 9), the right to health (article 12) and the right to education (article 13). Unlike the Human Rights Committee, the Economic Committee has no communications mechanism, although one has been under consideration in recent years.<sup>31</sup> However, in the same way as the Human Rights Committee, the Economic Committee regularly questions States parties on women's enjoyment of the rights in the Covenant, a task facilitated by its innovative methods and procedures, incorporating discussion days, soliciting information from different sources and non-

<sup>27</sup> *General comments 7(16) and 9(16)* (both adopted in 1982), UN Doc HRI/GEN/1/Rev.2, at 7 and 9 respectively (1996). These general comments were, however, replaced in 1992 by *General comments 20(44) and 21 (44)*, UN Doc HRI/GEN/1/Rev.2, at 30 and 33 respectively (1996). In the former of these the Committee, although not adopting a comprehensive gender analysis of the guarantee, made explicit that States parties were under an obligation to address the infliction of torture or cruel, inhuman or degrading treatment by private actors: *id* at 30, paras 2 and 13.

<sup>28</sup> *General comment 14(23)* (adopted in 1984), UN Doc HRI/GEN/1/Rev.2, at 18 (1996).

<sup>29</sup> *General comment 10(19)* (adopted in 1983), UN Doc HRI/GEN/1/Rev.2, at 11 (1996).

<sup>30</sup> On the work of the Committee, see generally Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, Clarendon Press, 1995).

<sup>31</sup> For the result of the latest discussions of the Committee on the issue and the recommended text of a draft protocol, see Committee on Economic, Social and Cultural Rights, "Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications concerning non-compliance with the International Covenant on Economic, Social and Cultural Rights", *Report on the Fourteenth and Fifteenth Sessions*, UN Doc E/1997/22, Annex IV.

governmental organisation participants, which allow it to gain a greater insight into problems affecting women in their enjoyment of rights. The concluding observations of the Economic Committee regularly make reference to discrimination against women in the enjoyment of economic, social and cultural rights and its revised reporting guidelines require some minimal coverage of women's interests. Its general comments suggest a serious attempt to introduce a gender perspective, through rigorous amplification of the meaning of each right from a gender perspective. The Committee's commitment to a gendered interpretation of its Covenant is manifested in its current work to elaborate a general comment on that theme. When completed, this comment, as well as the existing general comments of the Committee, will be instructive for national decision-makers.

The final treaty bodies I will consider — leaving CEDAW and the Committee on the Rights of the Child to others — are the Committee on the Elimination of Racial Discrimination and the Committee against Torture. The former, established to oversee the Racial Discrimination Convention, has done little to address discrimination against women. The Racial Discrimination Convention does not refer explicitly to women and there has been no reference either in the reporting system and through general comments to gender discrimination generally or the interplay of race and sex discrimination in particular.

Certainly, CERD has considered one communication from a woman under its optional communication procedure relating to race discrimination in *Yilmaz-Dogan v Netherlands*.<sup>32</sup> The complainant was a Turkish national living in the Netherlands whose employment had been terminated because of her pregnancy. She alleged that she had been subjected to racial discrimination since she claimed that her employer was of the view that foreign women (unlike Dutch women) did not give up work on having children, but rather continued to work and take extended sick leave. Her case was that had she been Dutch and not Turkish, she would not have been dismissed and that her dismissal constituted a violation of several articles of the Convention.<sup>33</sup> The Committee concluded that Ms Yilmaz-Dogan had not been afforded protection in respect of her right to work and directed the Netherlands to ascertain whether she was currently gainfully employed and, if not, to provide her with alterantive employment.

The Committee against Torture has yet to reveal an awareness of the gender dimensions of torture, despite increasing attention by other parts of the human rights system to the gendered aspects of torture, and

<sup>32</sup> Communication No 1/1984, UN Doc A/43/18, Annex IV (1988).

<sup>33</sup> These included article 5(a)(i), which obliges a State party to ensure that a person enjoys the right to gainful work and protection against unemployment without discrimination on the ground of race; and article 6, which requires a State party to ensure protection against racial discrimination, including the provision of legal remedies for discrimination.

<sup>34</sup> See Andrew Byrnes, "The Convention against Torture" in Kelly Askin and Dorean Koenig (eds), *Women's International Human Rights: A Reference Guide* (Transnational Publishers, forthcoming 1997).

academic criticism.<sup>34</sup> CAT, like CERD, was however, represented at the Glen Cove meeting of the human rights treaty bodies at which the human rights aspects of women's right to health were discussed.<sup>35</sup> The responsibility of all treaty bodies to reflect a gender approach in their interpretation of rights was stressed at this Roundtable and it may well be that the approach of the committees will be affected by the recommendations agreed at Glen Cove.

A comprehensive coverage of the general human rights standards and their relevance to women would entail a survey of the regional human rights systems — European,<sup>36</sup> Inter-American,<sup>37</sup> and African<sup>38</sup> — the first two of which have devoted significant attention to women, the last less so. Suffice it to say that each relies on the general norm of non-discrimination on the basis of sex rather than entrenching specific human rights for women. The European Convention on Human Rights and the American Convention on Human Rights, unlike the ICCPR, contain no freestanding guarantee of equality before the law or equal protection of the law; the African Charter on Human and Peoples' Rights contains guarantees similar to those of the ICCPR.<sup>39</sup> Litigation under the European and American Conventions is thus confined to claims of discrimination in the enjoyment of the substantive rights guaranteed by the two Conventions.<sup>40</sup> Despite this limitation, there have been a number of gender-based complaints from women brought before the Strasbourg organs under the European Convention.<sup>41</sup> Not all of these have been formulated as claims of discrimination and, even where they have been, not all of them have been decided on that basis, the Commission and the Court appearing to be of the view that if violation of a convention right is established as such, an added claim for discrimination simply gilds the lily and does not need to be determined.<sup>42</sup> There

<sup>35</sup> *Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Reproductive and Sexual Health Rights*, Glen Cove, New York, December 1996.

<sup>36</sup> See the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221. The European system is shortly to undergo major institutional reform: the amended text of the Convention and the protocols adopted to date are reproduced at 15 HRLJ 102.

<sup>37</sup> See the American Convention on Human Rights 1969 ("Pact of San José, Costa Rica"), 1144 UNTS 123.

<sup>38</sup> See the African Charter on Human and Peoples' Rights 1981, OAU Doc CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 58 (1982).

<sup>39</sup> African Charter on Human and Peoples' Rights, articles 2 and 3.

<sup>40</sup> Article 14 of the European Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of the American Convention on Human Rights (and article 2 of the African Charter) are in similar terms.

<sup>41</sup> See generally Maud Buquicchio de Boer, *Equality between the sexes and the European Convention on Human Rights: A Survey of Strasbourg Case Law*, Human rights files No 14 (Strasbourg, Council of Europe, 1995).

<sup>42</sup> See D J Harris, M O'Boyle and C Warbrick, *The Law of the European Convention on Human Rights* (London, Butterworths, 1995) at 468-469.

have also been a number of cases brought before the Inter-American Commission and Court of Human Rights raising similar issues.<sup>43</sup>

It is impossible neatly to categorise the litigation, but suffice it to say that it has included complaints of disparate treatment of unmarried mothers vis-à-vis their children,<sup>44</sup> state failure to provide a remedy in the face of private violence,<sup>45</sup> sex discrimination in paternity rights,<sup>46</sup> differential treatment of the foreign husbands of female citizens,<sup>47</sup> claims of self-determination in reproductive choice,<sup>48</sup> discrimination in taxation,<sup>49</sup> and requirements regulating the adoption of a family name or the retention by a woman of her maiden name.<sup>50</sup> A number of cases which have been decided on the basis of substantive rights and not on the ground of discrimination have been important from the point of view of women's human rights; one of the most important of these held that restrictions on women's access to information about abortion services available abroad were an impermissible restriction on freedom of expression.<sup>51</sup> Of similar importance was the Court's judgment rejecting a challenge brought against the decisions of the English courts in which the applicants were found guilty of marital rape.<sup>52</sup> Two cases have also concerned rape in war and civil unrest, where rape was characterised as torture or cruel, inhuman or degrading treatment.<sup>53</sup>

The results of this litigation have been mixed, but like the matters that have come before the international bodies, the issues dealt with have been relatively easy analytically, raising in the main facial discrimination issues rather than indirect discrimination claims.

<sup>43</sup> See, eg, *Baby Boy case*, Inter-American Commission of Human Rights, case 2141 (United States of America), Resolution No 23/81, 6 March 1981, (1981) 2 HRLJ 110 (permissibility of abortions in the light of the right to life); *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No 4, 79 ILR 282, 5 HRLJ 161.

<sup>44</sup> *Marckx v Belgium*, European Court of Human Rights, Judgment of 13 June 1979, Series A, No 31, 2 EHR.R 330.

<sup>45</sup> *X and Y v Netherlands*, European Court of Human Rights, Judgment of 26 March 1985, Series A, No 91, 81 ILR 91, 8 EHR.R 235 (gap in national law which meant that criminal sanctions were not available against person who sexually assaulted mentally handicapped girl a violation of the Convention).

<sup>46</sup> *Rasmussen v Denmark*, European Court of Human Rights, Judgment of 28 November 1984, Series A, No 87, 7 EHR.R 371.

<sup>47</sup> *Abdulaziz, Balkandali and Cabales v United Kingdom*, European Court of Human Rights, Judgment of 28 May 1985, Series A, No 94, 81 ILR 139, 7 EHR.R 471.

<sup>48</sup> See, eg, *Paton v United Kingdom*, European Commission of Human Rights, Application No 8416/78, decision on admissibility of 13 May 1980, 19 D&R 224, 3 EHR.R 408 (finding that national court's denial of alleged right of unmarried father of child to prevent mother from obtaining an abortion did not involve violation of the father's rights under the Convention). But see also *Brügge and Scheuten v Federal Republic of Germany*, European Commission of Human Rights, Application No 6959/75, Report of 12 July 1977, 10 D&R 100, 3 EHR.R 244 (upholding restrictions on access to abortion).

<sup>49</sup> *Lindsay v United Kingdom*, European Commission of Human Rights, Application No 11089/84, decision on admissibility of 11 November 1986, 49 D&R 181, 9 EHR.R 555.

<sup>50</sup> *Burghartz v Switzerland*, European Court of Human Rights, Judgment of 22 February 1994, Series A, No 180-B, 18 EHR.R 101.

<sup>51</sup> *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland*, European Court of Human Rights, Judgment of 29 October 1992, Series A, No 246, 15 EHR.R 244.

<sup>52</sup> *SW v United Kingdom, CR v United Kingdom*, European Court of Human Rights, Judgments of 22 November 1995, Series A, Nos 335-B and 335-C, 21 EHR.R 363.

<sup>53</sup> *Cypnus v Turkey*, European Court of Human Rights, Applications No 6780/74 and 6950/75, 4 EHR.R 482, 62 ILR 4, paras 358-74 (rape by soldiers constituted inhuman treatment); *Sükrin Aydin v Turkey*, European Commission of Human Rights, Application No 2317/94.

### ***Relevance of the international practice to domestic advancement of women's human rights***

There has been much exploration of the relevance to adjudication by domestic courts of the pronouncements of international bodies — whether in the form of treaty provisions or guarantees contained in other international instruments, binding judgments, non-binding views, general comments or recommendations and concluding observations. The series of judicial colloquia organised by the Commonwealth Secretariat on exactly this theme has contributed significantly to the discussion of the possibilities and problems of drawing on international jurisprudence to enhance the interpretation of national constitutions and laws and to develop the common law generally.<sup>54</sup> Many of the same issues arise in the context of utilizing international norms to advance women's human rights at the domestic level and, indeed, a number of the significant cases in which international standards have been drawn on have involved women's human rights.<sup>55</sup>

There is no doubt that, despite the orthodox doctrine that unincorporated treaties do not form part of domestic law that obtains in many Commonwealth countries, they can legitimately be drawn on to inform the process of domestic adjudication. Many Commonwealth courts have shown themselves open to these influences and it is to be hoped that others will follow suit, supported by the legal profession.

### **Conclusion**

This brief review of the mainstream mechanisms indicates that this framework has very often responded positively to promote the interests of women. Nonetheless, the value of this framework in this regard is limited by the fact that it has been more able to address claims of women which involve allegations of violations identical to those men might suffer, as well as claims by women to rights, entitlements or privileges they would enjoy if they were men. Moreover, the framework is far more responsive to “public” rather than “private” violations of rights, such as rights to nationality and legal personality. In addition, the litigation has involved little complex gender analysis and continues to reflect an androcentric model of women's entitlements by virtue of human rights guarantees.

Recent years have seen significant progress in the approach of the mainstream procedures to issues of gender. Reflective of the fact, however, that public attention at the international level has focused predominantly on issues of gender-based violence, it is this issue that has

<sup>54</sup> See generally Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992).

<sup>55</sup> See Andrew Byrnes, “Human Rights Instruments Relating Specifically to Women, with particular emphasis on the Convention on the Elimination of All Forms of Discrimination against Women” in this volume, *infra*, p 39.

attracted the greatest response from these mechanisms. It is only now that a pro-active gender analysis of general norms has begun in earnest. Pro-active analysis, combined with gender mainstreaming, will ensure that the past approach of "just add women" is now being substituted by a reappraisal so as to achieve a qualitative change in the relevant institutions, laws and procedures.