



**Commission on the Status of Women
Fifty-fourth session
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A. INTRODUCTION

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

Convention in October 1999 and December 2000 re

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

The evolution of the Committee and its practice

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

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Fourth World Conference on Women in Beijing.⁶ The increased interest in gender issues and efforts to strengthen international mech

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

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

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

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

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

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

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

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

The breadth and flexibility of the interpretations of the Conventions adopted in the later General recommendations have proved wrong at least in part claims that the Convention was fundamentally flawed in its approach to equality, though that is

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

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

As the Committee's body of case law grows and more decisions are adopted in which the Committee finds violations, the question of domestic implementation will assume greater importance. While much responsibility in this respect lies with the executive government and legislature, often the courts may need to be involved, if for example a court decision needs to be reviewed or reversed. Similar issues have arisen in relation to the implementation of the views of other human rights treaty bodies, as in many countries the decision of the treaty bodies have no formal legal status, and the successful complainant may therefore not be able to rely directly on the decision of the CEDAW Committee to make or reopen a case under domestic law.¹³ An instance of this can be seen in one of the cases against Austria, in which the Austrian Supreme Court stated in the context of a civil claim for compensation brought as a result of the case of ¹⁴ that the decision and recommendations of the CEDAW Committee were not relevant to the domestic court's decision, as the establishi

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

The Committee took the view that, notwithstanding the fact that there were still in theory opportunities for domestic relief, the domestic re

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

F. CHALLENGES AND OPPORTUNITIES – OLD AND NEW

Reservations

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

³⁴ International Law Association Committee on International Human Rights Law and Practice,

(2002) 507-555; International Law Association Committee on International Human Rights Law and Practice, , in International Law Association, (London: 2004) 621-688.

³⁵ In , AIR 1997 SC 3011, at 3015 the Supreme Court of India not only referred to the General recommendation No 19 on violence against women adopted by the CEDAW Committee, but drew up rules to govern sexual harassment in employment (pending the enactment of legislation) which drew extensively on the wording of the General recommendation. In Judgment of 7 October 1998, the Swiss Federal Supreme Court (Bundesgericht) (BGE 125 I 21, at 34-35) referred to the CEDAW Convention and CEDAW's General recommendation No 7 (1988). In , 2001 (10) BCLR 995 (CC) the South African Constitutional Court referred to CEDAW's General recommendation No 19 on violence against women, in particular its reference to the obligation of the State to take preventive, investigate or punitive steps in relation to private violations. In [1999] 1 SCR 330, 169 DLR (4th) 193 the Supreme Court of Canada upheld an appeal against an acquittal of a person charged with sexual assault and substituted a conviction. Heureux-Dubé and Gonthier JJ in a concurring judgment referred to CEDAW's General recommendation 19. In [1998] 1 NZLR 523, at 553 the dissenting judge of the New Zealand Court of Appeal, Thomas J, (refers to CEDAW's general recommendation on the family (General recommendation No 21, paras 13 and 16) in his discussion of whether refusal to permit same-sex marriages was a violation of the guarantee of equality. In [2004] FCA 1250 the Federal Court of Australia discusses at length, with reference to General recommendation No 25 and other sources, the concept of (temporary) special measures under the Convention and implementing Australian legislation. In Decision C-355/06 of 10 May 2006, the Constitutional Court of Colombia drew on CEDAW as part of its reasoning to hold that abortion could not be considered a crime in a number of circumstances. See also

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

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

The Human Rights Council's Universal Periodic Review procedure

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

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

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

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

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

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, A/HRC/12/14, paras 9-12.

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

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

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

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

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, <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/Parliamentarians.pdf>.