

## REVIEW ESSAY

*THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* EDITED BY MARSHA A FREEMAN, CHRISTINE CHINKIN AND BEATE RUDOLF (OXFORD, UK: OXFORD UNIVERSITY PRESS, 2012) 808 PAGES. PRICE AU\$239.95 (HARDCOVER) ISBN 9780199565061.

### CONTENTS

I	Introduction .....	1
II	Structure of the <i>Commentary</i> .....	3
III	Critiques of <i>CEDAW</i> , the Committee’s Interpretations and the <i>Commentary</i> .....	8
	A The Committee’s Interpretive Methodology .....	9
	B Other Controversial Issues Raised in the <i>Commentary</i> .....	16
	1 Non-Discrimination against Women Based upon Sexual Orientation .....	16
	2 Tensions between Women’s Rights and Religious Rights .....	19
	3 Abandoning the Traditional Male Yardstick and Adopting Temporary Special Measures for Non-Traditional Men .....	24
IV	Conclusion: A Call to Action .....	28

### I INTRODUCTION

The UN *Convention on the Elimination of All Forms of Discrimination against Women* (‘*CEDAW*’ or ‘*Convention*’)<sup>1</sup> has had a profound global influence on the advancement of women over the last three decades. As its name suggests, this international convention attempts to eradicate discrimination against women, promote women’s equality with men, and improve the wellbeing of women and girls throughout the world. By the end of 2010, 186 countries had joined the *Convention*, and 100 had also ratified the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (‘*Optional Protocol*’),<sup>2</sup> providing for additional enforcement mechanisms.<sup>3</sup> In their periodic reports to the Committee that oversees implementation of the *Convention* (‘Committee on the Elimination of Discrimination against Women’ or ‘Committee’),<sup>4</sup> states parties to the *Convention* have recounted numerous

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<sup>1</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (‘*CEDAW*’).

<sup>2</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) (‘*Optional Protocol*’).

<sup>3</sup> Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) v (‘*Commentary*’).

<sup>4</sup> Reports are submitted at least every four years to the Secretary-General of the UN (or more frequently if required by the Committee on the Elimination of Discrimination against Women (‘Committee’)), in accordance with art 18 of the *Convention*.

improvements in the status of women.<sup>5</sup> Although some of these changes may well have occurred in the absence of an international convention, both the existence of the *Convention* and the oversight mechanisms through the Committee have certainly contributed to the momentum impelling governments forward in taking concrete actions to provide greater equality for women.

*CEDAW's* impact, particularly through the work of the Committee, is thoughtfully examined in an important new volume entitled *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* ('*Commentary*'), edited by Marsha A Freeman, Christine Chinkin and Beate Rudolf.<sup>6</sup> The editors incisively state the aim of the work in its preface, noting:

The *Commentary* is designed as an in-depth account of the *Convention* norms, and their meaning and application, as developed by the CEDAW Committee ... [The Committee's] primary purpose is to develop the legal standards against which States parties' actions are measured, and to engage them in a dialogue under both the review process and the *Optional Protocol*, that explains to them where they have met the standards, where they fall short, and how to move forward. The *Commentary* documents the achievement of that purpose.<sup>7</sup>

The *Commentary* superbly accomplishes this mission. Article by article, it provides a comprehensive account of the Committee's interpretation and states parties' application of the *Convention*. The book also offers a detailed description of the *Optional Protocol*, which allows for individual petitions concerning violations of *CEDAW* by states parties, as well as inquiries into grave or systematic violations of the *Convention*. Each chapter has been carefully edited and thoughtfully integrated into the overall framework of the book, creating a meticulously unified whole. Moreover, although apparently not an explicit goal of the work, woven throughout its chapters are a series of threads interlacing into several overarching themes — some of which are quite controversial — the patterns of which will likely emerge more distinctively throughout the continuing evolution of the *Convention's* interpretation. These themes provide rich material for further evaluation, analysis, development and scholarship, and address critical issues such as the Committee's methodology of interpreting the *Convention*, whether the scope of the *Convention* encompasses discrimination against women based on sexual orientation or gender identity,

<sup>5</sup> Christine Chinkin and Marsha A Freeman, 'Introduction' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 1, 33.

<sup>6</sup> Hanna Beate Schöpp-Schilling, who served as a member of the Committee for 20 years, initiated this *Commentary* in 2008. Though sadly she passed away in July 2009, the completion of this volume evidences a tribute to her exceptional contributions in inspiring this book, in her service on the Committee, and in her dedication to promoting women's human rights globally: see Navi Pillay, 'Foreword' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) v, vi; 'Dedication' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) vii.

<sup>7</sup> Marsha A Freeman, Christine Chinkin and Beate Rudolf, 'Preface' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) ix, ix.

tensions between women's rights and religious rights, and the role of the *Convention* with respect to men.

This review essay provides a critique not only of the *Commentary*, but also of the Committee's interpretation of the *Convention* and, at times, of the *Convention* itself. Further, it offers a foundation for exploring some of the provocative strands that are raised by the *Commentary*, as highlighted above. In the following Parts, this review essay briefly describes the structure and content of the *Commentary*, highlights some of the contested issues the book raises as a catalyst for future development and scholarship, and applauds the *Commentary*'s inspiration of further progress in advancing women's human rights globally.

## II STRUCTURE OF THE *COMMENTARY*

To accomplish the explicit goals of the *Commentary*, the editors have brought together an illustrious team of international women's human rights experts,<sup>8</sup> who systematically examine the *Convention* article by article in separate chapters of the book.<sup>9</sup> The first chapter introduces the historical context and overall structure of the *Convention*. In discussing the interpretation of *CEDAW*, this chapter describes the Committee as the *Convention*'s primary interpretive body, which utilises various mechanisms to interpret the *Convention*, such as general recommendations, concluding observations, individual communications and contributions by non-governmental organisations ('NGOs'), among others. This chapter also addresses substantive and contextual issues regarding the interpretation and application of *Convention* norms, such as *CEDAW*'s status as a human rights instrument, its relationship to other international instruments, non-derogability, customary international law and related issues.

After the introduction, the subsequent chapters analyse the Committee's interpretation of the *Convention* article by article. They begin with a brief discussion of the Preamble, and then launch into chapters on each of the first five articles of *CEDAW*, which set forth the purpose of the *Convention* and states parties' general obligations. Article 1 prohibits any distinction on the basis of sex that impairs women's human rights in the political, economic, social, cultural, civil or any other field. Article 2 ensures that states parties will pursue a policy of eliminating discrimination against women by all appropriate means and without delay, including through law reform. In art 3, states parties agree to take all appropriate measures, including implementing legislation, to ensure the full development and advancement of women, and to guarantee their enjoyment of human rights and fundamental freedoms on a basis of equality with men. Article 4 permits states parties to employ temporary special measures to advance women's equality, and to recognise the special function of maternity. Article 5 requires states parties to eliminate harmful gender stereotypes and promote the sharing of family responsibilities.

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<sup>8</sup> In addition to the editors, the other contributors include Fareda Banda, Ineke Boerefijn, Andrew Byrnes, Janie Chuang, Jane Connors, Rebecca J Cook, Savitri W E Goonesekere, Rikki Holmaat, Susann Kroworsch, Frances Raday, Verónica Undurraga and Sarah Wittkopp.

<sup>9</sup> For a summary of the structure of the *Convention*, see Chinkin and Freeman, above n 5, 8–13.

After setting forth the general obligations and purpose, the next eleven chapters address the provisions in arts 6–16 that delineate specific categories of substantive rights guaranteed by the *Convention*. Article 6 contends with the exploitation of women through prostitution and trafficking. Article 7 guarantees non-discrimination against women within the political and public life of the states parties. Article 8 ensures the opportunity for women to represent their governments at the international level. Article 9 provides for non-discrimination on the basis of nationality for women and their children. Article 10 requires equality in education. Article 11 addresses the right to work, equality in employment conditions and sexual harassment in the workplace. Article 12 concerns health care, including reproductive health services. In art 13, states parties agree to eliminate discrimination in other areas of economic and social life, family benefits, bank loans, mortgages and other forms of financial credit, recreational activities, sports and all aspects of cultural life. Article 14 highlights the special needs of rural women. Article 15 focuses on equality within the legal system. Article 16 deals with equality in marriage and family relations.

Notably, following the chapters addressing the first 16 articles of the *Convention*, the editors of the book include another chapter on the crosscutting issue of violence against women, which is an issue that is not explicitly confronted in the express language of the *Convention* itself. At the time the *Convention* was drafted, violence against women was not being addressed by the international community and therefore was omitted from the *Convention* provisions.<sup>10</sup> As international attention became increasingly focused on this issue, the Committee began to interpret various *Convention* provisions as including violence against women within their parameters.<sup>11</sup> Due to its current prominence as a global epidemic that is now being recognised and confronted worldwide, the editors of the book dedicated an entire chapter to how the Committee now includes violence against women as falling within the scope of the *Convention*.<sup>12</sup>

The subsequent articles of *CEDAW*, as well as the *Optional Protocol*, establish the mechanisms for implementation and interpretation and are addressed in the last group of chapters in the book. Articles 17 through 22 establish the body known as the Committee to monitor the states parties' implementation of the *Convention*. Article 17 provides for the selection of the

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<sup>10</sup> Christine Chinkin, 'Violence against Women' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 443, 444.

<sup>11</sup> *Ibid* 447.

<sup>12</sup> See generally Christine Forster, 'Ending Domestic Violence in Pacific Island Countries: The Critical Role of Law' (2011) 12(2) *Asian-Pacific Law and Policy Journal* 123; Karen Musalo, Elisabeth Pellegrin and S Shawn Roberts, 'Crimes without Punishment: Violence against Women in Guatemala' (2010) 21 *Hastings Women's Law Journal* 161; Kim Thuy Seelinger, 'Violence against Women and HIV Control in Uganda: A Paradox of Protection?' (2010) 33 *Hastings International and Comparative Law Review* 345; Lee Hasselbacher, 'State Obligations regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection' (2010) 8 *Northwestern Journal of International Human Rights* 190.

23 independent experts to serve as the oversight body.<sup>13</sup> Article 18 establishes the reporting mechanism for the states parties to indicate their progress in implementing the *Convention* to the Committee. Article 19 enables the Committee to establish its own rules of procedure. Article 20 limits the number of weeks during which the Committee is permitted to meet annually. Article 21 assigns the Committee's reporting obligations to the UN Economic and Social Council and to the General Assembly. Article 22 specifies the relationship between the Committee and the other specialised agencies of the UN. Articles 23–30 include terms similar to those in other human rights treaties, such as the mechanism for joining the *Convention*; the stipulation that any provision in national or international law that provides greater protection for women's equality will prevail; the position that reservations that are 'incompatible with the object and purpose'<sup>14</sup> of *CEDAW* are impermissible; a mechanism for the resolution of disputes about how states parties interpret or apply the *Convention*; and authentication of *CEDAW* in the six official languages of the UN. The final chapter of the book highlights the *Optional Protocol*, including its background, Preamble and all 21 of its articles.<sup>15</sup> This chapter provides a detailed account of the development and negotiating history of the *Optional Protocol*, as well as the Committee's responses to the various individual complaints that have been brought under this mechanism, along with the one inquiry that the Committee had conducted thus far.

Within each chapter, the authors of the *Commentary* particularly focus on how the Committee has interpreted each article, primarily by examining the Committee's concluding observations on the state party reports through 2010 and also referencing sources such as the Committee's general recommendations

<sup>13</sup> Hanna Beate Schöpp-Schilling was the longest continuously serving member of the Committee, from 1989–2008, as the independent expert elected from Germany: Ineke Boerefijn, 'Article 17' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 475, 483. She held the posts of Committee Rapporteur in 1995 and 1996, Vice-Chairperson in 1999 and 2000, and Chairperson of the open-ended Working Group under the *Optional Protocol* from 2000 onwards: see the resumé of Dr Schöpp-Schilling: *Dr Hanna Beate Schöpp-Schilling (Germany)* (2004) Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/Sch%C3%B6ppSchilling.pdf>>. In 2007, she published a book celebrating the first twenty-five years of the Committee's work: Hanna Beate Schöpp-Schilling and Cees Flinterman, *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (Feminist Press, 2007). According to its introduction:

The original concept of the book included all relevant articles and aspects of the *CEDAW Convention* as well as all facets of work of its Committee. The personal interests of current and former members in certain topics as well as the very nature of each expert's unique perception of the *Convention* and its Committee moved the book slightly off that course.

The *Commentary* has unquestionably helped fulfil that original goal, resulting now in two seminal volumes documenting the phenomenal work of the Committee, which were inspired in large part by Schöpp-Schilling's vision.

<sup>14</sup> An analysis of 'incompatible' is provided in David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 *Vanderbilt Journal of Transnational Law* 565.

<sup>15</sup> For a discussion of individual complaint mechanisms, see generally Alexandra R Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights Treaties' (2012) 22 *Duke Journal of Comparative & International Law* 153.

and case law under the *Optional Protocol*.<sup>16</sup> Each chapter briefly introduces the subject matter pertaining to the pertinent article, and then explores its *travaux préparatoires*, which describe the article's legislative history and how the negotiators developed the language during the drafting process.<sup>17</sup> Each also includes a section analysing various issues of interpretation that have arisen during the Committee's consideration of that article's implementation by states parties.<sup>18</sup>

With the exception of the introduction, *travaux préparatoires* and issues of interpretation, the other sections within each chapter display some degree of variation. Many, though not all, of the chapters contain a section exploring the concept of equality in relation to the particular article, examining themes such as formal equality, substantive equality, transformative equality, direct versus indirect discrimination and intersectional discrimination.<sup>19</sup> In addition, several chapters discuss issues of implementation or other issues of application related to those articles. The obligations of states parties are also addressed in numerous chapters, as well as the evolution of the concept of 'due diligence' within the international human rights framework. Certain chapters include a comparison with corresponding articles or related provisions in other human rights instruments and how those provisions have been interpreted and applied.<sup>20</sup> The subsections addressing reservations are only included for particular articles, since not all of the articles are explicitly reserved, although several are reserved extensively, and a number of general reservations might arguably apply to all of the articles. For example, no state party has entered a reservation to art 6, nor to

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<sup>16</sup> Marsha A Freeman, Christine Chinkin and Beate Rudolf, 'A Note on Citation Formats' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) xxxv; Chinkin and Freeman, above n 5, 2.

<sup>17</sup> This topic is most often in a separate section, although in some instances it is incorporated within the introduction: see, eg, Japanese Association of International Women's Rights, *Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Shogakusya, 1995) ('1995 Commentary'), cited in Chinkin and Freeman, above n 5, 2 n 2: a work with a similar name, the *1995 Commentary* focuses on the *travaux préparatoires*. See also Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 1993), cited in Chinkin and Freeman, above n 5, 2 n 2.

<sup>18</sup> Some of these subsections are titled slightly differently, such as 'The Committee's Interpretation of Article 5' rather than the more typical title of 'Issues of Interpretation'.

<sup>19</sup> See also the discussion of whether 'the same rights' ensures only formal equality or comprehensive equality for women: Beate Rudolf, 'Article 13' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 335, 338.

<sup>20</sup> See, eg, Andrew Byrnes, 'Article 1' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 51; Frances Raday, 'Article 4' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 123; Rikki Holtmaat, 'Article 5' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 141. Some chapters include a full section addressing these issues, whereas others only mention other related human rights instruments in passing (for example, art 11).

art 12.<sup>21</sup> Although the book provides useful information in detailing which articles have and have not been explicitly reserved, it might also have been helpful to provide the reader with greater insights as to whether, and how, general reservations or reservations to specific articles may, arguably, give rise to an implicit reservation to other articles. The book also describes how the Committee has addressed omissions in the *Convention*, such as: its failure to address issues like violence against women (noted above); unplanned and unwanted pregnancy and other reproductive health issues; and the unrecognised value of women's unpaid household and care-giving work.<sup>22</sup>

The *Commentary* represents a magnificent contribution to the scholarship on CEDAW and clearly manifests as a joint effort among many contributors.<sup>23</sup> Although this collaboration undoubtedly strengthened the volume in many ways, it also may have contributed to a certain amount of lack of uniformity between the chapters noted above, as well as repetition of concepts between various chapters. In part, the repetition in the book may be due to the inherent repetitiveness within the language of the *Convention* itself.<sup>24</sup> Though the comprehensiveness of the book and thoroughness of its contributors certainly comprise several of its strengths, these traits also contribute to the duplication of concepts between many of the chapters.<sup>25</sup> The book, therefore, may have benefited from greater harmonisation of the format and analysis amongst the different substantive articles of the *Convention*.<sup>26</sup> If the duplication of discussions of particular concepts had been reduced, the book would have been

<sup>21</sup> See respectively Janie Chuang, 'Article 6' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 169, 172; Rebecca J Cook and Verónica Undurraga, 'Article 12' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 311, 332.

<sup>22</sup> Chinkin and Freeman, above n 5, 18.

<sup>23</sup> The authors came together in person several times during the creation of the *Commentary* to help ensure that the book was harmonised and integrated: *ibid* 2.

<sup>24</sup> For example, '[t]he reiteration, in Article 14, of some of the issues already covered elsewhere in the *Convention*, was seen as important in "stressing the situation of rural women": Fareda Banda, 'Article 14' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 357, 362. See also Christine Chinkin, 'Article 3' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 101, 115; Andrew Byrnes, 'Article 2' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 71, 72.

<sup>25</sup> For instance, repetition is common in discussions about states parties' obligation to respect, protect and fulfil: Chinkin and Freeman, above n 5, 19–20; Chinkin, 'Article 3', above n 24, 115–21. With respect to due diligence, see at 119.

<sup>26</sup> For example, a helpful technique that some authors used was to include the text of the provision being addressed in each subsection, such as in the chapters discussing the Preamble and arts 3 and 11 of CEDAW: see, eg, Frances Raday, 'Article 11' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 279, 285. The headings in the chapter on art 13 also provide useful descriptions: Rudolf, above n 19, 351. Of course, these techniques are more feasible when the article is short. By contrast, some chapters only provide the heading numbers rather than the precise language, such as the chapter discussing art 2, making it a bit more difficult to follow.

shorter and possibly more accessible.<sup>27</sup> That said, the fact that each chapter is relatively self-contained makes the book an incredibly useful resource for readers who want to refer to one chapter without having to read the entire volume to obtain the needed information. For example, a new member of the Committee could simply refer to the chapter addressing the relevant article and find a complete analysis of that article in one package (thus necessitating a bit of repetition).<sup>28</sup> The book will probably most often be used as a reference guide and, therefore, will likely not be consumed cover to cover by most readers, who can use it in a piecemeal fashion and still obtain the full picture of that particular article, since each article is fleshed out as a stand-alone segment. Furthermore, a helpful technique that some authors utilised is to reference the discussion of a concept in other chapters, instead of repeating the discussion.<sup>29</sup> This minimises overlap yet still points the reader to useful information about the concept elsewhere to ensure that the reader will be able to find the information easily.<sup>30</sup>

The outcome of this collaborative endeavour is an exceptional tome that accomplishes three distinct objectives. First, it provides a rich and sophisticated account of the history of the *Convention* and how it has been interpreted and applied, as briefly described above. Secondly, throughout the chapters, the authors skilfully and astutely offer numerous critiques of *CEDAW* and the Committee's interpretation of its provisions, providing insightful suggestions for further development of the *Convention*. Although presumably not the primary aim of the editors, these critiques point to some of the more highly contested issues that the *Convention* has raised and its evolving interpretation. Some of these issues are examined in the next Part of this review in order to help put a spotlight on these hot topics that will continue to confront the Committee. Finally, partly in light of these assessments, the book provides a blueprint and call for further action to advance the status of women globally, as well as a wellspring of inspiration to all who are concerned about women's human rights.

### III CRITIQUES OF *CEDAW*, THE COMMITTEE'S INTERPRETATIONS AND THE *COMMENTARY*

Having briefly described the structure of the *Commentary*, this review essay next follows a number of those provocative strands throughout the book to highlight issues that the Committee will likely need to confront more directly in the future, before concluding with highlights of the book's call to action for further advancements in women's human rights. The *Commentary* touches upon

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<sup>27</sup> Longer volumes are more costly to purchase and ship to remote locations, as well as more intimidating to read and take a greater investment of time to peruse and digest.

<sup>28</sup> See, eg, the discussion of equality in the introduction as well as in art 1: Byrnes, 'Article 1', above n 20, 64–6. See also the assertion in the *Commentary* that *General Recommendation 19* 'refers to a number of rights not specifically mentioned in the *Convention* which may be violated by the subjection of women to violence in the family': Byrnes, 'Article 2', above n 24, 73. See also *General Recommendation No 19: Violence against Women* as contained in *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47<sup>th</sup> sess, Supp No 38, UN Doc A/47/38 (1993) ('*General Recommendation 19*'). See also Byrnes, 'Article 1', above n 20, 68 n 84.

<sup>29</sup> The introduction affirms that cross-referencing was intentionally included by the authors: Chinkin and Freeman, above n 5, 2.

<sup>30</sup> See, eg, the reference to due diligence standards in other chapters: Chuang, above n 21, 184 n 92, 188 n 133.



several polemic issues within *CEDAW* and its interpretation, which have yet to be resolved. This Part draws out these areas of tension in an attempt to help encourage the continuation of a broad, open and respectful exploration of them, with the aim of moving the conversation forward. First, this Part assesses a foundational and cross-cutting issue that affects all others — the methodology by which the Committee interprets the treaty — and suggests ways in which the Committee’s interpretive methodologies could be strengthened. The Part then addresses examples of more specific and contentious issues, which include (but are by no means limited to) the following:

- (i) whether the scope of the treaty includes non-discrimination against women based upon sexual orientation;
- (ii) how the *Convention* resolves tensions between women’s rights that are perceived to conflict with religious and cultural rights; and
- (iii) the role of the *Convention* with respect to men (such as the use of a ‘male yardstick’ to measure gender discrimination and equality, and whether temporary special measures on behalf of men may be needed to eliminate gender discrimination).

These issues are discussed in the Sections that follow, with the initial focus on the Committee’s methodology of interpreting the *Convention*, in keeping with the *Commentary*’s central theme.

#### A *The Committee’s Interpretive Methodology*

In spite of its many strengths, one of the few limitations of the *Commentary* is that it does not seem to place as much emphasis as one might expect on the importance of the methodology by which the Committee has undertaken to interpret the treaty. The *Commentary* makes a good start at describing some of the methodologies that the Committee uses when interpreting the language of the *Convention*. However, it could potentially have gone even further in fleshing out the Committee’s interpretive methodologies in order to assist the reader in understanding the Committee’s reasoning that supports its decisions in interpreting the *Convention*. This Section examines some of the *Convention*’s ambiguities that are highlighted in the *Commentary*; critiques both the Committee’s and the *Commentary*’s methodologies in interpreting such ambiguities in the treaty; and suggests that more explicitness in the future application and analysis of the Committee’s interpretive methodologies may be beneficial.

As is the case when construing and applying any legal document, gaps and ambiguities in *CEDAW*’s language must be analysed and its provisions interpreted to determine the legal scope of the *Convention* and the obligations to which the states parties have committed themselves.<sup>31</sup> Of course, this task is complicated by the fact that the *Convention* exists in six different languages, all of which are official and have the same legal effect. Moreover, considering that

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<sup>31</sup> Chinkin and Freeman, above n 5, 13:

Partly because it is a product of its time, some key terms are not defined and some issues that are critical to women’s full enjoyment of their human rights are not mentioned, or are addressed only in general and indeterminate language.

the *Convention* is a product of compromise among many nations with different cultures, resources, governmental systems and so on, one can expect a significant amount of ambiguity in the language that would have to be drafted vaguely enough to satisfy a wide range of countries. For example, it is noted that certain phrases in the *Convention* are ambiguous enough to allow the states parties some latitude in deciding how to fulfil their obligations, and that the Committee intentionally has not indicated its understanding of those phrases. For instance, the *Commentary* indicates that the term

‘[a]ppropriate measures’ affords States parties flexibility in determining how best to achieve the objectives of the *Convention* within their own particular social, economic, and political contexts, recognizing that this may not always be through legislation. The Committee has not explicitly stated its understanding of ‘appropriate measures’.<sup>32</sup>

The first sentence of this statement assumes that the determination as to what measures are appropriate has been left to the states parties without providing the basis for that assumption. The second sentence may indeed undermine that initial assumption by implying that the Committee may eventually state its understanding of ‘appropriate measures’. If it does so, what impact will this have on the states parties’ authority to interpret and apply this provision? Again, a more in-depth analysis of the treaty language and how to interpret it would be helpful.

By allowing for a margin of appreciation in the states parties’ interpretation of their obligations under the *Convention*, the Committee builds flexibility into the application of *CEDAW*, which provides several benefits. First, more states may be willing to join human rights treaties if they are allowed latitude in applying the *Convention* considering their own circumstances. Secondly, the elasticity of the *Convention* may allow it to evolve over time in a progressive manner, rather than having one set of interpretations become ossified, leaving no room for future evolution. For example, the Committee has adopted the use of general recommendations as an authoritative method of interpreting the *Convention*,<sup>33</sup> and has used general recommendations to add issues it now considers to fall within the scope of the *Convention* that were not originally considered to be part of it.<sup>34</sup>

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<sup>32</sup> Chinkin, ‘Article 3’, above n 24, 107 (citations omitted).

<sup>33</sup> Chinkin and Freeman, above n 5, 20–1.

<sup>34</sup> Chinkin, ‘Article 3’, above n 24, 103, quoting Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [8] (‘*General Recommendation 28*’): the *Convention* ‘anticipates the emergence of new forms of discrimination that had not been identified at the time of its drafting’. See also Chinkin, ‘Violence against Women’, above n 10, 443: ‘There is no provision in either the [Declaration on the Elimination of the Discrimination against Women] or the [Convention] that explicitly addresses violence against women’. See *Declaration on the Elimination of Discrimination against Women*, GA Res 2263 (XXII), UN GAOR, 3<sup>rd</sup> Comm, 22<sup>nd</sup> sess, 1597<sup>th</sup> plen mtg, Agenda Item 53, UN Doc A/RES/2263(XXII) (7 November 1967) (‘*DEDAW*’). See also Chinkin, ‘Violence against Women’, above n 10, 444:

To its credit, the introductory chapter of the *Commentary* includes a section on the Committee as an interpretive body and its use of interpretive processes and mechanisms. However, relatively few pages are devoted to this crucial issue. The discussion mainly focuses on the outcomes of the Committee's interpretation (eg, general recommendations, concluding observations, individual communications and inquiry, suggestions, decisions and statements), rather than on the methodologies that are used to reach those outcomes (eg, an analysis of the text of the *Convention*, the context in which it was drafted, the intention of the drafters, the intention of the states parties, the document's legislative history and so on).<sup>35</sup> This lacuna is surprising, considering that the purpose of the book is to document the work of the Committee in interpreting the *Convention*'s provisions. It seems that one of the primary themes of the *Commentary* might have been an analysis of how the Committee has undertaken its interpretive responsibilities, so the book's lack of focus on this process appears to be a gap in its otherwise impressive coverage.<sup>36</sup>

Of course, another complicating factor is that the Committee itself is not a single, monolithic, uniform entity, but instead is comprised of numerous experts

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By requiring a holistic approach to the different manifestations of violence against women, identifying violence as discrimination against women, and thereby adopting a rights-based approach, *General Recommendation 19* [UN Doc A/47/38], on Violence against Women, 1992 was the instrument that brought violence against women unequivocally into the domain of international human rights law.

See also *General Recommendation 19*, UN Doc A/47/38. See also Chinkin, 'Violence against Women', above n 10, 448: Chinkin states that the *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 3<sup>rd</sup> Comm, 48<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 111, UN Doc A/RES/48/104 (20 December 1993), which the United Nations General Assembly adopted in 1993, indicates that

violence historically as a consequence of patriarchy is a 'manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men ... [and] is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'.

<sup>35</sup> Chinkin and Freeman, above n 5, 13 (citations omitted):

Since the *Convention* does not include provisions on interpretation, it should be interpreted in accordance with the normal rules of public international law as encapsulated in the *Vienna Convention on the Law of Treaties* ... In particular, every Article should be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose', that is, of the *Convention* as a whole. *Travaux préparatoires* are a supplementary means of interpretation which should be consulted only when the above process leads to ambiguity or to a result that is 'manifestly absurd or unreasonable'.

<sup>36</sup> See, eg, Byrnes, 'Article 2', above n 24, 84, citing Committee on the Elimination of Discrimination against Women, *Views: Communication No 18/2008*, 46<sup>th</sup> sess, UN Doc CEDAW/C/46/D/18/2008 (1 September 2010) ('*Vertido v Philippines*'): the Committee has stated that 'while ... the text of the *Convention* does not expressly provide for a right to a remedy, [it] considers that such a right is implied in the *Convention*, in particular, in Article 2(c)'. It could be useful to the reader of the *Commentary* to understand upon which the Committee grounded its reasoning and what interpretive methodologies were used.

with sometimes divergent views as to how to interpret the *Convention*.<sup>37</sup> The *Commentary* also indicates that the Committee has been inconsistent in its interpretation of certain articles, which adds further dimensions to the complexity of this issue.<sup>38</sup>

Granted, at times the *Commentary* does introduce the reader to the Committee's use of different interpretive methodologies (eg, references to interpretation of similar articles in other international human rights instruments, the importance of legislative history and so on) and in certain instances the authors provide helpful explanations supporting the Committee's interpretation. For instance, the *Commentary* notes that art 23 expressly indicates that *CEDAW* should be interpreted in light of other national and international legal frameworks.<sup>39</sup> Similarly, in support of an assertion that the *Convention* covers a broad scope of all economic and social rights, including those in other international human rights treaties and those in national law that go beyond international human rights law, Rudolf indicates that 'the most relevant sources for identifying such rights are the [*International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')] and regional human rights treaties',<sup>40</sup> and helpfully includes a list to illustrate some of those rights. As another example, Raday indicates that 'the distinction between appropriate and all appropriate measures is somewhat semantic and does not derogate from the immediacy and totality of the States parties' obligations under art 11(2)'.<sup>41</sup> Although this assertion contradicts the rule of interpretation that different terms have different meanings, Raday helpfully provides support for this interpretation: 'In contrast with the [*ICESCR*, *CEDAW* does not include a general provision limiting the pace of implementation to the "maximum of a State's available resources"'.<sup>42</sup> Moreover, an argument in favour of a broad reading of the scope of the *Convention* is the language in art 1 that it applies to women's human rights and fundamental freedoms in 'any other field', including rights that are not explicitly mentioned in the *Convention*.<sup>43</sup>

The *Commentary* also touches upon on the legislative history of *CEDAW* and its *Optional Protocol*, although this too could have been fleshed out a bit further with respect to its importance to the Committee's interpretive methodology.<sup>44</sup> As noted above, each chapter of the book explores the *travaux préparatoires* of each

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<sup>37</sup> An example includes the controversial aspects and expanded definition of trafficking. See Chuang, above n 21, 170 (citations omitted):

Not surprisingly, given the deep divides within the international feminist community over prostitution reform, the Committee members themselves have divergent views as to how states parties should address prostitution.

<sup>38</sup> *Ibid* 173; the Committee has been 'inconsistent [in its] interpretations of the scope of Article 6'.

<sup>39</sup> *CEDAW* art 23.

<sup>40</sup> Rudolf, above n 19, 339 (referring to the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976)).

<sup>41</sup> Raday, 'Article 11', above n 26, 307.

<sup>42</sup> *Ibid*.

<sup>43</sup> See generally Byrnes, 'Article 1', above n 20, 62.

<sup>44</sup> Chinkin and Freeman, above n 5, 2 (citations omitted): 'The drafting process for each article is described only briefly, as two commentaries on the *travaux préparatoires* already exist'. See also 1995 *Commentary*, above n 17; Rehof, above n 17.

article, briefly describing its legislative history and how the drafters developed the language during the drafting process. *CEDAW* was largely modelled upon the 1967 *Declaration on the Elimination of Discrimination against Women* ('*DEDAW*'),<sup>45</sup> which was adopted by the UN General Assembly as a precursor to the *Convention*. Therefore, some of the *Convention*'s legislative history involves expanding the more general, aspirational and skeletal language of *DEDAW* into more concrete, detailed and specific language in the *Convention*. However, some of the provisions within *DEDAW* were removed from the final draft of the *Convention*, which may raise questions as to whether those issues were intended by the drafters not to be covered by the *Convention*. For example, in writing art 16 the drafters 'eliminat[ed] the reference to equal inheritance rights that had been included in *DEDAW* Article 6(1)(a)'.<sup>46</sup> Freeman notes that '[t]his issue remains problematic for women in many states parties and is addressed in *General Recommendation 21*',<sup>47</sup> affirming that the Committee interprets this issue to be within the scope of the *Convention*, even though it was expressly omitted.<sup>48</sup> The issues of unwed mothers and children born out of wedlock were also eliminated from the final version of art 16.<sup>49</sup> Unfortunately, the *Commentary* does not explain which countries advocated for removal of these provisions, nor why they did so, which could be useful and relevant information in determining whether those issues do or do not fall within the purview of the *Convention*.

The drafting history can also be important when the Committee or states parties subsequently interpret an article, to help determine what the drafters had intended with respect to language that may be ambiguous. The chapters of the book are useful and informative in this regard when they explain why the countries adopted particular positions on issues that arose during the drafting of the *Convention*. For example, the Chapter addressing art 10 indicates that

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<sup>45</sup> *DEDAW*, UN Doc A/RES/2263(XXII).

<sup>46</sup> Marsha A Freeman, 'Article 16' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 409, 414.

<sup>47</sup> *Ibid.* See Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No 21: Equality in Marriage and Family Relations*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008) 337 ('*General Recommendation 21*').

<sup>48</sup> Freeman, above n 46, 414. Where the *Convention* does not explicitly address a particular issue, the Committee has sometimes interpreted the *Convention* to include the issue implicitly. For example, the Committee 'has consistently expressed concern over discrimination against women with respect to inheritance despite the lack of specific language in the *Convention*': at 435. Might this broadened interpretation deter countries (like the United States) from ratifying *CEDAW* due to concern that its obligations might extend beyond the language in the *Convention*? Would it deter countries from entering into other human rights treaties in the future, because they do not realise the full implication of the compact (that is, how they might be interpreted and expanded in the future)? How could one address such a concern? Again, it would have been helpful to include more analysis of the Committee's interpretive methodologies in the *Commentary*, especially considering that its primary focus is the Committee's interpretation of *CEDAW*. See also Jessica Sanchez, 'Ratifying *CEDAW*: Is the United States Falling behind on Women's Rights?' (2011) 17 *Public Interest Law Reporter* 64.

<sup>49</sup> Freeman, above n 46, 414.

[t]he Swedish view was that the *Convention* should not ‘make a specific link between women and family planning education since this should be seen as a shared responsibility’ and not solely the responsibility of women.<sup>50</sup>

This statement helpfully provides information not only about Sweden’s position during the negotiation — opposing the inclusion of family planning education in the *Convention* — but also the reasons justifying those stances, because Sweden supports family planning education for both women and men.<sup>51</sup> Including the reasoning forecloses the possibility that some might interpret the opposition to the inclusion of family planning education in the *Convention* as signifying an opposition to family planning education in general (which may otherwise be a reasonable assumption). Regrettably, not all of the references to the *travaux préparatoires* provide as much detail, potentially leaving the reader with questions regarding the purpose behind some of the countries’ positions and therefore with questions about the meaning of the final language.<sup>52</sup>

Where the *Convention* is ambiguous, the Committee has sometimes used a context-specific approach to interpretation, rather than attempting to articulate a comprehensive delineation of states’ obligations.<sup>53</sup> The drawback to this approach is that states may not know the parameters of their obligations — what do they have to do in order to comply with a particular article? How do they know whether they are falling short and what they have to do to come into compliance? On the positive side, this methodology allows for a flexible approach to the *Convention*, along with continual interpretation and development of the meaning of those *Convention* provisions.

The absence of explicit interpretive methodologies by the Committee, as set forth in the *Commentary*, may be somewhat problematic. Several times the contributors indicate that a particular phrase in the *Convention* is intended to be read broadly, yet they do not explain why that broad reading should be adopted. For instance, the chapter discussing art 1 asserts that a particular phrase in the treaty,

<sup>50</sup> Fareda Banda, ‘Article 10’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 253, 258–9 (citations omitted).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* 257. Banda also mentions that:

There were some changes to *DEDAW* provisions, notably the deletion, at the suggestion of the United Kingdom (opposed by Indonesia), of the phrase ‘married or unmarried’ in the chapeau to *DEDAW* Article 9.

However, it does not explain why the United Kingdom suggested this change, nor why Indonesia opposed it, nor its significance in altering the meaning and scope of the article (if any). Banda’s chapter also notes that another scholar observed that art 10 ‘was accorded “considerable latitude in its drafting”’: at 257(citations omitted). See also Rehof, above n 17. Again, it would be helpful to the reader to know why this was so and why it mattered. What difference did the wide latitude make in the final version of the article and with what result with respect to the obligations of states parties?

<sup>53</sup> See, eg, Chinkin, ‘Article 3’, above n 24, 115–16:

Nor has the Committee explicitly identified what is required by each of the layers of obligation, or clarified what States parties must do to comply with Article 3. It is, therefore, useful to examine the issues about which members of the Committee have questioned States parties, the steps for which the Committee has commended States, and gaps and omissions in implementation about which it has expressed concern, to determine how they illuminate the normative content of Article 3.

in conjunction with the following ones, is intended to be read broadly to encompass the many ways in which women might be denied equality because of gendered assumptions, practices and social structures.<sup>54</sup>

Moreover, Chinkin indicates that

[t]he phraseology ‘all fields’ is sufficiently indeterminate to provide *Convention* authority for an expansive interpretation that encompasses areas of activity not spelled out in subsequent provisions of the *Convention*. The Committee’s concluding observations to States parties’ reports, general statements, and recommendations suggest that it implicitly endorses this approach.<sup>55</sup>

For the reasons stated above, one might ask whether the Committee would be better off explicitly endorsing this approach and explaining its reasons for doing so.

In other instances, the *Commentary* provides the Committee’s own interpretation of a phrase, fleshing it out in broader language and arguably widening the scope of the states parties’ obligations, without explicating their decision to expand the meaning of the article.<sup>56</sup> In many instances, the text does not explain who originally intended the phrase to be read broadly (eg, the drafters, the states parties, the Committee or some other entity). The text also does not offer support to bolster this assertion (eg, general principles of interpretation of human rights treaties or another rationale). Such information would have been useful in addressing the concerns of any potential opponents of such a broad reading. It may have been helpful had the authors included more

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<sup>54</sup> Byrnes, ‘Article 1’, above n 20, 59.

<sup>55</sup> Chinkin, ‘Article 3’, above n 24, 104.

<sup>56</sup> Banda, ‘Article 10’, above n 50, 260–1 (citations omitted):

‘Same’ here goes beyond a formal understanding of equality ... The same ‘access to studies’ requires States parties to remove discriminatory policies, legal, physical, socio-economic, or cultural barriers that impede women and girls from accessing education.

See also Savitri W E Goonesekere, ‘Article 15’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 387. Goonesekere notes at 392 that the phrase ‘equality before the law’ could be interpreted to have a

narrower meaning of equal access to civil courts and tribunals and non-discriminatory administration of justice. However, the Committee applies this provision to address issues of equal protection of the law as well. Therefore, the right to equality before the law must be interpreted broadly. It encompasses all decision-making bodies, executive or judicial, including civil, criminal, and administrative courts and tribunals. Article 15 also applies to traditional legal systems.

support for some of the assertions made about the proper interpretation of the *Convention*.<sup>57</sup>

By systematically utilising, and explaining their use of, well-grounded methodologies to interpret treaties, interpretive bodies such as the Committee can enhance their credibility by justifying their interpretations in a thoughtful and rational manner. Exhibiting transparency and consistency in their reasoning supporting the interpretation they have chosen to apply could increase the legitimacy of that interpretation, the Committee and the *Convention* itself. In the future, it would be helpful if the Committee and scholarship analysing its interpretation of the *Convention* would focus on the importance of these principles and the benefits of making their interpretive methodologies explicit.

## B Other Controversial Issues Raised in the Commentary

This Section follows a number of the other provocative strands that are woven throughout the *Commentary*, in order to highlight some of the controversial issues that the Committee will likely need to confront more directly in the future. Using the *Commentary* as a springboard, this review essay provides the foundation for a direct critique of CEDAW and the Committee's approach to the *Convention*, through an examination of some examples of these contentious aspects. These include:

- (i) whether the scope of the *Convention* includes non-discrimination against women based upon sexual orientation;
- (ii) how the *Convention* resolves tensions between women's rights that are perceived to conflict with religious and cultural rights; and
- (iii) the role of the *Convention* with respect to men (such as the use of a 'male yardstick' to measure gender discrimination and equality; and whether temporary special measures on behalf of men may be needed to eliminate gender discrimination).

### 1 Non-Discrimination against Women Based upon Sexual Orientation

As the *Commentary* explains, discrimination against women based upon sexual orientation or gender identity is not explicitly addressed in the language of CEDAW.<sup>58</sup> Yet such discrimination is clearly based on a conceptualisation of

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<sup>57</sup> Andrew Byrnes, 'Article 24' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 539, 541: in examining art 24, Byrnes indicates that '[t]he word "necessary" is not limiting but rather underlines the need for States parties to take decisive action, to do everything that is necessary to achieve the full realization of the rights'. Are there Committee statements that support this interpretation, or statements by international human rights scholars? Also, are there any divergent opinions or sources that need to be refuted? As another example, Byrnes critiques one commentator's suggestion 'that the scope of Article 24 is limited to the areas covered in the *Convention's* substantive articles', asserting that 'this seems an unduly narrow interpretation of a provision intended by the drafters to be comprehensive in scope, in a human rights convention which should normally be construed generously': at 542. It would have been helpful to provide citations to sources supporting the statement about the drafters' intentions, as well as supporting the statement that human rights conventions should normally be construed generously (in addition to the phrases from the Preamble to the *Convention*).

<sup>58</sup> Chinkin and Freeman, above n 5, 15–16.



appropriate gender roles for women and men. Further, it is noted by Andrew Byrnes that

[a]nother issue is whether ‘sex’ [in the *Convention*] includes sexual orientation or sexuality, providing for application of the *Convention* to discrimination against women on the grounds of their sexuality, either as a form of sex discrimination or because such discrimination reflects harmful stereotypes about the roles of women and men. The extent to which the *Convention* provides protection to transgendered and intersexual persons, transsexuals is also unclear.<sup>59</sup>

When women do not conform to societally-imposed gender roles — including roles concerning sexuality and gender identity — discrimination against them based upon this non-conformity is intrinsically both gender-based and sex-based discrimination.<sup>60</sup> According to

the basic cognitive structure of the human mind ... it is easiest to learn things when they fit into pairs of concepts that are opposed to each other. A system of fixed gender stereotypes of ‘female’ and ‘male’ characteristics and behavior helps to construct such pairs. This construction of differences between ‘man’ and ‘woman’ is also closely related to sexuality or sexual attractiveness (to the other or to the same sex). Because gender stereotypes play an important role in the construction of identity, of individuals, communities, and States, eradicating or abolishing them would remove the basis of this gender identity, which would most probably lead to uncertainty and anxiety.<sup>61</sup>

This issue goes to the heart of the subordination of people on the basis of sex, in terms of both gender and intimate relationships.<sup>62</sup> The enforcement of conformity to traditional gender roles with respect to intimate relationships and familial relationships epitomises gender-based discrimination.<sup>63</sup> This stance

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<sup>59</sup> Byrnes, ‘Article 1’, above n 20, 60.

<sup>60</sup> Ibid.

<sup>61</sup> Holtmaat, above n 20, 148–9 (citations omitted).

<sup>62</sup> Ibid 149 (citations omitted):

The construction of gender stereotypes and fixed parental gender roles ultimately rests upon the assumption that there are two opposite and mutually exclusive biological sexes. This means that intersexual people by definition do not fit into the picture. Heterosexual sexuality takes a central place in this construction. The most blatant transgression of the patriarchal female gender identity and her fixed gender (motherly) role is the lesbian woman who chooses to renounce a male sexual partner and thereby also rejects the protection of the male head of household and all other forms of male supervision and control of her life. Lesbian women experience severe forms of violence, including (gang) rape in order to ‘cure’ their ‘abnormal’ sexual preference. Through the mechanism of gender stereotyping, discrimination on the ground of sexual orientation and discrimination against transsexual and intersexual people intersects with discrimination on the basis of sex and — from the perspective of Article 5 — should be eliminated and combated by all States parties.

See also Lorenzo Di Silvio, ‘Correcting Corrective Rape: *Carmichele* and Developing South Africa’s Affirmative Obligations to Prevent Violence against Women’ (2011) 99 *Georgetown Law Journal* 1469.

<sup>63</sup> See generally Byrnes, ‘Article 1’, above n 20, 64 (citations omitted):

There is, in principle, no reason why the *Convention* should not be applied to provide protection for women who are discriminated against because of their sexuality where it ‘has been used to subordinate women and reinforce male superiority’, for example, where ‘a lesbian’s right to life is violated when she is subjected to death threats for not conforming to dictated heterosexual norms’.

authorises as legitimate only those relationships that are between men and women and its purpose is to reinforce men's traditional access to women for purposes of both intimate and familial relationships by forbidding anyone who is not a traditional male from entering into these relationships.<sup>64</sup> Forbidding same-sex relationships imposes numerous facets of harm.<sup>65</sup> First, it harms women who do not conform to traditional sexuality and gender identity roles (lesbians, transgender people, intersex people, etc) by inhibiting their relationships and allowing, even encouraging, discriminatory treatment, harassment and violence against them.<sup>66</sup> Secondly, it may also harm women who do conform to traditional sexuality and gender roles, but who do not conform to other manifestations of traditional gender roles, by fostering an overall climate encouraging or mandating adherence to traditional gender roles and stereotypes. Moreover, it arguably contravenes *CEDAW*'s protection of the family, since many families in today's world include same-sex couples, many of whom are in long-term, committed relationships, and many of whom are raising children together.<sup>67</sup>

Periodically, the Committee has expressed concern about discrimination based upon sexual orientation and gender identity and indicated its support for policies undertaken by states parties to eliminate such discrimination.<sup>68</sup> However, the Committee has yet to take a clear, explicit and consistent stance opposing discrimination against and favouring equality for women based on sexual orientation or gender identity.<sup>69</sup> It has also not taken a clear position that

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<sup>64</sup> Ibid.

<sup>65</sup> See, eg, Mindy Jane Roseman and Alice M Miller, 'Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law' (2011) 34 *Harvard Journal of Law & Gender* 314; Timothy Garvey, 'God v Gays? The Rights of Sexual Minorities in International Law as Seen through the Doomed Existence of the *Brazilian Resolution*' (2010) 38 *Denver Journal of International Law and Policy* 659.

<sup>66</sup> See Byrnes, 'Article 1', above n 20, 64.

<sup>67</sup> Ibid (citations omitted):

*General Recommendation 21* [UN Doc HRI/GEN/1/Rev.9 (Vol.II)] underlines women's autonomy in relation to marriage and family matters and recognizes the existence of 'various forms of family', though it is not clear how far this would extend with respect to treatment of same-sex couples.

<sup>68</sup> Chinkin and Freeman, above n 5, 16 (citations omitted):

The Committee's approach to the specific issues of discrimination faced by lesbian women has a long evolution. Between 1994 and 2001, it referred to sexual orientation in several concluding observations but then stopped doing so ... The Committee has again begun to express its concern about discrimination and harassment of women because of their sexual orientation or gender identity. *General Recommendation 28* [UN Doc CEDAW/C/GC/28] paragraph 31 affirms that lesbian women are particularly vulnerable to discrimination, although it does not explicitly refer to bisexual, transgender, and intersexual persons.

'The Committee ... has expressed concern about discrimination against women based on their sexuality or gender identity': Byrnes, 'Article 1', above n 20, 60. 'It has referred with approval to legislation which prohibits discrimination on the ground of sexual orientation and has noted with concern the criminalization of same-sex relationships': at 64 (citations omitted).

<sup>69</sup> Byrnes, 'Article 1', above n 20, 64: 'The Committee has been cautious in its approach to issues relating to discrimination against women on the ground of their sexuality'. 'The Committee has been cautious in addressing the issue of sexuality': at 60. See also Chinkin and Freeman, above n 5, 16.

the term ‘family’ includes same-sex couples and their children.<sup>70</sup> Freeman notes that

[t]he Committee has not addressed same-sex marriage or other relationships with a view to defining them, but it has recognized the reality of same-sex relationships and indicated that States parties must provide for equality between the parties.<sup>71</sup>

Perhaps the Committee should consider adopting a general recommendation focusing on discrimination against women based on sexual orientation and gender identity in the future. It seems that discrimination against women ‘in any field’ ought to apply to their choice of life partner as well, and that they should not be forced by traditional gender roles into having a male partner.<sup>72</sup>

## 2 *Tensions between Women’s Rights and Religious Rights*

The *Commentary* highlights the fact that the Committee has had to navigate significant tensions between women’s rights and religious rights with respect to the interpretation and application of the *Convention*.<sup>73</sup> Some states parties and religious organisations contend that where such tensions exist, religious rights

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<sup>70</sup> See generally Rudolf, above n 19, 350 (citations omitted): ‘The CEDAW Committee has not defined the term “family”. Like the [*International Covenant on Civil and Political Rights*], it considers that, in view of the different concepts worldwide, there is no standard definition’.

<sup>71</sup> Freeman, above n 46, 416 (citations omitted).

<sup>72</sup> See *CEDAW* art 16 (which addresses the right to form a family and the right to choose one’s spouse).

<sup>73</sup> Chinkin and Freeman, above n 5, 30:

The *Convention* does not subscribe to any particular theory of law or politics but builds on the overlapping consensus of different moral, cultural, and legal approaches. However, its commitment to women’s equality and empowerment are at odds with the beliefs associated with certain religious communities and cultural traditions.

See, eg, Alison Stuart, ‘Freedom of Religion and Gender Equality: Inclusive or Exclusive?’ (2010) 10 *Human Rights Law Review* 429; Rebecca J Cook, ‘Modern Day Inquisitions’ (2011) 65 *University of Miami Law Review* 767. As noted in the previous quote, a closely related issue to the tension between women’s rights and religious rights is that of the tension between women’s rights and cultural rights. Due to space limitations, this review essay focuses on the tensions with religious rights, but the cultural tensions provide fertile ground for further exploration as well: see, eg, Banda, ‘Article 14’, above n 24, 373 (citations omitted):

While it is important to recognize cultural and other differences between groups, the preservation of cultural norms cannot be invoked to justify discrimination against women. Approving of a State party’s recognition of cultural differences, the Committee cautioned,

while the recognition of community justice by the State party might make it easier for indigenous and rural people to have access to justice, it might operate to perpetuate stereotypes and prejudices that discriminate against women and violate the human rights enshrined in the *Convention*.

See also the discussion on cultural rights: Rudolf, above n 19, 337, 344; Katie L Zaunbrecher, ‘When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations’ (2011) 33 *Houston Journal of International Law* 679.

should supersede the rights of women.<sup>74</sup> Furthermore, some states parties delegate certain legal functions to religious entities, allowing discriminatory religious tenets to supersede women's rights in those instances.<sup>75</sup> Chinkin and Rudolf note that

[m]any States parties, although not allowing sex discrimination in their own laws and policies, officially recognise the validity of customary or religious laws in the constitution and/or state (federal) laws, even when such laws are contrary to the principle of sex equality. This issue touches upon the general question of how far a state party can justify violations of human rights on its territory on the basis of legally guaranteed autonomy of certain cultural or religious groups (often ethnic and religious minorities). On the basis of Articles 5 and/or 2(f), the Committee rejects direct discrimination against women that flows from the official recognition of religious or customary laws. The Committee makes the same point as to reservations on the ground of respect for religious or customary law.<sup>76</sup>

The Holy See has promoted the adoption of the concept of complementarity as opposed to equality with respect to women and men.<sup>77</sup> Numerous states parties have submitted reservations, declarations and understandings to various articles of the *Convention* citing conflicts between those provisions of the *Convention* with religious beliefs and practices.<sup>78</sup> Examples of contexts where these tensions arise include nationality;<sup>79</sup> segregation of women and men in the workplace;<sup>80</sup> prohibitions on women serving in certain public roles such as judges on religious courts;<sup>81</sup> parental roles and inequality within the family;<sup>82</sup> 'religious dress';<sup>83</sup>

<sup>74</sup> See Sarah Wittkopp, 'Article 7' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 197, 209 (citations omitted): 'some states parties reserve certain areas of public service for men, such as ... religious positions'.

<sup>75</sup> Freeman, above n 46, 420 (citations omitted): 'Many states parties relegate family law issues, referred to as personal status law, to the law or custom of ethnic and religious communities'.

<sup>76</sup> Holtmaat, above n 20, 154–5 (citations omitted).

<sup>77</sup> Christine Chinkin and Beate Rudolf, 'Preamble' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 35, 41. The Holy See has a special status within the UN and can join international treaties, although it has refused to join *CEDAW* due to its opposition to the family planning provisions: Susann Kroworsch, 'Article 25' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 547, 551.

<sup>78</sup> Byrnes, 'Article 1', above n 20, 70 (citations omitted): the United Kingdom stated that its ratification 'is subject to the understanding that none of its obligations under the *Convention* shall be treated ... as extending to the affairs of religious denominations or orders'. Israel had entered a reservation 'concerning the appointment of women to serve as judges in religious courts where it is prohibited by the laws of any of the religious communities': Wittkopp, above n 74, 219 n 184.

<sup>79</sup> Savitri W E Goonesekere, 'Article 9' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 233, 246–8, 250.

<sup>80</sup> Raday, 'Article 11', above n 26, 289.

<sup>81</sup> Wittkopp, above n 74, 212, 219; Freeman, above n 46, 426. See generally Carolyn A Dubay, 'Beyond Critical Mass: A Comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan' (2012) 24 *Florida Journal of International Law* 163; Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' (2012) 12 *Chicago Journal of International Law* 647.

'legal capacity';<sup>84</sup> 'domicile';<sup>85</sup> and family planning and sex education programs, including HIV/AIDS and teenage pregnancy prevention programs.<sup>86</sup>

The Committee has generally indicated that when conflicts exist between women's human rights and religious rights, women's rights must prevail.<sup>87</sup> Rikki Holtmaat notes that

[a]ccording to the Committee, the principles of equality and non-discrimination and respect for women's dignity clearly prevail over claims about the values of religion, culture, or tradition and the wish of States parties to preserve these values. This issue touches on the debate about the concept of the universality of human rights in the light of claims made by some cultures or religions that their (internal) norms should be respected, protected, and sustained, even when they contravene women's human rights ... The Committee's position conforms to many other international legal instruments, which acknowledge the right of all human beings to live according to cultural traditions and a right to practice one's beliefs. These rights exist under the condition that the human rights of others, including women, are not in any way restricted or violated.<sup>88</sup>

States have an obligation not only to refrain from discriminating against women on the basis of religion, but also to ensure that religious entities within their borders do not discriminate against women.<sup>89</sup> The Committee recognises that religions are not static, but instead that they, including their tenets and beliefs,

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<sup>82</sup> Freeman, above n 46, 411.

<sup>83</sup> Banda, 'Article 10', above n 50, 273. See generally Theresa Perkins, 'Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo' (2012) 30 *Boston University International Law Journal* 529; Bridgette Dunlap, 'Protecting the Space to be Unveiled: Why France's Full Veil Ban Does Not Violate the *European Convention on Human Rights*' (2012) 35 *Fordham International Law Journal* 968; Hera Hashmi, 'Too Much to Bare: A Comparative Analysis of the Headscarf in France, Turkey, and the United States' (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class* 409.

<sup>84</sup> Goonesekere, 'Article 15', above n 56, 402.

<sup>85</sup> Ibid.

<sup>86</sup> Banda, 'Article 10', above n 50, 270.

<sup>87</sup> Chinkin and Freeman, above n 5, 33: 'culture, tradition, religion, and community identity are no excuse for failure to address discrimination'. The Committee generally takes the same approach with respect to culture as it does with respect to religion, in that women's rights must prevail. See, eg, Rudolf, above n 19, 352-3: 'The processes of developing and defining cultural norms must engage women on an equal basis with men'. See also Holtmaat, above n 20, 150:

Article 5 addresses culture in terms of 'patterns of conduct' and 'customary practices', but it does not mention the words tradition or religion. In practice, the Committee uses the terms religion, culture, tradition, and customs in the context of Article 5. Religious beliefs and practices are seen as a specimen of social, cultural, or traditional practices and customs that (when damaging for women's rights) must all be modified.

See generally at 167.

<sup>88</sup> Holtmaat, above n 20, 160 (citations omitted).

<sup>89</sup> States undertake 'an obligation to intervene positively in the activities and practices of religious, cultural, or ethnic groups that either directly or indirectly discriminate against women': Byrnes, 'Article 2', above n 24, 91. States parties must 'introduce measures directed at encouraging full compliance with the principles of the *Convention*, particularly where religious or private law or custom conflict with those principles': Chinkin, 'Article 3', above n 24, 116, citing *General Recommendation 21*, UN Doc HRI/GEN/1/Rev.9 (Vol. II), [50].

constantly evolve and change over time.<sup>90</sup> The Committee has highlighted religious discrimination against women, and has recommended proactive strategies that states parties could utilise to encourage religious entities to end discrimination against women by changing their tenets and practices.<sup>91</sup> For example, states parties could withhold financial support (such as grants or tax exemptions) from religious associations that discriminate against women.<sup>92</sup> The Committee has also encouraged states parties with official state religions, such as some Islamic countries, to adopt more progressive interpretations of Islam advancing women's equality that have been embraced by other Islamic states.<sup>93</sup> It has

refused to accept assertions that Sharia law is not subject to interpretation that can harmonize religious law and the *Convention* ... The Committee ... frequently offers a general statement on harmonizing Islamic law and the *Convention*, which is ... supported by developments in Muslim States that have eliminated discriminatory nationality laws.<sup>94</sup>

Additionally, it has encouraged states parties to withdraw reservations that permit discrimination against women on the grounds of religion.<sup>95</sup>

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<sup>90</sup> See Chinkin and Freeman, above n 5, 31 (discussing the 'evolving interpretations of religious law seen in some of the Islamic States parties'). See also Freeman, above n 46, 421 (citations omitted):

The Committee has frequently observed that 'culture is dynamic and subject to change' and that culture and religion, frequently cited as the basis for discriminatory family law, are not static and are subject to evolution and interpretation.

Again, with respect to culture, the Committee recognises that it, too, is dynamic and constantly evolving. See, eg, Rudolf, above n 19, 353: 'Article 13 emphasizes the dimension of "cultural rights" as individual rights, including the right to determine whether to participate in a particular culture, and of "culture" as a dynamic concept, not a fixed state'. See also Chinkin and Freeman, above n 5, 31: 'In more recent years it has encouraged States parties to address cultural issues by viewing culture as dynamic rather than as monolithic or immutable'.

<sup>91</sup> Holtmaat, above n 20, 159: 'With respect to religion, it has noticed that States parties do not make sufficient effort to counteract the damaging effects of some (fundamentalist) religious beliefs or practices'.

<sup>92</sup> Wittkopp, above n 74, 217 (citations omitted):

States parties must enact legislation prohibiting [non-governmental organisations] and associations from discriminating against women and excluding them from membership. One mechanism is to make the granting of financial support to NGOs conditional upon their adoption of a gender quality perspective.

<sup>93</sup> Goonesekere, 'Article 9', above n 79, 250. See also Goonesekere, 'Article 15', above n 56, 406: 'The Committee has encouraged States parties with domestic laws based on Sharia to use comparative jurisprudence in harmonizing domestic law with the *Convention* norms. Progress has been slow'. For discussions of women's rights and Islam, see, eg, Asifa Quraishi, 'What if Sharia Weren't the Enemy? Rethinking International Women's Rights Advocacy on Islamic Law' (2011) 22 *Columbia Journal of Gender and Law* 173; Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 2009).

<sup>94</sup> Goonesekere, 'Article 9', above n 79, 250 (citations omitted).

<sup>95</sup> Holtmaat, above n 20, 167, quoting *Statements on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, UN GAOR, 53<sup>rd</sup> sess, Supp No 38, UN Doc A/53/38/Rev.1 (14 May 1998) pt II para 17: 'Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the *Convention*'.

However, according to the *Commentary*, the Committee has sometimes exhibited equivocation on this issue and has not always been as decisive as it could be in support of women's rights in the face of religious opposition. In its early days, the Committee

went rather far in suggesting that a culture or religion could or should be changed or even abolished. It now phrases these concerns more cautiously, but it is still quite firm about the necessity of intervention by the State party when women's rights are violated based on culture, including religious practices or beliefs.<sup>96</sup>

In part, this hesitance to take a stronger stance may be due to a fear of an anti-women's rights backlash by religious entities and states that are strongly influenced by religion.<sup>97</sup> The Committee has also, at times, indicated that other rights may inhibit a state's ability directly to ensure women's human rights, which seems to contravene its stance in other instances that under such circumstances women's rights must prevail.<sup>98</sup>

In order to address this issue, perhaps the Committee could employ provisions of the *Convention* that have not as often been discussed in the context of the tension between women's rights and religious rights, such as art 7, which guarantees non-discrimination against women within the political and public life of the states parties.<sup>99</sup> I would suggest that religious organisations should be a prominent addition to this list. The author notes that art 7 does not 'interfere with freedom of association of private single-sex social clubs' but does address NGOs that affect 'the public and political life of the country'.<sup>100</sup> Therefore, if a religious entity decides to intervene in the public and political life of a country, it is arguably opening itself up to regulation by the state with respect to discriminatory practices against women in which it might engage. In one encouraging example, Sarah Wittkopp notes that

[i]n its reviews of States parties' reports, the Committee has broadly interpreted the notion of 'associations' to cover all associations that are private in nature, but

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<sup>96</sup> Holtmaat, above n 20, 156.

<sup>97</sup> 'Gradual implementation of Article 5 and support from the population may be required to avoid a backlash': Frances Raday, 'Traditionalist Religious and Cultural Challenges: International and Constitutional Human Rights Responses' (2008) 41 *Israel Law Review* 596, cited in Holtmaat, above n 20, 165. Holtmaat mentions 'a backlash caused by some judgments of constitutional courts condemning traditional or religious practices as violations of women's human rights': at 165 n 210.

<sup>98</sup> Holtmaat, above n 20, 162: The Committee has recognised that a government may 'not have the authority to intervene directly because it would risk violating freedom of expression, the freedom of religion, and/or the freedom of education'.

<sup>99</sup> See Wittkopp, above n 74, 201:

The 'political and public life of the country' ... extends to civil society, as specified in Article 7(c), and includes

public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations or other organizations concerned with public and political life.

See also Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No 23: Political and Public Life*, as contained in *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 16<sup>th</sup> sess, UN Doc A/52/38 (1997) [5].

<sup>100</sup> Wittkopp, above n 74, 201.

operate in public and political life. It applies, therefore, to ... religious organizations.<sup>101</sup>

The Committee could also consider a general recommendation advising states about how to resolve tensions between women's rights and religious rights and discrimination against women by religious entities. Another proposal might be to recommend restitution and compensation for women who have suffered from discrimination by religious entities. Furthermore, the UN might consider adopting a declaration and subsequently a convention on the religious rights of women (similar to the *Convention on the Political Rights of Women*).<sup>102</sup>

### 3 *Abandoning the Traditional Male Yardstick and Adopting Temporary Special Measures for Non-Traditional Men*

In various places throughout the volume, the authors of the *Commentary* touch upon the issues that raise questions as to whether a male yardstick is an appropriate measure for determining gender equality and how the Committee should deal with perceived social norms and exceptions to those norms.<sup>103</sup> Readers of the *Commentary* might ponder whether the use of such a male yardstick may normalise traditional men's life experiences as the standard and marginalise women's and non-traditional men's life experiences as the exception.<sup>104</sup> For example, with respect to employees and employment policies, a non-child-bearing and non-child-rearing worker may be viewed as the norm.<sup>105</sup>

<sup>101</sup> Ibid 207 (citations omitted).

<sup>102</sup> *Convention on the Political Rights of Women*, opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954).

<sup>103</sup> See generally below n 105.

<sup>104</sup> Raday, 'Article 4', above n 20, 137:

Identification of maternity needs as being an exception rather than the norm has been challenged by some feminist writers, who regard it as creating a 'difference dilemma' which leads to marginalization of the needs of those who are labelled different.

By contrast, if the norm were to require individualised attention for all people at their current stage in life, then the norm would include such measures as parental leave (these measures would not be deemed exceptional).

<sup>105</sup> See *ibid* 125: 'Maternity, insofar as it concerns the childbearing functions of pregnancy, childbirth, and breast-feeding, represents a biological difference, which requires permanent special measures for women'. The fact that these conditions are considered to be 'special' seems to reconfirm men, or non-pregnant persons, as the yardstick that defines the norm. If maternity were redefined as a normal condition around which society (the workplace, and so forth) must be constructed, then the measures to accommodate pregnancy, childbirth and breast-feeding would not be considered 'special' but would be considered routine or normal. Raday addresses this term at 127 (citations omitted), indicating that 'special' might also imply that 'women ... [are] weak, vulnerable and in need of "special" measures in order to participate or compete in society', quoting Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)* as contained in *Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies*, UN ESCOR, 30<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (2004) 286 [21] ('*General Recommendation 25*'). At 127, Raday argues that:

The use of special measures does not suggest charity but rather entitlement ... Special measures are essential to secure equal opportunity in participation and competition in various fields of social life, where social, health, and economic burdens may be placed on women as a result of gender stereotypes or of their role in maternity.

Yet the fact that some people attribute a negative connotation to the term 'special' remains problematic.



By this standard, anyone who takes time off work for childbirth or parental leave would be considered the exception, for which 'special' accommodations must be made.<sup>106</sup> This perception may lead to resentments against people who receive such 'special' accommodations, may encourage employers to refrain from hiring people who may need such 'special' accommodations (particularly women of child-bearing age) and may discourage people from utilising those accommodations so they are not marginalised (eg, men who feel social pressure not to take parental leave to care for their children).<sup>107</sup>

By contrast, if child-bearing and parenting workers are considered to be the standard, then employers' policies and governmental policies related to workers would likely automatically provide accommodations for workers with such responsibilities, such as more family friendly policies like paid parental and family leave of sufficient length, flexible schedules, telecommuting policies, support for child care and so on.<sup>108</sup> Furthermore, if a traditional male yardstick is focused primarily on gaining higher income levels along with longer working hours and higher-stress positions, perhaps a more neutral standard of measuring ideal employment conditions would focus on more of a balance that would result in more reasonable hours, less demanding workloads and greater benefits (such as family leave, flexitime, child care support, etc) in exchange for lower expectations regarding income levels.<sup>109</sup>

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<sup>106</sup> See, eg, Raday, 'Article 4', above n 20, 125–6, concluding that '[i]n the interim, in traditionalist family contexts, special protective measures for mothers regarding not only childbearing but also childrearing may be necessary': at 126.

<sup>107</sup> For example, Raday discusses 'the right to maternity leave with pay': Raday, 'Article 11', above n 26, 298. This raises a concern that the right to maternity leave with pay, without the right to paternity leave with pay, may perpetuate discrimination and stereotypes. See also Raday, 'Article 4', above n 20, 138:

There is a danger that special protective measures for women in childrearing will perpetuate disadvantageous stereotypes regarding women's ability to participate in the marketplace and in public life.

<sup>108</sup> See, eg, Rangita de Silva de Alwis, 'Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation' (2011) 18 *Duke Journal of Gender Law & Policy* 305; Darren Rosenblum, 'Unsex Mothering: Toward a New Culture of Parenting' (2012) 58 *Harvard Journal of Law & Gender* 57.

<sup>109</sup> Raday, 'Article 4', above n 20, 133–4 (citations omitted), quoting *General Recommendation* 25, UN Doc HRI/GEN/1/Rev.9 (Vol. II), [9]:

There are two contesting visions of the aims of [temporary special measures]: equality of opportunity and equality of results. Equality of opportunity as a goal rests on the view that the role of anti-discrimination law is to eliminate discrimination in access to opportunity and choices, and that equality cannot be achieved if individuals begin the race from different starting points; it reflects a vision of society that is based on respect for efficiency and individual merit and achievement. Equality of results as a goal rests on the view that skills and talents are distributed uniformly and that the test of whether opportunity is equal in every sense is whether the outcomes are equal ... The Committee takes the view that:

Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature, that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

Moreover, perhaps the Committee should consider the use of temporary special measures for non-traditional men who do not conform to persistent gender stereotypes.<sup>110</sup> The *Convention* indicates that both men and women have equal responsibilities for parenting and raising children, though significant disparities remain in this regard.<sup>111</sup> To encourage fulfilment of this ideal, training programs for employees whose careers have been interrupted due to childcare responsibilities should be available on an equal basis for both women and men. However, the *Commentary*'s focus with respect to such training remains on the needs of women. For example, Raday states that

[t]he emphasis on vocational training, retraining, and recurrent training is especially significant in view of the interrupted career or labour market participation pattern of women's work.<sup>112</sup>

Interruptions for child rearing purposes should be the normal career pattern for both male and female parents. It would then be seen as the norm, not the (female) exception to the (male) standard. The same should be true with part-time employment, to help ensure that men have those same choices and are encouraged to be responsible for their children). Nonetheless, parental leave for child rearing should be made available to both men and women on an equal basis.<sup>113</sup> In order to create transformative equality, we also need special

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I would like to have seen the *Commentary* more squarely address the claims that women and non-traditional men may as a group make different choices than traditional men based on different values systems: eg, women and non-traditional men value more time with their families rather than having as high of an income. Perhaps the concept that men value high incomes and demanding jobs in preference to family time is a social construct that negatively constrains men to think they must value material wealth and prestige over time with their families, and this is harmful to men and families (and, therefore, should not be the appropriate yardstick by which everyone should be measured).

<sup>110</sup> Wittkopp, above n 74, 211 n 115, citing CEDAW Committee, *Concluding Comments on the Committee of the Elimination of Discrimination against Women: Cape Verde*, 36<sup>th</sup> sess, UN Doc CEDAW/C/CPV/CO/6 (25 August 2006) [24]; in Wittkopp's words, the Committee asked 'the State to encourage men to undertake their fair share of domestic responsibilities so that women can devote time to public and political life'.

<sup>111</sup> Holtmaat, above n 20, 142 n 2, quoting Frances Raday, 'Culture, Religion, and CEDAW's Article 5(a)' in Hanna-Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (Feminist Press, 2007) 74: 'the most universal traditionalist cultural norm that disadvantages women ... is the stereotypical assignment of sole or major responsibility for childcare to women'. See also Holtmaat, above n 20, 164 (citations omitted):

The Committee ... repeatedly insists that concrete measures are needed to promote the role of men in unpaid care activities. The enactment of ... parental leave is not deemed sufficient for that purpose, as it cannot be guaranteed that [it] will lead to a substantial change in (fixed) gender roles.

See also Freeman, above n 46, 427.

<sup>112</sup> Raday, 'Article 11', above n 26, 291.

<sup>113</sup> See *ibid* 300 (citations omitted):

The need underlying the requirement of mandatory leave for the mother in childbearing is physiological and is, hence, a maternal rather than a parental right. The Committee should consider whether, under art 11(2)(b), a distinction can be made between mandatory and optional leave periods which would make it possible for women to opt out of the non-mandatory period of maternity leave. It follows that the optional part of the maternity leave should be parental leave, transferable to the father.

See also Raday, 'Article 4', above n 20, 138:

temporary measures to enable men to take part fully in child rearing, such as special incentives for companies to encourage men as well as women to take parental leave and other measures to encourage fathers to take a greater role in parenting, such as through Father's Day celebrations and Fathers' Awards, much as states have recognised Mother's Day and Mothers' Awards.<sup>114</sup> The lack of a focus on the harms of gender-based discrimination against men may be an unfortunate drawback resulting from the otherwise beneficial 'innovative nature of the *Convention* as an asymmetrical *Convention* targeted not at prohibition of sex-based discrimination but at discrimination against women'.<sup>115</sup>

Yet discrimination against men through barriers from taking parental leave also discriminates against women. It continues to force women and men into stereotypical gender roles, thus reinforcing those roles.<sup>116</sup> Such special measures favouring women's maternity leave but ignoring men's paternity leave should not be permitted under the *Convention*, because such measures reinforce traditional gender roles. Gender-specific maternity leave policies will allow continued discrimination against men in the workplace who want to take parental or family (care-giving) leave, but who face legal or social pressures against doing so.<sup>117</sup> This not only discriminates against men (at least where women have won those rights and the presumption that it is permissible for women to exercise them), but also against women, who are still presumed to be (and so de facto must continue to be) the primary caregivers.

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Special measures to protect childrearing functions should be available to both parents, on a gender-neutral basis. The gender-neutral designation of the parental services contributes to the transformative equality required by art 5(b) and to recognition of the common responsibility of men and women in the upbringing and development of their children. The CEDAW Committee and the [Committee on Economic, Social and Cultural Rights] have encouraged the introduction of parental leave, have called for incentives for men to take up parental leave, and have commended a number of countries for their successful introduction of parental leave.

<sup>114</sup> Raday, 'Article 4', above n 20, 138. See also Raday, 'Article 11', above n 26, 301:

The Committee has encouraged the introduction of parental leave and has called for incentives for men to take up parental leave. The Committee has applauded States parties which have encouraged male employees to use their right to paternity leave and to increase their involvement as caretakers.

<sup>115</sup> Chinkin and Rudolf, above n 77, 39. See also Holtmaat, above n 20, 148: 'Gender stereotypes and fixed parental gender roles are also oppressive for men; those who do not live up to them bring shame upon the family and may be punished socially and/or legally'. See also Byrnes, 'Article 1', above n 20. Byrnes notes at 52 (citations omitted):

A number of states would have preferred that the *Convention* address discrimination on the ground of sex generally, thereby also covering discrimination against men on the basis of sex, rather than focusing solely on discrimination against women. However, the overwhelming view was that such a symmetrical approach would fail to recognize the pervasive discrimination against women on the basis of their sex, and that an asymmetric guarantee was needed in the form of a sex-specific instrument.

<sup>116</sup> See generally Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).

<sup>117</sup> See generally Raday, 'Article 11', above n 26, 299–302.

## IV CONCLUSION: A CALL TO ACTION

The *Commentary* is a monumental achievement that will undoubtedly prove to be a widely-utilised resource for the continuing international women's human rights movement. It is a model of meticulous research, thoughtful critique and unwavering commitment to social justice. The book makes a notable addition to existing scholarship by offering a comprehensive exploration of the treatment of each article in the *Convention* by the Committee.<sup>118</sup> The *Commentary* should be added to the reading list of human rights lawyers, NGOs and other women's human rights advocates, especially those seeking to provide input to the Committee.<sup>119</sup> Others who will find it helpful include current and future members of the Committee, government officials of states party to the *Convention* (particularly those in ministries or agencies who develop their country's reports and who are charged with enforcing the *Convention* within each country), judges and lawyers seeking to operationalise the *Convention* within their own countries and scholars or other individuals interested in learning more about international protection of women's human rights.<sup>120</sup>

The *Commentary* sounds a call to action for various stakeholders to continue enhancing the *Convention's* effectiveness in advancing women's human rights. The authors provide numerous suggestions as to where the Committee could take additional actions to help advance progress on women's human rights, and do not hesitate to indicate where the Committee could place more emphasis in implementing the *Convention*.<sup>121</sup> For example, it provides several suggestions

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<sup>118</sup> Chinkin and Freeman, above n 5, 2: 'This volume is the first comprehensive commentary on the *Convention* and its *Optional Protocol* ... as interpreted through the work of its monitoring body, the [Committee]'.

<sup>119</sup> Ineke Boerefijn, 'Article 18' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 489, 506–7: for NGOs and others who would like to influence the Committee's process, the *Commentary* provides guidance to NGOs regarding the timing for submission of written and oral contributions as well as their format. It is also a spectacular resource for lawyers who want to use *CEDAW* to challenge laws that discriminate against women in their national courts — both for ideas and for persuasive cases from other countries: see, eg, Banda, 'Article 14', above n 24, 376 (describing *Ephraim v Pastory* [2001] African Human Rights Law Reports 236 (Tanzanian High Court)); Chinkin, 'Violence against Women', above n 10, 459–60 (describing a case addressing workplace violence in India). See also the list of cases from countries around the world that address discrimination against women with respect to nationality laws: Goonesekere, 'Article 9', above n 79, 240.

<sup>120</sup> For example, the chapter on art 6 provides an excellent summary of the issue and survey of how the Committee has dealt with trafficking and prostitution through its concluding observations. This chapter is very useful in providing specific examples of measures that the Committee has recommended states parties should take to comply with art 6: Chuang, above n 21, 186–96.

<sup>121</sup> Rudolf, above n 19, 336:

The potential of Article 13 is underdeveloped in the work of the Committee. The practice of other human rights bodies, in particular the [Committee on Economic, Social and Cultural Rights], and of the special procedures of the Human Rights Council, could be used as inspiration for understanding and applying the article.

See also Chuang, above n 21, 186–96: Chuang's chapter addressing art 6 provides specific notations as to where the Committee has not taken a stand on particular issues, indicating areas for strengthening its future work. As one example, at 188–9 Chuang comments that

for the development of additional general recommendations.<sup>122</sup> It points out areas where the Committee should take a more conscientious gender perspective.<sup>123</sup> The authors highlight problems that the *Convention* does not adequately address, such as transnational corporations, notes the Committee's actions on these issues and encourages the Committee to take further steps to

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[i]n some instances, the Committee has refrained from addressing in detail issues that have been dealt with elsewhere under international law, or to which the Committee has previously alluded ... The open-ended language of Article 6 would provide the Committee the scope to address these issues in greater detail, especially when read with other provisions of the *Convention*.

Chuang also notes that '[a]lthough the Committee has yet to address this issue, relevant international norms establish that the best interests of the child are to be paramount at all times' when dealing with child victims of trafficking: at 192 (citations omitted). See also Boerefijn, 'Article 17', above n 13, 473: 'The Committee has not always gone as far as some of the reports of the [Special Rapporteurs on Violence against Women] and academics have sought'.

<sup>122</sup> See, eg, Banda, 'Article 14', above n 24, 378 (citations omitted):

The Special Rapporteur on the Right to Adequate Housing has consulted the Committee in his work and notes that the Committee has accepted his recommendation that it prepare and adopt a general recommendation on the right to housing and land. This has yet to occur.

See also Chuang, above n 21, 173: art 6 'could greatly benefit from specific elaboration in the form of a general recommendation on trafficking and exploitation of prostitution'. See also Banda, 'Article 10', above n 50, 255: 'The CEDAW Committee has yet to produce a general recommendation focusing specifically on Article 10'. See also Rudolf, above n 19, 337, pointing to the absence of a general recommendation on art 13. See also Goonesekere, 'Article 15', above n 56, 407:

The failure of the Committee to rely on Article 15 more regularly is to be regretted in so far as States may not recognize the implicit link in many recommendations. The principles underlying Article 15 are, however, often discussed and should be considered among the most important in the *Convention* ... A specific general recommendation from the Committee giving guidance on each provision of Article 15, rather than one linking it to other provisions, would underscore the importance of this provision.

<sup>123</sup> Jane Connors, 'Optional Protocol' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 607, 639:

It has been suggested that, except in cases where the subject of the communication is violence, the Committee's approach to exhaustion of domestic remedies has been conservative and it has not approached the criterion flexibly in the spirit of the *Convention's* object and purpose ... It should be noted, however, that inadmissibility decisions have not all been unanimous, and dissenters have approached the criterion of exhaustion from a gender perspective.

address remaining deficiencies.<sup>124</sup> The book indicates the extent to which the Committee consults and works with other human rights experts and bodies within the UN system and calls for greater coordination of action among the Committee and other international bodies.<sup>125</sup> The *Commentary* highlights the interconnections between *CEDAW* and other international human rights treaties and mechanisms, such as the development of the due diligence standard in the Inter-American human rights system, requiring that states must ‘take reasonable measures to prevent or to investigate and punish any violation by non-State actors of the rights recognized by the treaty in question’.<sup>126</sup> It also notes that

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<sup>124</sup> Chinkin and Freeman, above n 5, 31: ‘corporate actors remain largely unregulated by international law’. See also Chinkin, ‘Article 3’, above n 24, 119 (citations omitted): the Committee ‘has recommended the formulation and implementation of codes of ethics and action programmes for multinational corporations, especially those operating in export processing zones’. See also Byrnes, ‘Article 2’, above n 24. Byrnes notes at 96 (citations omitted):

The *Convention* does not explicitly address the issue of whether a State party has an obligation to regulate the acts of its nationals or its corporations outside its territory. In *General Recommendation 28* [UN Doc CEDAW/C/GC/28], the Committee stated that the obligations of States parties to establish effective legal protection of the rights of women ‘also extend to acts of national [private] corporations operating extraterritorially’. Although the Committee has on occasions commended States for regulating certain activities of their nationals abroad (eg assisting or performing female genital mutilation, sex tourism, and trafficking), it has not developed this aspect of the *Convention* application to a significant degree.

See generally Rachel J Anderson, ‘Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations’ (2010) 88 *Denver University Law Review* 183; José E Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 *Santa Clara Journal of International Law* 1; Tiana O’Konek, ‘Corporations and Human Rights Law: The Emerging Consensus and its Effects on Women’s Employment Rights’ (2011) 17 *Cardozo Journal of Law & Gender* 261; Chuan-Feng Wu, ‘Transnational Pharmaceutical Corporations’ Legal and Moral Human Rights Responsibilities in relation to Access to Medicines’ (2012) 7 *Asian Journal of WTO & International Health Law & Policy* 77.

<sup>125</sup> See generally Chinkin and Freeman, above n 5, 25–30; Banda, ‘Article 14’, above n 24, 378. It is also noted in Ineke Boerefijn, ‘Article 19’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 509, 512:

Meetings and events at which the Committee is generally officially represented include meetings of the [Commission on the Status of Women], the Human Rights Council, the General Assembly, World Conferences, Chairpersons meetings, and the Inter-Committee Meetings.

See also Boerefijn, ‘Article 17’, above n 13, 479:

By the end of 2010 ... there was no institutionalized relationship between the treaty bodies and the Human Rights Council. The Committee has indicated that it looks forward to developing one. The Chairpersons agree that the treaty system and the Universal Periodic Review are ‘complementary and mutually reinforcing’. The Committee has not designated an observer to follow the Universal Periodic Review process.

Proposals have been made to create ‘a unified standing treaty body’ about which the Committee has expressed concern: at 479–80. See generally Kerry Boyne, ‘UN Women: Jumping the Hurdles to Overcoming Gender Inequality, or Falling Short of Expectations?’ (2011) 17 *Cardozo Journal of Law & Gender* 683; Elizabeth F Defeis, ‘The United Nations and Women — A Critique’ (2011) 17 *William and Mary Journal of Women and the Law* 395.

<sup>126</sup> Byrnes, ‘Article 2’, above n 24, 88.

collaboration with other UN entities has been slow but is gradually increasing.<sup>127</sup> The *Commentary* sets forth details with respect to the states parties' obligations under specific articles of the *Convention*.<sup>128</sup> It is also a call to action for other players, such as judges serving in national judiciaries, who can utilise the *Convention* to develop the jurisprudence within their countries' legal systems.<sup>129</sup> Moreover, the *Commentary* highlights that a great deal of information about women's human rights nationally and internationally can be found on the Committee's website.<sup>130</sup> The book has unmistakably excelled in meeting its purpose — describing the influence of *CEDAW* and the Committee since its inception — and leaves the reader hungry for more, anticipating what the Committee may undertake in the future. In addition, in laying out some of the provocative strands running through the *Convention* and through the Committee's interpretation of the document, the *Commentary* helps set the future agenda and highlights the need for additional evolution in these crucial areas.

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<sup>127</sup> Ineke Boerefijn, 'Article 22' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 527, 527–30; Boerefijn, 'Article 17', above n 13, 479.

<sup>128</sup> See, eg, Byrnes, 'Article 2', above n 24, 74: The Committee has adopted a 'tripartite framework' to describe the obligations of the states parties to respect, protect, and fulfil women's human rights within the context of *CEDAW*. Byrnes notes at 74 (citations omitted) that:

The obligation to respect requires the State itself to refrain from taking actions that involve discrimination against women; the obligation to protect requires that States protect women against discrimination by non-State actors; and the obligation to promote or fulfil involves taking a range of measures to create the conditions under which women can enjoy de jure and de facto equality.

<sup>129</sup> Chinkin and Freeman, above n 5, 17:

The *Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women*, adopted by the Commonwealth Secretariat in 1994, emphasizes the importance of judges being guided by the *Convention* when applying national constitutions and laws, including the common law and customary law.

See also Pillay, above n 6, v: The Committee's 'jurisprudence has guided regional and national courts and tribunals'. See also Goonesekere, 'Article 9', above n 79, 248 (citations omitted): 'the action of traditional tribunals in preventing women from exercising their rights under Article 9 also can be challenged in regional and national courts'.

<sup>130</sup> For example, see Boerefijn, 'Article 18', above n 119, 506:

Many domestic, regional, and international NGOs and coalitions now regularly submit information. The [Office of the High Commissioner for Human Rights] website for *CEDAW* (and all other treaty bodies) contains a section for 'Information provided to the Committee', linking to the reports submitted by NGOs for each session.

See also Office of the High Commissioner for Human Rights, *United Nations Human Rights* (2012) <<http://www.ohchr.org>>. Cook and Undurraga's chapter on art 12 also provides a plethora of resource materials in the footnotes relating to other international human rights instruments and bodies: Cook and Undurraga, above n 21, 313–14.

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