HUMAN RIGHTS INSTRUMENTS RELATING SPECIFICALLY TO WOMEN, WITH PARTICULAR EMPHASIS ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

◆

*Andrew Byrnes**

Introduction

International concern with the position of women and the reflection of that concern in treaties regulating particular fields of social activity is no new phenomenon, going back in some instances to the end of the 19th century (or even earlier). The first half of the 20th century saw the adoption of treaties which address particular social problems such as trafficking in persons or which sought to regulate the participation by women in the labour force. Since the second world war a number of instruments have been adopted which address discrimination against women in public and private life and which seek to advance the equality of women and their full enjoyment of fundamental human rights and freedoms.

The purpose of this paper is to examine the ways in which international conventions which explicitly address gender issues can be drawn on in domestic litigation to help advance the human rights of women. The major focus of the discussion is the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention" or "the Women's Convention").

The first section of the paper gives a brief overview of international legislation relating to women. The second outlines the structure and content of the Convention, describes the monitoring system established under it, and highlights the output of the Convention system that may be of use in proceedings before national courts. The third section reviews the status of treaties in common law systems and their relevance to domestic litigation. The final section describes a number of domestic cases in which the Convention has been invoked by the parties or by national courts.

* Senior Lecturer in Law and Director, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong. This paper is a revised version of the paper presented at the Hong Kong Colloquium and draws on the collection of materials prepared for the Hong Kong Colloquium by Jane Connors, Scott Wilkens, Victoria Medd and myself.

International concern with issues particularly affecting women or with sex discrimination

The gender-specific international conventions that have been adopted over the years reflect a variety of stances with respect to the proper role of women in society and their entitlement to participate fully in all fields of social activity.[1] Times and attitudes have changed considerably since the early part of the century and these changes have been reflected in the adoption of new instruments and the revision or abandonment of older ones that are no longer felt to be appropriate to modern times. Nevertheless, international legislative activity is a slow process and takes place on many fronts — older conventions which reflect ideas that have had their day in the view of many members of the international community may coexist with instruments reflecting a more modern outlook: not all international legislators necessarily share the same views about the roles of women as other institutions, and the slow process of adoption and adhesion to international treaties can mean that conceptions that are a generation old continue to prevail by default. The nature of treaty regimes may lead to an overhang of older treaties, with some States being party to older treaties while others have moved on to be governed by more modern treaties.

A typology of gender-specific international conventions

One scholar, Natalie Kaufman Hevener, has developed a typology of international conventions and other instruments addressing gender-specific issues adopted in the period since 1945. She has classified these conventions into three categories (while recognising that some conventions may contain provisions from one or more of the categories): *protective* conventions, *corrective* conventions, and *non-discriminatory* conventions.[2] These categories are equally applicable to those treaties adopted before 1945.

Protective instruments are those "which reflect a societal conceptualization of women as a group which either should not or cannot engage in specified activities", the protection "normally [taking] the form of exclusionary provisions, articles which stipulate certain activities from which women are prohibited".[3] Conventions which prohibit or limit women's participation in night work or underground

[1] See the list of gender-specific treaties in Annex A.

[2] See generally Natalie Kaufman Hevener, *International Law and the Status of Women* (Boulder, Co, Westview, 1983)[hereinafter *International Law*]. For an earlier discussion, see Hevener, "International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women" (1978) 1 *Harvard Women's Law Journal* 131. See also Betty G Elder, "The Rights of Women: Their Status in International Law" (1986) 25 *Crime and Social Justice* 1, and Anne M Trebilcock, "Sex Discrimination" in Rudolf Bernhardt (gen ed), *Encyclopedia of public international law* (Max Planck Institute for Comparative Public Law and International Law), vol 8, at 476 (Amsterdam, North-Holland Pub Co, 1985).

[3] Hevener, *International Law*, *supra* note 2, at 4.

work are examples of this type of convention, as are provisions which limit women's participation in activities for reasons related to women's reproductive capabilities.[4]

Corrective instruments also "identif[y] women as a separate group which needs special treatment, but corrective provisions are significantly different from protective ones. The aim of the corrective provisions is to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area."[5] Conventions which address trafficking in women, those which seek to remedy the disadvantages which women historically faced in the realm of nationality upon marriage to a person of another nationality, and conventions which seek to ensure that women enter into marriage only with their free and full consent are the primary examples of this type of convention.[6]

Non-discriminatory instruments "reject a conceptualization of women as a separate group, and rather reflect one of men and women as entitled to equal treatment ... These provisions treat women in the same manner as men. When women are specifically referred to as a class, it is only with the aim of ending existing separation or special treatment".[7] Examples of such instruments or provisions are the Charter of the United Nations, the Universal Declaration of Human Rights, the equality provisions of the two International Covenants and ILO instruments on equal remuneration for equal work by men and women workers.[8]

As Hevener points out, some instruments may contain elements of different approaches,[9] thereby reflecting unresolved tensions about the position of women in society or the view that genuine equality for women can only be achieved by a combination of different approaches tailored to the context of specific problems. Hevener considers that the Women's Convention contains elements of all three approaches, though she notes that the Convention is overwhelmingly based on a model of non-discrimination.[10]

Areas of concern

The following are the principal subject areas that have been addressed by gender-specific international instruments adopted in the last 100 years:[11]

- *Trafficking conventions:* those conventions originally directed at the so-called "white slave trade" (although it may be noted that the earlier

4 *Id* at 6-9.
5 *Id* at 4.
6 *Id* at 9-12.
7 *Id* at 4.
8 *Id* at 12-18.
9 *Id* at 18-21.
10 *Id* at 28-45.
11 See the list of conventions at Annex A.

anti-slavery conventions also addressed violations of human rights of which women were victims). From the 19th century conventions onwards, there has been a fairly regular reenactment of prohibitions on or regulation of various aspects of trafficking in women, including prostitution and the exploitation of others within national boundaries as well as across them.

- *International labour conventions:* these conventions, adopted within the framework of the International Labour Organisation, have sought to regulate the working conditions of women workers specifically as a group; they include conventions relating to night work by women, underground work by women, maternity protection, equal remuneration, and non-discrimination in employment and occupation.
- *Conventions dealing with specific issues of civil and political rights and status:* these conventions, adopted after the second world war within the United Nations by the Commission on the Status of Women, address areas where women may face particular problems because of discriminatory national laws and corrective action needs to be taken to bring women's position substantively into a position similar to that of men; these include instruments relating to the nationality of married women, the political rights of women, and conventions relating to the minimum age for marriage and registration of marriage.
- *Comprehensive sex discrimination instruments:* these instruments call on States to eliminate discrimination against women across a broad range of areas, including both civil and political rights as well as economic, social and cultural rights. The main examples of this type of instrument are the Declaration on the Elimination of All Forms of Discrimination against Women 1967 and the Convention on the Elimination of All Forms of Discrimination against Women 1979.[12]
- *Instruments dealing with violence against women:* these instruments reflect the growing concern with violence against women at the international normative level; while issue-specific conventions, these conventions represent an important change in perspective in a number of respects. The most important instruments are the Declaration on the Elimination of Violence against Women[13] and the Inter-American Convention on Violence against Women.[14]

This paper focuses on the 1979 Women's Convention, since it is the most comprehensive international treaty dealing with gender equality issues, and incorporates many of the standards contained in the earlier, more focused conventions.

[12] 1249 UNTS 13, opened for signature 1 March 1980, entered into force 3 September 1981.

[13] Declaration on the Elimination of Violence Against Women, GA Res 48/104 (1994), 1 IHRR 329.

[14] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), opened for signature 9 June 1994, entered into force 5 March 1995, 33 ILM 1534.

The Convention on the Elimination of All Forms of Discrimination against Women

In the early 1970s the UN Commission on the Status of Women decided to embark on the elaboration of what was to become the Convention on the Elimination of All Forms of Discrimination against Women. The proponents of the Convention considered that the time had come for a comprehensive statement of women's entitlements to equality in a form that would be legally binding for States which became parties to a treaty which contained those guarantees. The Convention thus moved beyond the 1967 Declaration on the Elimination of Discrimination against Women, which had been a broad statement, in non-binding form, of women's rights to equality and non-discrimination in many areas of life.

The Convention on the Elimination of All Forms of Discrimination against Women was finally adopted in 1979 and entered into force some 16 years ago, in September 1981.[15] As of 14 July 1997 there were 160 States parties to the Convention.

The Convention contains guarantees of equality and freedom from discrimination by the State and by private actors in all areas of public and private life. To a large extent, it codifies the existing gender-specific and general human rights instruments containing guarantees of freedom from discrimination on the ground of sex, though it adds some significant new provisions.[16] It thus requires equality in the fields of civil and political rights, as well as in the enjoyment of economic, social and cultural rights.

The problem the Convention addresses is that of discrimination against women, rather than discrimination on the basis of sex. For the purposes of the Convention article 1 defines "discrimination" in the following terms (which draw on the similar definition in the Racial Discrimination Convention):

> "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

[15] Two recent book-length commentaries on the Convention are Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht, Martinus Nijhoff, 1993), and Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo, Japanese Association of International Women's Rights, 1995). For a detailed bibliography on the Convention and related matters, see Rebecca J Cook and Valerie L Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429. This bibliography is updated and made available on-line through the Internet by the Laskin Law Library at the University of Toronto: http://www.law.utoronto.ca/pubs/h_rghts.htm.

[16] The Convention's explicit application to discrimination in the field of private life as well as public life (as in the International Convention on the Elimination of All Forms of Racial Discrimination), its requirement in article 5 that States must eliminate traditional and stereotyped notions of the roles of the sexes, and article 14's explicit concern with rural women are innovative provisions.

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[17]

Both *direct* and *indirect* discrimination are covered by the Convention.

Under the Convention States parties assume different types of obligations with respect to the elimination of discrimination in a number of fields.[18] A number of provisions of the Convention require immediate steps to be taken to guarantee equality, while other provisions are of a more programmatic nature, under which States parties oblige themselves to take "all appropriate measures" or "all necessary measures" to eliminate particular types of discrimination.[19]

In addition to the substantive obligations accepted by States which become parties to the Convention, States also accept an obligation under article 18 of the Convention to submit regular reports on the steps they have taken to give effect to their obligations under the Convention. These reports are to be submitted within one year after the entry into force of the Convention for the State concerned and every four years thereafter. These reports are examined by the Committee on the Elimination of Discrimination against Women (CEDAW), a body established pursuant to article 17 of the Convention and consisting of 23 independent experts elected to serve in their personal capacity by the States parties to the Convention. The reporting procedure is the only monitoring or enforcement procedure established under the Convention which is obligatory for States parties,[20] though work is presently proceeding on an optional protocol to the Convention that may establish an individual complaints and an inquiry procedure.[21]

[17] The Human Rights Committee has interpreted the guarantees against discrimination contained in the International Covenant on Civil and Political Rights in similar terms: see *General comment 18 (37)* (adopted in 1989), UN Doc HRI/GEN/1/Rev. 2, at 26 (1996).

[18] Many States have entered reservations to the Convention limiting their obligations in quite fundamental ways (by general reservations) or in relation to specific articles.

[19] For a legal analysis of the different types of obligations under the Convention see 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?" (1996) 21(3) *Brooklyn Journal of International Law* 679 at 707-732; Rebecca J Cook, "State Accountability under the Convention on the Elimination of All Forms of Discrimination Against Women" in Rebecca J Cook (ed), *The Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994) 228.

[20] Though it should be mentioned that article 21 provides for reference of a dispute over the interpretation of the Convention to the International Court of Justice, a provision to which many States parties have entered reservations and which has never been used.

[21] See generally, Byrnes and Connors, *supra* note 19; Andrew Byrnes and Jane Connors, *American Society of International Law Newsletter*, June-August 1996, 10; 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* 227 (1995).

The Committee on the Elimination of Discrimination Against Women and its products

As of the end of March 1997, the Committee on the Elimination of Discrimination against Women had held 16 sessions since it began its work in 1982.[22] During those sessions the Committee has reviewed dozens of reports submitted by States parties to the Convention on the measures that they have taken to give effect to their obligations under the Convention. In addition, the Committee has carried out a considerable amount of other work, contributing to international conferences focusing on women as well as on other themes, and elaborating suggestions and general recommendations under the Convention.

Although the Convention was adopted in 1979 and there is a wealth of material concerning its application, most of this material is relatively little known and frequently difficult to access, even for those who are aware of its existence. In the work of the Committee four types of documentation are of particular importance:[23]

- the Convention itself
- the *General recommendations* of the Committee
- the Concluding observations of CEDAW on individual countries
- the reports of individual countries to the Committee (and the record of discussion of those reports between the Committee and government).

While the Convention itself may be reasonably well-known to many, the other output of the Committee and of the States parties to the Convention is not. Yet it is these documents that provide detailed content to the generally-worded provisions of the Convention (in the

[22] The reports of the Committee on the work of its sessions are contained in the report of the Committee to the General Assembly, issued as a supplement (generally Supplement No 38) to the Official Records of the General Assembly, and obtainable in the official languages of the United Nations from the Division for the Advancement of Women, United Nations, New York. Documents from the earlier sessions of the Committee are to be found in United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 1 (1982-1985)* (New York, United Nations, 1989), UN Sales No E.89.IV.4, and United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987)* (New York, United Nations, 1990), UN Sales No E.90.IV.4. For a review of the work of the Committee up to the Beijing Fourth World Conference on Women, see *Report of the Committee on the Elimination of Discrimination against Women (CEDAW) on the progress achieved in the implementation of the* Convention, UN Doc CEDAW/C/1995/7 (1995), reproduced as Document 115 in *The United Nations and the Advancement of Women 1945-1995*, The United Nations Blue Books Series, vol VI (New York, United Nations, 1995), at 511. Many recent documents of the Committee and information about the Committee and its members can be found on the website of the United Nations Division for the Advancement of Women: http://www.un.org/DPCSD/daw/cedaw.htm.

[23] While the present discussion is concerned primarily with the Women's Convention, the experience under the major UN human rights treaties has been similar and much can be learnt from examining the strategies employed under those treaties.

case of the *General recommendations*), show the relevance of the Convention's provisions to the situation in a particular country (the *Concluding observations* adopted following a country's report), and provide a source of comparative information about how other States parties (and one's own) have gone about implementing the Convention.

General recommendations

Under article 21 of the Convention CEDAW has the power to make "suggestions and general recommendations" to States parties. In recent years CEDAW has begun to use its power to make general recommendations to elaborate its understanding of particular articles of the Convention, or of how the Convention applies to thematic issues (such as violence against women). The use of this power in such a way is an important development in the work of CEDAW (which in this respect is following the lead of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights[24]). Formally, the *General recommendations* are not binding interpretations of the Convention, but are considered as particularly persuasive interpretations of it.[25] The more recent *General recommendations* of the Committee and its future ones are likely to provide useful material to support arguments based on the Convention in and out of court.

As of March 1997 the Committee had adopted 22 *General recommendations*.[26] While a number of the earlier *General recommendations* are useful, the Committee began in 1992 to adopt more detailed recommendations. The two most detailed *General recommendations* adopted to date are *General recommendation No 19* (1992) dealing with violence against women, and *General recommendation No 21* (1994) dealing with equality in marriage and the family.[27] Both these *General recommendations* set out in detail the Committee's understanding of the meaning of articles of the Convention and make detailed recommendations to States parties about the steps that need to be taken in order to fulfil their obligations under the treaty.

Although as a formal matter of international law these general recommendations are not binding on States parties, nevertheless they are considered as particularly persuasive interpretations of it; they have been invoked before courts and tribunals, though less frequently than the

[24] These are the two expert committees established under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, with functions similar to those of CEDAW.

[25] See Byrnes & Connors, *supra* note 19, at 766-767.

[26] At its January/February 1997 session the Committee completed its work on a draft of a 23rd *General recommendation* on articles 7 and 8 of the Convention (dealing with women's equal participation in public life), which was formally adopted at its July 1997 session.

[27] The text of these *General recommendations* appears in International Women's Rights Action Watch and the Commonwealth Secretariat, *Assessing the Status of Women* (2nd ed 1996), Appendix E, at 72 and 76.

General comments of the Human Rights Committee, which have been often invoked before courts, both in jurisdictions in which the ICCPR has been incorporated (such as Hong Kong[28] and Japan[29]) and in jurisdictions in which it has not (such as Australia).

Reports of States parties

Each State party to the Convention accepts an obligation to submit reports to the Committee on a regular basis. These provide a useful source of comparative information, both about what States consider to be the extent of their obligations under the Convention and about the various ways in which the Convention can be implemented. In relation to one's own country, the national report provides an authoritative (though not always satisfying) statement of the government's position on various issues. Often national reports will contain commitments by governments to undertake particular actions, commitments to which a government can frequently later be referred in order to ensure that promises made are in fact carried out.

The Committee's consideration of reports and its concluding observations

One of the major sources for elucidating the meaning of the Convention has been the questions put by members of the Committee to States parties and the views members have expressed on the extent to which the State has given effect to its obligations under the Convention.[30] Recently, however, the Committee has adopted the practice of adopting concluding observations, which express the collective view of the Committee on the extent to which the Convention has been implemented in a given country, rather than the views of individual members. The purpose of these concluding observations is to highlight the areas in which the Committee considers action is required as a matter of priority. Sometimes they will include the Committee's view that there is a violation of the Convention.

This material can prove useful on a comparative basis, but its most useful application tends to be in relation to the country about which the comments are made. These concluding observations can provide useful support for efforts to bring about compliance with the Convention, in a formal legal context (such as litigation) or in a more political context.

[28] See generally Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights" in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, Clarendon Press, 1997), chapter 9, and Johannes Chan, "The Influence of International and Comparative Jurisprudence on the Interpretation of the Hong Kong Bill of Rights", *McGill Law Journal* (forthcoming 1997).

[29] See generally Yuji Iwasawa, "The Domestic Impact of Acts of International Organizations Relating to Human Rights", paper presented at *Conference on The Future of the UN Human Rights Treaty System*, Research Centre for International Law, University of Cambridge, Cambridge, 21-23 March 1997, at pp 9-15.

[30] For an overview of the types of questions asked, see *Assessing the Status of Women*, *supra* note 27.

The relevance of the Convention and similar instruments to domestic litigation

The status of treaties generally in common law jurisdictions

The position in nearly all Commonwealth and common law countries is in formal terms fairly similar: unincorporated treaties may not generally be relied on before domestic courts directly to found a cause of action, but they may nevertheless have an indirect impact on the interpretation and application of law. The presumption that the legislature does not intend to legislate in a manner that is inconsistent with international law is well-accepted in common law jurisdictions, and has as its corollary a principle of statutory interpretation — of uncertain practical importance — that statutes should be interpreted in a manner which is consistent with international law.[31] International treaties law and customary international law are also recognised as relevant sources for the development of the common law. Examples of how unincorporated treaties have been used by courts include:

- as an aid to constitutional or statutory interpretation, either generally or in order to resolve an "ambiguity": eg, *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana) (consideration of various international instruments in deciding whether constitutional guarantee of equality included discrimination based on sex)
- a relevant consideration to be taken into account in the exercise of an administrative discretion by a decision-maker (and thus subject to judicial review): eg, *R v Director of Immigration, ex parte Simon Yin Xiang-jiang* (1994) 4 HKPLR 264 (HK CA) (existence of treaty obligation not to expel a stateless person except on grounds of national security or public morals should be taken into account by decision-maker considering whether to expel such a person on other grounds), citing *Tavita v Minister of Immigration* [1994] NZAR 116 (NZ CA)
- as giving rise to a *legitimate expectation* that the provisions of the treaty will be applied by a decision-maker unless a hearing is given to the person affected: *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 128 ALR 353 (High Court of Australia) (relevance of guarantees in the Children's Convention to decision to deport a parent)

[31] The issue can be complicated somewhat in relation to treaties. As a strictly logical proposition it might be maintained that in general a legislature can only be presumed to have legislated consistently with treaties which were in force for the State concerned (or at least in contemplation) at the time when the statute was passed.

- a factor that may be taken into consideration in the development of the common law, where the common law is unclear: *Rantzen v Mirror Newspapers* [1994] QB 670 (Eng CA) (guarantee of freedom of expression and its relation to applicable standard for review of jury awards in defamation cases)
- a factor that may be taken into account when identifying the demands of public policy: eg, *Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321 (Ont CA) (international treaties on non-discrimination, including the Women's Convention taken into account in determining whether a sexist, racist and classist charitable trust was against public policy).

The extent of utilisation of unincorporated treaties depends largely on the approach adopted by the judiciary: a judiciary which is prepared to be open to international influences and to draw on international jurisprudence has some scope for doing so in most common law systems. The task is probably easier where the judge is interpreting a constitutional or statutory Bill of Rights (in which there may be similar or identical guarantees to those contained in treaties by which the State is bound or which form part of customary international law). This is the case for the vast majority of Commonwealth countries which became independent after the second world war; many of these countries have constitutions which trace their parentage to the European Convention on Human Rights.[32] This makes reference to international jurisprudence under the European Convention (and the ICCPR) particularly easy to justify in formal terms, if any justification is needed. For those countries that have accepted the competence of the Human Rights Committee under the First Optional Protocol to the ICCPR to consider individual complaints, the relevance of international case law is even more immediate.[33]

In recent years a number of Commonwealth courts (especially those in Southern Africa) have energetically embraced international jurisprudence in the interpretation of national constitutional guarantees, including treaties to which the State concerned is not a party as well as those by which it is bound.[34]

[32] See the classic statement of Lord Wilberforce in *Minister of Home Affairs and Another v Fisher* [1980] AC 319 at 328-330 (Privy Council).

[33] See the views of Brennan J of the High Court of Australia in *Mabo v Queensland (No 2)* (1995) 175 CLR 1, at 42: "The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imposes."

[34] See, eg *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana); *State v Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, [1994] 1 LRC 343, 1995 (2) SA 182 (Supreme Court of Zimbabwe). See generally John Dugard, "The Role of Treaty-Based Human Rights Standards in Domestic Law: The Southern African Experience", paper presented at *Conference on The Future of the UN Human Rights Treaty System*, Research Centre for International Law, University of Cambridge, Cambridge, 21-23 March 1997.

There are, of course, a number of reasons why judges may wish to be cautious about drawing too enthusiastically on treaties which have not been incorporated as part of domestic law, even though they are binding on the State as a matter of international law. Justice Michael Kirby (now of the High Court of Australia) has identified a number of matters that may influence judges to take a less expansive approach to the use of treaty norms.[35] They include the fact that the ratification of a treaty is generally an executive act, which may or may not reflect the views of the populace or the Parliament; or, in federal states, concern that the federal government may use the power to ratify treaties (and associated legislative power to implement them) to expand federal power at the expense of the power of the States.[36] Other concerns are that the process of judicial development of the law may divert attention from the more open and democratic adoption of such norms by way of statutory or constitutional Bills of Rights, suspicion about the composition and competence of international bodies, and a concern that the drive towards international conformity not lead to a neglect of the relevant national and local social and historical context.[37]

Some examples of the invocation of the convention or similar instruments in domestic courts — does it make a difference?

The following section consists of brief references to cases in which reliance has been placed on or references made to the Women's Convention or other instruments which address gender-specific issues.

References to the Women's Convention

- *Aldridge v Booth* (1988) EOC ¶92-222, 80 ALR 1 (Fed Ct of Australia)
  The Federal Court dismissed a challenge to the constitutionality of the sexual harassment provisions of the federal Sex Discrimination Act, holding that article 11 of the Convention imposed a very clear

[35] See Michael Kirby, "The Role of International Standards in Australian Courts" in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia* (Sydney, Federation Press, 1995) 81. These concerns have a special relevance to the case of Australia, as is illustrated by the decision of the High Court in *Teoh* (holding that the ratification of the Convention on the Rights of the Child by Australia gave rise to a legitimate expectation that its principles would be adhered to by decision-makers in immigration decisions). This gave rise to considerable objections by the government, generating a joint statement by the Attorney-General and Minister for Foreign Affairs of the Labour government (10 May 1995), which was subsequently reiterated by the same Ministers in the coalition government that succeeded them: see Minister for Foreign Affairs and the Attorney General and Minister for Justice, *Joint Statement: The Effect of Treaties in Administrative Decision-Making*, 25 February 1997, *Commonwealth of Australia Gazette, Special Gazette*, 26 February 1997, No S 69 (stating that the ratification of a treaty should not be taken as giving rise to a legitimate expectation that would permit an administrative decision to be challenged).

[36] *Id* at 86-87.

[37] *Id* at 87-88.

obligation on Australia to eliminate sex discrimination in employment, and that sexual harassment was a form of sex discrimination within the meaning of the Convention. Accordingly, the provisions were constitutionally valid under the power to legislate "with respect to external affairs", which included the power to implement treaty obligations.

That the court's conclusion was correct in terms of the Convention can been seen from CEDAW's view as expressed in its *General recommendation No 19* (1992), paras 17-18, in which the Committee makes clear its view that sexual harassment is a violation of article 11 of the Convention and is a form of gender-specific violence.[38]

- *Ephrahim v Pastory* (1990) 87 ILR 106, [1990] LRC (Const) 757 (High Court of Tanzania)
  The High Court of Tanzania relied on the Convention (as well as the ICCPR and the African Charter on Human and Peoples' Rights) in holding that the guarantee of equality contained in the Bill of Rights overrode the customary law rules which prevented women from selling clan land, while permitting men to do so (subject to the condition that any other clan member could repurchase the land from a purchaser).

- *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana)
  The High Court and Court of Appeal of Botswana upheld a challenge to provisions of Botswana's nationality law, which did not permit a Botswana woman married to a non-Botswana national to pass on her citizenship to the children of the marriage. The Convention, along with other human rights instruments, has been relied on in a number of cases to interpret constitutional guarantees of equality.

- *Dhungana and another v Government of Nepal*, Supreme Court of Nepal, Writ No 3392 of 1993, 2 August 1995, unreported[39]
  A challenge was made to the Nepali law that provided that, while a son was entitled to a partition share of his father's property at birth, a daughter was only entitled to obtain a share when she reached the age of 35 and was still unmarried. Under Nepali law ratified treaties form part of the law of Nepal and an action was brought challenging

[38] See also *Victoria v Commonwealth* (1996) 138 ALR 129, in which a number of sections of federal legislation relating to equal remuneration of men and women workers and parental leave were held to be valid by the High Court of Australia, since they involved the implementation of obligations under ILO Conventions, the Women's Convention and the International Covenant on Economic, Social and Cultural Rights.

[39] I am grateful to Ms Sapana Pradhan, of Development Law Associates, Kathmandu, counsel in the case, for providing me with an English translation of the judgment.

this law on the ground that it violated both the guarantee of equality in the Constitution and article 15 of the Women's Convention. The court appeared to consider that there was a violation of these guarantees, but was reluctant to declare the law unconstitutional with immediate effect. The court eventually ordered the government to "introduce an appropriate Bill to Parliament within one year ... by making necessary consultations as to this matter with the recognised Women's Organisations, sociologists, the concerned social organisations and lawyers ... and by studying and considering also the legal provisions made in other countries in this regard."

- *Re Robert Southern and Department of Education, Employment and Training, Australian Administrative Appeals Tribunal,* No A92/87 AAT, No 8533, 17 February 1993, (1993) EOC ¶92-491
  In this case the Administrative Appeals Tribunal upheld a refusal to disclose documents containing complaints of sexual harassment, which would have permitted the respondent to identify the persons who had lodged those complaints. The Tribunal stated (at para 27) that:

  > "27. It is not only a matter of public interest and importance to maintain a workable sexual harassment complaints and elimination system, it is a fulfilment of the legal responsibilities of any agency under the Act. The Act itself is a fulfilment of Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women, as appears in s 3(a) of the Sex Discrimination Act. These are substantial public interest considerations. It is important, in my view, that complainants or potential complainants be assured of confidentiality when they invoke the mechanism established by their employing agency to complain of sexual harassment. They should be free to withdraw formal complaints without proceeding to a formal hearing (at which of course some of the matters alleged must be made known to the alleged offender) without fear that their identity or the substance of their complaint would be made public. It is in the public interest, not only that justified complaints be treated sensitively and in confidence, but also that other complaints, which may or may not be justified, may be withdrawn without fear of recrimination. To facilitate a different result would be to cause a substantial adverse effect on the management of personnel."

- Supreme Court of India, Writ Petition (Civil) No 684 of 1994, reproduced from Rani Jethmalani, "WARLAW's Petition in the Supreme Court of India at New Delhi (Civil Original Jurisdiction) Writ Petition (Civil) No 684 of 1994" in Rani Jethmalani (ed), *Kali's*

Yug: Empowerment, Law and Dowry Deaths (New Delhi, Har-Anand Publications, 1995) 107-119[40]
This action was a response to the declaration entered by India when it ratified the Women's Convention and the government's apparent failure to take steps to determine the views of the different communities on repealing discriminatory personal laws. When India ratified the Convention in 1993, it entered a declaration in these terms:

> "With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."

The petitioners sought an order from the court directing the government of India to show what steps it had taken to ascertain the views of the Hindu community on whether it was appropriate to repeal discriminatory personal laws with a view to ensuring equality for women. The case is still pending.

- *Vishaka and others v State of Rajasthan,* Supreme Court of India (1995)[41]
  This case arose out of an alleged gang rape and the failure of officials to investigate complaints of rape (the women who were raped were State employees). A writ was lodged with the Supreme Court requesting it to direct the State to form a Committee to frame guidelines for the prevention of sexual harassment and abuse of women. The terms proposed to the court by counsel for the petitioners were in part drawn directly from certain passages in CEDAW's *General recommendation 19* dealing with violence against women.

The difference it makes: the question of temporary special measures

- *Re Australian Journalists' Association* (1988) EOC ¶92-224 (Australian Conciliation and Arbitration Commission)
  The Commission refused to permit a change to the rules of the Australian Journalists' Association which was designed to ensure that there was at least one-third representation of women members on the Association's governing body. Boulton J found that the provision was discriminatory and did not fall within section 33 of the Sex

[40] I am grateful to Ms Rani Jethmalani of WARLAW, counsel in the case, for information about it.
[41] I am indebted to Mr Fali S Nariman, one of the counsel in the case, for information about the proceedings.

Discrimination Act, which permitted measures to be taken which are intended to ensure equality of opportunity. [42]

Boulton J held that women had the same opportunity formally to stand for election and that therefore the section did not apply. He did not consider article 4 of the Women's Convention (which s 33 was intended to reflect); otherwise, it is difficult to see how he could have come to any conclusion other than finding the proposed rule was a permissible temporary special measure and therefore not unlawful. The union subsequently applied for and was granted an exemption under the legislation. In its decision granting the exemption the Human Rights and Equal Opportunity Commission stated that it did not necessarily agree with the interpretation of Boulton J: *Re an application for an exemption by the Australian Journalists' Association* (1988) EOC ¶92-236, at p 77,209 (Australian Human Rights and Equal Opportunity Commission).

- *Re Municipal Officers' Association of Australia: Approval of Submission of Amalgamation to Ballot* (1991) EOC ¶92-344, (1991) 12 ILLR 57 (Australian Industrial Commission)
  In this case the Australian Industrial Commission considered a similar issue and, after referring to article 4 of the Convention and other international cases dealing with the concept of discrimination, took the view that a union rule providing that each union branch have to have at least one female vice-president was covered by s 33 of the Sex Discrimination Act.

Gender-specific instruments other than the Women's Convention

- *Van Gorkom v Attorney-General* [1977] 1 NZLR 535 (Supreme Court of New Zealand)
  In this case Cooke J considered a challenge to the setting of conditions distinguishing between the payment of removal allowances to married male and married female teachers, pursuant to a discretion to set such conditions conferred on the relevant Minister by the Education (Salaries and Staffing) Regulations 1957. In holding that the adoption of the distinction between male and female married teachers was beyond the power conferred by the enabling regulation (and was therefore invalid), the court referred to articles 2 and 23 of the Universal Declaration of Human Rights and article 10(1) of the Declaration on the Elimination of Discrimination against Women. The judge held that, although these instruments were not part of New Zealand domestic law, they represented desirable international

[42] Section 33 provides:
"Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act."

goals and it would be unsafe to conclude that the enabling regulation was intended to permit actions that would be inconsistent with those standards. ([1977] 1 NZLR at 542-543)

Others

- *The State v Kule* [1991] PNGLR 404 (National Court of Justice of Papua New Guinea)
  In this case Doherty J held that the custom of giving a daughter in compensation and reparation for murder to the family of the person murdered was not enforceable, since it was an institution or practice similar to slavery and therefore contrary to section 253 of the Constitution, which prohibited "slavery, and the slave trade in all their forms, and all similar institutions and practices". In reaching this conclusion the judge interpreted the word "slavery" in the Constitution by reference to the Slavery Convention[43] and its amending Protocol,[44] and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[45]

ANNEX A*

- International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment 1906, 2 Martens Nouveau Recueil, Ser 3, 861; 4 AJIL Supp 328
- Convention Concerning the Employment of Women Before and After Childbirth 1919, ILO 3, 38 UNTS 53
- Convention Concerning Employment of Women During the Night 1919, ILO 4, 38 UNTS 68
- International Convention for the Suppression of Traffic in Women and Children 1921, 9 LNTS 415; and Protocol 1947, 53 UNTS 39
- International Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 LNTS 431; and Protocol 1947, 53 UNTS 49
- Inter-American Convention on the Nationality of Women 1933, PAUTS 37, 28 AJIL Supp 61
- Convention Concerning Employment of Women During the Night (Revised 1934), ILO 41, 40 UNTS 33
- Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds 1935, ILO 45, 40 UNTS 63

[43] 60 LNTS 253 (1926).
[44] 182 UNTS 51 (1953).
[45] 266 UNTS 3 (1956).
* Originally prepared by Jane Connors and Victoria Medd, and revised by Lum Bik.

- Inter-American Convention on the Granting of Civil Rights to Women 1948, PAUTS 23
- Inter-American Convention on the Granting of Political Rights to Women 1948, PAUTS 3
- Convention Concerning Night Work of Women Employed in Industry (Revised 1948), ILO 89, 81 UNTS 147
- Convention Concerning Migration for Employment (Revised 1949), ILO 97, 120 UNTS 71
- Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others 1950, 96 UNTS 271 & Final Protocol 1950, 96 UNTS 316
- Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951, ILO 100, 165 UNTS 303
- Convention Concerning Maternity Protection (Revised 1952), ILO 103, 214 UNTS 321
- Convention on the Political Rights of Women 1953, 193 UNTS 135
- Convention on the Nationality of Married Women 1957, 309 UNTS 65
- Convention Concerning Discrimination in Respect of Employment and Occupation 1958, ILO 111, 362 UNTS 31
- UNESCO Convention on Discrimination in Education 1960, 429 UNTS 93
- Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages 1962, 521 UNTS 231
- Migrant Workers (Supplementary Provisions) Convention 1975, ILO 143, 1120 UNTS 323
- Workers with Family Responsibilities Convention 1981, ILO 156, 1331 UNTS 295
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (Convention of Belém do Pará), 33 ILM 1534

ANNEX B
Some useful sources on the Convention on the Elimination of All Forms of Discrimination against Women

- Website of the United Nations Division for the Advancement of Women: http://www.un.org/DPCSD/daw/cedaw.htm
- Philip Alston, "The Purposes of Reporting", in United Nations/UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (New York, United Nations, 1991), 13-16
- Cecil Bernard, "The Preparation and Drafting of a National Report", in United Nations/UNITAR, *Manual on Human Rights*

Reporting under Six Major International Human Rights Instruments (New York, United Nations, 1991), 17-23

- Noreen Burrows, "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women", (1985) *Netherlands International Law Review* 419-457
- Rebecca Cook and Valerie Oosterveld, "A Select Bibliography of Women's Human Rights", (1995) 44 *American University Law Review* 1429-1471 [This bibliography is updated and made available on-line through the Internet by the Bora Laskin Law Library at the University of Toronto: http://www.law.utoronto.ca/pubs/h_rghts.htm]
- Rebecca Cook (ed), *International Human Rights Law and Women's Human Rights* (Philadelphia, University of Pennsylvania Press, 1994)
- Zagorka Ilic, "The Convention on the Elimination of All Forms of Discrimination Against Women", in United Nations/UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (New York, United Nations, 1991), 153-176
- Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (Bunkyo, Japanese Association of International Women's Rights, 1995)
- Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Dordrecht, Martinus Nijhoff, 1993)
- United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 1 (1982-1985)* (New York, United Nations, 1989), UN Sales No. E.89.IV.4
- United Nations, *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), volume 2 (1986-1987)* (New York, United Nations, 1990), UN Sales No. E.90.IV.4