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## Bridging the Enforcement Gap? Evaluating the Inquiry Procedure of the CEDAW Optional Protocol

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# BRIDGING THE ENFORCEMENT GAP? EVALUATING THE INQUIRY PROCEDURE OF THE CEDAW OPTIONAL PROTOCOL

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*Considerable optimism accompanied the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Optional Protocol. However, one of the Optional Protocol's two enforcement measures, the inquiry procedure, appeared to languish for fourteen years and has, to date, resulted in only four inquiry reports. The article evaluates the inquiry procedure, finding largely unmet expectations in addressing CEDAW's structural weaknesses, countering the privileging of civil and political rights, and redressing state non-compliance with CEDAW, but significant potential nonetheless. The findings of this Article vindicate the enduring salience of foundational feminist critiques of human rights. The Conclusion proposes measures to enhance the inquiry procedure's efficacy.*

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INTRODUCTION

The adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1999 brought to fruition nearly a decade of advocacy and negotiation for the enhanced protection of women’s human rights.<sup>1</sup> Plagued by problems of both sweeping reservations and widespread non-compliance, the adoption of the Optional Protocol was widely viewed as critical to the meaningful enforcement of obligations under the Convention.<sup>2</sup> In particular, women’s rights afforded lesser protection by the mainstream system’s emphasis on civil and political rights, such as women’s socioeconomic and reproductive rights, could potentially benefit from the new instrument.<sup>3</sup>

The individual complaints procedure introduced by the Optional Protocol has been the subject of—largely positive—scholarship and evaluation. The inquiry procedure, also introduced by the Optional Protocol, has remained unexamined in scholarship and under-utilized in practice despite optimism

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1. See Marsha A. Freeman et al., Commentary, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women - A Commentary* (2012) (noting that the Convention was not immediately or universally enforced by States).

2. See *id.*; see also Rebecca J. Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U. J. INT’L L. & POL. 645, 645-46 (1991) [hereinafter *International Protection of Women’s Reproductive Rights*] (explaining that the protection of women’s rights has not been a high priority for governments); see also Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination of Women*, 30 VA. J. INT’L. L. 643, 647 (1990) [hereinafter *Reservations to the Convention*] (arguing that reservations to the Convention pose a threat to the achievement of equality between men and women); see also Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women’s Convention?*, 21 BROOK. J. INT’L L. 679, 684 (1997) (describing how the Optional Protocol ensures “more effective implementation of the rights guaranteed in the Convention”). See generally HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 201-50 (2000).

3. See, e.g., *Montreal Principles on Women’s Economic, Social and Cultural Rights*, 26 HUM. RTS. Q. 760, 762 (2004) (stating that policies and decisions made by men are less likely to take into consideration the economic and social factors that affect women’s lives); see also Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 1, 2 (Dallmeyer ed., 1993) [hereinafter *Alienating Oscar?*].

about the unique potential of the inquiry procedure to be a “vehicle for addressing systematic and structural violations of women’s equality.”<sup>4</sup> For the first fourteen years of the Optional Protocol, which entered into force in December 2000, only one report, concerning the poorly-investigated deaths and disappearances of women on the United States-Mexico border, was issued by the CEDAW Committee under the Optional Protocol’s Article 8 procedure.<sup>5</sup> The CEDAW Committee’s apparent reticence to utilize the inquiry procedure is a cause for concern. Moreover, the CEDAW Committee’s use of the inquiry procedure for grave, widespread, and systematic violence against women in Mexico raised questions about the procedure’s efficacy to protect against other grave or systematic violations of women’s human rights that do not directly involve violence, such as socioeconomic and reproductive rights.<sup>6</sup> In 2015, the Committee published an inquiry report concerning the high number of missing and murdered indigenous women in Canada and an inquiry summary report on the inaccessibility of contraceptives to women in the Philippines capital Manila.<sup>7</sup>

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4. See, e.g., Andrew Byrnes & Eleanor Bath, *Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women - Recent Developments*, 8 HUM. RTS. L. REV. 517, 517-18, 533 (2008) (reviewing the ten public decisions arising from individual complaints submitted under the Optional Protocol as of 2007); see also Bal Sokhi-Bulley, *The Optional Protocol to CEDAW: First Steps*, 6 HUM. RTS. L. REV. 143, 145-57 (2006) (examining in detail two individual communications submitted to the Committee); see also Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 MELBOURNE J. INT’L L. 54, 65-83 (2013) (conducting an in-depth review of the individual complaint procedure at the Convention); see also Andrew Byrnes, *Slow and Steady Wins the Race? The Development of an Optional Protocol to the Women’s Convention*, 91 PROC. ANN. MEETING AM. SOC’Y INT’L L. 383, 387 (1997) [hereinafter *Slow and Steady Wins the Race?*].

5. See Comm. on the Elimination of Discrimination Against Women, Rep. on Mex. Under Article 8 of the Optional Protocol to the Convention, & Reply from the Government of Mex., at 3, U.N. DOC. CEDAW/C/2005/OP.8/MEXICO (2005) [hereinafter Rep. on Mexico] (detailing the investigations and trials employed by Mexico).

6. See generally Cusack and Pusey, *supra* note 4.

7. See Comm. on the Elimination of Discrimination Against Women, Rep. of the Inquiry Concerning Can. Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, at 3-4, U.N. DOC. CEDAW/C/OP.8/CAN/1 (2015) [hereinafter Rep. on Canada]; see also Comm. of the Elimination of Discrimination Against Women, Summary of the Inquiry Concerning the Phil. Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, at 2-3, U.N. DOC. CEDAW/C/OP.8/PHL/1 (2015) [hereinafter Rep. on the Philippines].

Further, 2018 witnessed the publication of the Committee's fourth report under the Optional Protocol, this time on the issue of access to abortion, focusing on the situation of Northern Ireland within the UK state party.<sup>8</sup>

It is timely, therefore, to reflect on the inquiry procedure's efficacy to date and its future potential. This Article draws on the preparatory documents leading to the Optional Protocol in order to distill the key motivations for its adoption and, in turn, to evaluate the extent to which it has delivered its intended results. The first motivation identified is the need to redress the structural weaknesses of the system for the protection and promotion of women's human rights.<sup>9</sup> Secondly, the Article turns to the motivation of redressing the historical privileging of civil and political rights in the human rights canon by attaching a robust enforcement mechanism to the full panoply of women's human rights guaranteed under CEDAW.<sup>10</sup> The third and final motivation considered in this Article is the pernicious problem of routine state non-compliance with CEDAW.<sup>11</sup> The Article finds that the Committee's use of the inquiry procedure to date evidences unmet expectations, but significant potential nonetheless.

The under-enforcement of rights guaranteed under CEDAW is, of course, not a problem unique to women's human rights. It reflects broader and deeper shortcomings in the international system for the protection and promotion of human rights. Nevertheless, the shortcomings in the use to date of the inquiry procedure are distinct as they evidence the enduring salience of foundational feminist critiques of human rights. The Conclusion proposes some possible ways forward for the Committee to enhance the efficacy of the inquiry procedure.

## I. STRENGTHENING THE SYSTEM FOR THE PROTECTION AND PROMOTION OF WOMEN'S HUMAN RIGHTS

### A. *The Structural Weaknesses of CEDAW*

It was in response to the identified gendered shortcomings of the human rights canon that CEDAW was adopted in 1979 and the CEDAW Committee

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8. Comm. on the Elimination of Discrimination Against Women, Rep. of the Inquiry Concerning the U. K. of Gr. Brit. & N. Ir. Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/OP.8/GBR/1 (2015) [hereinafter Rep. on U.K.]

9. See *infra* Part II.A.

10. See *infra* Part III.

11. See *infra* Part IV.A.

was established to monitor its implementation.<sup>12</sup> The Convention's radical departure from the established canon at the time of its adoption was demonstrated in its broad definition of discrimination against women encompassing both public and private life, its integration of civil and political, social and economic rights, the permissive provision for temporary special measures to remedy gender inequality, and its requirement on state parties to modify discriminatory social and cultural patterns.<sup>13</sup> The CEDAW Convention and its monitoring Committee are therefore optimally placed to overcome the persistent gendered shortcomings of the human rights canon.

The structural weaknesses of CEDAW are, however, manifold and well-documented. For example, the emergence of the CEDAW text from the Commission on the Status of Women, and not from the Commission on Human Rights, constituted early signs of ghettoization.<sup>14</sup> Moreover, its passage through the Social Affairs Committee, and not the Legal Affairs Committee of the U.N. General Assembly, signaled the *sui generis* and perceived lesser legal status of the Convention.<sup>15</sup> "In other words" concludes Charlesworth, "[t]he creation of a specialized branch of women's human rights law has allowed its marginalization."<sup>16</sup> Further, scholarship on the limitations of CEDAW has focused on the challenge posed by far-reaching reservations to the Convention, whereby states seek to "hollow out the heart of their obligations."<sup>17</sup> Compounding the challenge of reservations, the Convention's lack of an individual complaints procedure, and the Committee's mandate to "conside[r] the progress made in the

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12. See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 495 (1990) (illustrating how CEDAW is the primary international legal mechanism for enforcing women's rights as human rights); see *Reservations to the Convention*, *supra* note 2, at 647 (explaining that the Convention's "object and purpose" was to eliminate such shortcomings); see also Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, U.N. DOC. A/RES/34/180 (Dec. 18, 1979), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> [hereinafter CEDAW].

13. CEDAW, *supra* note 12, arts. 2(f), 4, 5(a), 10-13.

14. See Freeman et al., *supra* note 1, at 25.

15. See *id.* at 26 (describing how the Committee's work was less visible to other UN human rights bodies as a result of its physical separation from the secretariat for those bodies).

16. *Alienating Oscar?*, *supra* note 3, at 6.

17. CHARLESWORTH & CHINKIN, *supra* note 2, at 113; see also *Reservations to the Convention*, *supra* note 2, at 644 (stating that at least twenty-three of the one hundred state parties to the Convention made a total of eighty-eight substantive reservations).

implementation . . . of the Convention”<sup>18</sup>—as distinct from monitoring compliance or determining violations—has historically posed a significant structural obstacle to the protection and promotion of women’s rights. Weaker implementation and obligation procedures contribute to a picture of a fragile infrastructure for CEDAW.

Such is the acceptance of CEDAW’s structural weaknesses that some have even advocated for a shift away from considering the Convention as a legal instrument.<sup>19</sup> Largely due to its endemic problems of under-enforcement, CEDAW is often conceptualized as principally a cultural, rather than legal, tool for the advancement of women’s rights.<sup>20</sup> Sally Engle Merry, for example, argues that the Convention is more important for its cultural work than for its specific repressive function, stating “[h]uman rights law is itself primarily a cultural system. Its limited enforcement mechanisms mean that the impact of human rights law is a matter of persuasion rather than force, of cultural transformation rather than coercive change. Its documents create new cultural frameworks for conceptualizing social justice.”<sup>21</sup> While the operation of this cultural role is better understood with regard to challenging violence against women, there is evidence of CEDAW performing a similar role for women’s reproductive rights.<sup>22</sup> These are valuable exhortations for recognizing the Convention’s importance, even given its structural weaknesses.

CEDAW’s under-enforcement is usefully located within broader challenges of state commitment and compliance across the spectrum of international human rights treaties.<sup>23</sup> The Convention is not unique,

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18. CEDAW, *supra* note 12, at art. 17(1).

19. *See, e.g.,* SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (1st ed. 2006) [hereinafter HUMAN RIGHTS & GENDER VIOLENCE].

20. *See id.* at 24-25 (finding possible contradictions between the culture and the legal rights regarding violence against women).

21. *Id.* at 16.

22. *See id.* at 61 (describing a UN special rapporteur’s use of collected information, on the form and prevalence of violence against women from many cultures, to inform the international community on methods regulation and prevention); *see also* Catherine O’Rourke, *Advocating Abortion Rights in Northern Ireland: Local and Global Tensions*, 25 SOC. & L. STUD. 716, 717 (2016) [hereinafter *Advocating Abortion Rights in Northern Ireland*] (finding that despite the Convention’s legal limitations, it is distinguished from other treaty bodies “for its cultural work in affirming women’s rights and equality in local and global settings”).

23. *See generally* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

therefore, in the enforcement challenges that it confronts. Looking comparatively across a range of rights protected by international treaties, Beth Simmons concludes that the treaties' impacts lie less in their direct relationship with state parties, and more in the mobilizing framework that they offer to domestic reform constituencies.<sup>24</sup> The prerequisites for such impacts are supportive conditions for social mobilization and strategic litigation. Where such prerequisites are absent, human rights treaty ratification cannot, of itself, compel progressive change.<sup>25</sup> Simmons' findings indicate broadly positive outcomes for women's rights if CEDAW is re-conceptualized, not principally as a set of legally-binding obligations on states, but rather as a supportive mobilizing framework for domestic reform constituencies.

It is critical, nevertheless, that the efficacy of a human rights instrument is evaluated on its own express terms, namely to what extent it can provide an effective mechanism for state accountability and enhanced compliance for the rights guaranteed therein. The Optional Protocol to CEDAW established two new enforcement procedures.<sup>26</sup> Firstly, it established the right of individuals from states that are party to the Convention to file a petition to seek recourse for violations of their rights guaranteed under CEDAW.<sup>27</sup> These petitions are subject to a number of procedural requirements, most notably the obligation to exhaust domestic remedies.<sup>28</sup> Significantly, the Optional Protocol went beyond the right of individual petitions by also empowering the Committee to conduct an inquiry where it has received "reliable information of grave or systematic violations by a State Party of rights set forth in the Convention."<sup>29</sup> This inquiry procedure was a novel initiative towards strengthening the infrastructure of women's human rights, with the procedure's only precedent at the time existing in the Convention Against Torture, Inhuman or Degrading Treatment or Punishment (CAT).<sup>30</sup>

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24. *See id.* at 256 (explaining how mobilization is a function of the value that potential claimants place on certain rights and the likelihood that mobilization will succeed in realizing those rights).

25. *Id.* at 253-54.

26. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, U.N. DOC. A/RES/54/4 (Oct. 15, 1999), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement> [hereinafter Optional Protocol].

27. *See id.* at art. 2, 4(1).

28. *Id.*

29. *Id.* at art. 8(1).

30. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading



The need to redress the identified structural weaknesses underpinning women's human rights is evident throughout the preparatory documents that led to the Optional Protocol's adoption by the UN General Assembly in 1999. The procedural history of the Optional Protocol formally dates back to the 1993 Second World Conference on Human Rights in Vienna.<sup>31</sup> The Vienna Declaration and Programme of Action called on the Commission on the Status of Women (CSW) and the CEDAW Committee to "quickly examine" the possibility of introducing a right of individual petition to the CEDAW Convention by means of an Optional Protocol, in order to "strengthen implementation of the commitment to women's equality and the human rights of women."<sup>32</sup>

According to the preparatory documents, the Optional Protocol would contribute to the "strengthening" of the system for the protection of women's human rights in three distinct, but complementary, ways: firstly, CEDAW's lack of an enforcement mechanism gave rise to a perception that the Convention was lesser than the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Racial Discrimination (CERD) and CAT, all of which included the right of individual petition.<sup>33</sup>

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Treatment of Punishment, art. 6, U.N. DOC. A/39/46, (Dec. 10, 1984) (directing states to make an immediate preliminary inquiry into facts surrounding alleged violations of the CAT). It should be noted that a competence similar to the CEDAW Optional Protocol Inquiry Procedure was provided for by the Convention for the Protection of All Persons from Enforced Disappearance, art. 2, U.N. DOC. A/61/448 (Dec. 20, 2006), the Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 6, U.N. DOC. A/RES/61/106 (Dec. 13, 2006), the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 11, U.N. Doc. A/63/435 (Dec. 10, 2008), and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, art. 13(7), U.N. DOC. A/RES/66/138 (Dec. 19, 2011). Nevertheless, when the CEDAW Optional Protocol was adopted in 1999, the sole precedent for the inquiry procedure was contained in the CAT.

31. JANE CONNORS, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, [http://legal.un.org/avl/pdf/ha/opceafdw/opceafdw\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/opceafdw/opceafdw_ph_e.pdf) (last visited March 25, 2018) [hereinafter Procedural History of Optional Protocol].

32. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 40, U.N. DOC. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

33. U.N. Secretary-General, *Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention*, ¶ 15, U.N. DOC. E/Cn6/1997/5 (Feb. 18, 1997) [hereinafter *Additional Views*] (finding that the specific procedures for considerations of women's human rights violations were inadequate and insufficient).

The Optional Protocol would therefore strengthen CEDAW by “plac[ing] the Convention on an equal footing with other human rights instruments.”<sup>34</sup>

Secondly, it was argued that an optional protocol would strengthen the overall protection of women’s human rights by improving awareness of the “gender dimensions of human rights by existing mechanisms and procedures.”<sup>35</sup> In particular, the absence of any specific procedures within the UN system for considering individual or systematic violations of women’s human rights was noted with considerable concern.<sup>36</sup> Uniquely, an optional protocol to CEDAW would contribute to the integration of the human rights of women throughout the United Nations system by developing a specific doctrine and jurisprudence that would inform the other human rights mechanisms within the UN system.<sup>37</sup>

Thirdly, in negotiations that led to the Optional Protocol, state delegations and CSW members emphasized the unique importance of the inquiry procedure to draw attention to structural and systemic obstacles to the protection and promotion of women’s human rights.<sup>38</sup> Because individual complaints may fail to reflect the systematic nature of widespread violations, the importance of an inquiry procedure that would allow for the redress of individual and group grievances was particularly noted.<sup>39</sup> Moreover, as individuals or groups may face “acute dangers of reprisal or practical constraints on their ability to submit communications,” the inquiry procedure would circumvent these limitations.<sup>40</sup>

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34. *Id.* at ¶ 17; Comm’n on the Status of Women, Rep. on the Fortieth Session, ¶ 12, U.N. DOC. E/CN.6/1996/15 (Mar. 12, 1996) [hereinafter Fortieth Session Report].

35. U.N. Secretary-General, *Comparative Summary of Existing Communications and Inquiry Procedures and Practices Under International Human Rights Instruments and Under the Charter of the United Nations*, ¶ 4, U.N. DOC. E/CN6/1997/4 (Jan. 21, 1997) [hereinafter *Comparative Summary*].

36. *See Additional Views, supra* note 33, at ¶ 15 (stating that the most concerning women’s human rights issues receive relatively little attention under UN mechanisms).

37. *Id.* at ¶ 20 (explaining how an optional protocol could serve as a model for other UN treaty bodies that lack mechanisms to consider widespread women’s human rights violations).

38. *Comparative Summary, supra* note 35, at ¶¶ 8, 101.

39. *See* Comm’n on the Status of Women, Rep. on the Thirty-Ninth Session, ch. IV ¶ 6, U.N. DOC. E/1995/26 (1995) [hereinafter Thirty-Ninth Session Report] (describing how a right to petition, by both individuals and groups, would create broader public awareness of women’s human rights).

40. Byrnes & Connors, *supra* note 2, at 704-05, n.67 (noting that inquiry procedures permitted groups such as Amnesty International to communicate on behalf of the individuals or groups).

The inquiry procedure was argued to be particularly appropriate to human rights violations experienced by women, due to certain defining characteristics. Principally, the inquiry procedure has the potential to capture the widespread and systematic nature of gender inequality.<sup>41</sup> As Byrnes and Connors note, the inclusion of the inquiry procedure was “a move motivated by a desire to ensure that systemic discrimination against women is adequately addressed, especially in view of the fact that women may face particular disadvantages in securing information about and access to remedies.”<sup>42</sup> Because of the relative ease of its utilization, the inquiry procedure circumvents several of the practical obstacles to rights litigation, in particular, financial resources, and technical expertise.<sup>43</sup> Moreover, there is no specific requirement for the exhaustion of domestic remedies. Thus, the inquiry procedure avoids the burdens of stigma, publicity, and breach of anonymity that women may face by submitting individual petitions.<sup>44</sup> Lastly, the broad standing provided for in the Optional Protocol is highly conducive to collective action.<sup>45</sup> In general, the Optional Protocol inquiry procedure provides a substantial scope for redressing the Convention’s structural weaknesses and for advancing a new era of enforcement.

#### *B. The Efficacy of the Inquiry Procedure to Date*

Despite the lofty ambitions articulated for the CEDAW Optional Protocol, specifically to enhance the effectiveness and enforcement of women’s rights under the international human rights system, the Optional Protocol’s procedures have in fact been characterized by under-usage.<sup>46</sup> The Optional Protocol has been relatively successful in securing ratifications. It entered into force a little over a year after the adoption of the treaty text—admittedly with a low threshold for the number of ratifying states.<sup>47</sup> At this present time, there are 109 state parties to the instrument, only five of which have opted

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41. *See id.* at 751.

42. *Id.*

43. *See* Freeman et al., *supra* note 1, at 656.

44. *See id.*

45. *See* Byrnes & Connors, *supra* note 2, at 704-05 & n.67; *see also* Thirty-Ninth Session Report *supra* note 39, at ch. IV ¶ 6.

46. Byrnes & Connors, *supra* note 2, at 617 (stating that only a few petitions have been submitted).

47. *See Signatures and Accessions/Ratifications to the Optional Protocol*, UN ENTITY FOR GENDER EQUALITY & THE EMPOWERMENT OF WOMEN, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8-b.en.pdf> (last visited March 25, 2018).

out of the inquiry procedure under Article 8 of the Optional Protocol.<sup>48</sup> Nevertheless, in the first fourteen years after the Protocol entered into force, only one inquiry was conducted by the Committee.<sup>49</sup> Moreover, little has been written about the inquiry procedure, a fact that is no doubt exacerbated by the Committee's apparent reticence to invoke the procedure.

The relative under-usage of the inquiry procedure may, in part, be explained by the weaknesses that affect these types of procedures generally. The procedures are not well-known and can be difficult to access and use, especially for people without legal assistance.<sup>50</sup> Both the communications and inquiry procedures are slow, and the communications procedure also requires the exhaustion of domestic remedies before the merits of the case may be considered.<sup>51</sup> Additionally, enforcement issues persist because, although the views and decisions adopted by the Committee are authoritative, they are not binding and there is no enforcement procedure.<sup>52</sup> Moreover, would-be petitioners may choose to use other avenues to file a complaint, including mechanisms at the regional level, which have binding outcomes.<sup>53</sup>

Issues of under-enforcement also have a clearly gendered quality: fewer women than men use the human rights communications and inquiry procedures, suggesting that these litigation-style processes do not serve women as well as men because of the systematic power imbalance and disadvantage women experience, and because of their lack of resources, literacy, and access to legal aid.<sup>54</sup> The requirement that domestic remedies be exhausted before the Committee will consider a communication also poses a particular challenge for women in jurisdictions where their access to courts is limited.<sup>55</sup> Finally, these procedures, which relate to alleged violations by a State party, pose further difficulty where the facts of the case relate to non-state action, such as domestic violence.<sup>56</sup>

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48. *Id.* (stating that Bangladesh, Belize, Colombia, Cuba, and Tajikistan chose not to recognize Article 8).

49. Rep. on Mexico, *supra* note 5, ¶ 3.

50. Freeman et al., *supra* note 1, at 656.

51. Sokhi-Bulley, *supra* note 4, at 144.

52. *See id.* at 154-55.

53. *Id.* at 618.

54. *Id.* at 618, 656.

55. *See id.* at 146 (mentioning "gender-based discrimination by the courts").

56. *See id.*; *see also* Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 58 (1993).

The clandestine nature of the inquiry procedure has undoubtedly contributed to perceptions of its under-usage. Because of the confidentiality of the procedure, it is difficult to track, in detail, the work the Committee conducts under Article 8, but annual reports indicate that the Committee commenced work under Article 8 in 2003.<sup>57</sup> Later reporting revealed that the Committee's activity in 2003 referred to a request to investigate the deaths and disappearances of women on the Mexico-US border and the subsequent poor investigation of these offenses; specifically, in 2004 the Committee made public that the 2003 inquiry activity concerned Mexico.<sup>58</sup> In 2005, the Committee published the findings of the inquiry.<sup>59</sup> In contrast, from 2006 to 2010, the Committee's annual reports indicate no activity under Article 8.<sup>60</sup> However, the 2011, 2012, and 2013 annual reports clarified that the pace of requests for inquiries had accelerated.<sup>61</sup> In its 2013 Annual Report, the CEDAW Committee acknowledged "the urgent need to decide on a methodology for conducting inquiries and to review existing rules of procedures on inquiries under Article 8 of the Optional Protocol."<sup>62</sup> The 2014 Annual Report stated that the Committee requested that the High

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57. Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. V ¶ 441, U.N. Doc. A/58/38(SUPP) (Aug. 18, 2003) [hereinafter 2003 Annual Report].

58. See Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. V ¶ 393, U.N. Doc. A/59/38(SUPP) (Aug. 18, 2004) [hereinafter 2004 Annual Report]; see generally Rep. on Mexico, *supra* note 5.

59. See 2004 Annual Report at ch. V ¶ 393; see generally Report on Mexico, *supra* note 5.

60. See generally Comm. on the Elimination of Discrimination Against Women, Ann. Rep., U.N. Doc. A/61/38(SUPP) (Sept. 12, 2006) [hereinafter 2006 Annual Report]; Comm. on the Elimination of Discrimination Against Women, Ann. Rep., U.N. Doc. A/62/38(SUPP) (Jan. 1, 2007) [hereinafter 2007 Annual Report]; Rep. of the Comm. on the Elimination of Discrimination Against Women, Ann. Rep., U.N. Doc. A/63/38(SUPP) (Aug. 12, 2008) [hereinafter 2008 Annual Report]; Comm. on the Elimination of Discrimination Against Women, Ann. Rep., U.N. Doc. A/64/38(SUPP) (Jan. 1, 2009) [hereinafter 2009 Annual Report]; Comm. on the Elimination of Discrimination Against Women, Ann. Rep., U.N. Doc. A/65/38(SUPP) (Jan. 1, 2010) [hereinafter 2010 Annual Report].

61. See Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. V ¶¶ 19-22, U.N. Doc. A/66/38(SUPP) (Apr. 6, 2011) [hereinafter 2011 Annual Report]; see also Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. V ¶ 30, U.N. Doc. A/67/38(SUPP) (Apr. 2, 2012) [hereinafter 2012 Annual Report]; see also Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. I, ch. V ¶¶ 26-28, U.N. Doc. A/68/38(SUPP) (Mar. 24, 2013) [hereinafter 2013 Annual Report].

62. 2013 Annual Report, *supra* note 61, at ch. V ¶ 27.

Commissioner for Human Rights service the Committee's work under Article 8 and provide additional resources.<sup>63</sup> Moreover, the 2014 Report first publicly disclosed the Committee's activities in the Philippines under Article 8, and provided updates for *six* other requests for inquiries in undisclosed states.<sup>64</sup> A close reading of the Committee's annual reports points to growing civil society activity working to deliver the promise of the inquiry procedure.

For much of the past eighteen years, it seems likely that under-utilization of the procedure by civil society groups, and the Committee's reticence to publicly activate the procedure, have been mutually reinforcing. The confidentiality requirement of the procedure, whereby the Committee can actively consider a request for inquiry without any formal notification to the organizations that requested the inquiry, further reinforces the perception of Committee inactivity and under-utilization of the procedure.<sup>65</sup> Anecdotally, there is also the purported belief amongst women's rights advocates that the Committee's reticence to use the inquiry procedure reflects the Committee's concern that robust use of Article 8, while eighty of CEDAW's state parties have yet to ratify the Optional Protocol, would either encourage more newly-ratifying states to opt-out of the inquiry procedure or deter states from ratifying the Optional Protocol altogether. The apparent increase in Committee activity under the inquiry procedure since 2015 may, however, communicate its willingness to activate the procedure to civil society and state parties alike and, in turn, stimulate further increased activity.

## II. ENFORCING THE FULL PANOPLY OF WOMEN'S HUMAN RIGHTS

### A. *The Gendered Hierarchies of Human Rights*

Foundational feminist critiques of human rights focus on the presumed masculine subject of civil and political rights.<sup>66</sup> The historic privileging of the male political actor as the classic subject of human rights is as much an empirical reality as a conceptual critique.<sup>67</sup> The regular distribution of urgent

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63. Comm. on the Elimination of Discrimination Against Women, Ann. Rep., ch. I, U.N. DOC. A/69/38(SUPP) (Mar. 30, 2014) [hereinafter 2014 Annual Report].

64. *Id.* at ch. V ¶ 25.

65. CEDAW, *supra* note 12, at art. 8(5) (recognizing that “[s]uch an inquiry shall be conducted confidentially and the cooperation of the State party shall be sought at all stages of the proceedings”).

66. See generally Gayle Binion, *Human Rights: A Feminist Perspective*, 17 HUM. RTS. Q. 509 (1995) (pointing out that virtually all areas of the legal field have been influenced by feminism).

67. See Arvonne S. Fraser, *Becoming Human: The Origins and Development of*

action campaigns by human rights groups evidences this gender bias in prosaic, but important ways.<sup>68</sup> Rare was it that women formed the subject of such urgent campaigns.<sup>69</sup> Indeed, in 1993, Charlesworth damningly characterized first generation rights as “what men most fear will happen to them,” referring in particular to the torture of political dissidents.<sup>70</sup> Moreover, women’s disproportionate experience with poverty and socioeconomic deprivation means that inadequacies in the protection and enforcement of second generation rights were not gender-neutral.<sup>71</sup> The controversial categorization of human rights into first generation—civil and political—and second generation—economic, social, and cultural—reveals a heavily gendered hierarchy.<sup>72</sup> Consequently, advocacy for the strengthening of economic and social rights as a tactic for the strengthening of women’s rights is a well-established practice in the human rights canon.<sup>73</sup> Bunch, for example, in her trailblazing articulation of strategies for the improved protection of women’s human rights, advocated for the overall strengthening of socioeconomic rights in the human rights system, as women are disproportionately denied rights to food, shelter, education, and employment.<sup>74</sup>

The novelty of CEDAW lies in its articulation of women’s civil, political, economic, and social rights, without any distinction between so-called generations of rights.<sup>75</sup> The Optional Protocol offers the potential to align enforcement measures with the full panoply of women’s human rights in the

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*Women’s Human Rights*, 21 HUM. RTS. Q. 854, 860 (1999) (explaining that male-dominated history and tradition reinforce the existing social and political order).

68. See Fortieth Session Report, *supra* note 34, at ¶¶ 9-60. See generally *Advocating Abortion Rights in Northern Ireland*, *supra* note 22.

69. See CATHERINE O’ROURKE, GENDER POLITICS IN TRANSITIONAL JUSTICE 63-82 (2013) [hereinafter GENDER POLITICS IN TRANSITIONAL JUSTICE] (discussing gendered patterns in human rights advocacy in select case studies in Colombia, Northern Ireland, and Chile).

70. *Alienating Oscar?*, *supra* note 3, at 8.

71. See CHARLESWORTH & CHINKIN, *supra* note 2, at 238.

72. See *id.* at 233.

73. Fortieth Session Report, *supra* note 34, at ¶¶ 9-60.

74. See Bunch, *supra* note 12, at 494.

75. CEDAW, *supra* note 12, at art. 1 (defining “discrimination against women” to include “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”).

Convention. In fact, there is evidence from the preparatory documents that redressing the hierarchy between first and second generation rights was an important motivation leading to the Optional Protocol. In practical terms, tensions between the protection of first and second generation rights manifested in debates over whether rights such as non-discrimination in employment, education, or marriage and family relations guaranteed under CEDAW should be designated “non-justiciable.”<sup>76</sup> Whereas several states pointed to the “more programmatic nature” of many of the rights guaranteed under the Convention, other delegations noted the legal character of the treaty and the obligation of states to execute the treaty in good faith.<sup>77</sup> These latter delegations feared the entire initiative might be undermined if some provisions of critical importance did not fall within the framework of the Optional Protocol and the competence of the Committee.<sup>78</sup> The importance of the Optional Protocol as a mechanism for strengthening the full panoply of women’s human rights was evidenced by the identified need to supplement the enforcement activities of the Human Rights Committee, which focused exclusively on civil and political rights.<sup>79</sup> Given these initial lines of division among state delegations, the significance of the final text of the Optional Protocol as an instrument for the enforcement of *all* rights guaranteed by CEDAW should not be underestimated.

Tensions during the preparatory negotiations concerning the justiciability and possible hierarchy of rights within the Convention played out in explicit ways in the negotiation for the inquiry procedure. There was significant state resistance to the inquiry procedure.<sup>80</sup> States opposing the procedure argued that it could be “unnecessarily confrontational, could require significant human and financial resources, and was appropriate only in the context of torture.”<sup>81</sup> However, these standard state concerns were overlaid by more clearly gendered concerns about the “appropriateness” of an inquiry procedure for a Convention such as CEDAW, given that the procedure would be confrontational and resource-intensive, which were features thought to be

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76. See Fortieth Session Report, *supra* note 34, at ¶¶17, 106-07 (alluding to the disagreement between delegations regarding whether all substantive provisions of the Convention should be considered justiciable under the Protocol).

77. *Id.*; see *Comparative Summary*, *supra* note 35, at ¶6.

78. See Fortieth Session Report, *supra* note 34, at annex III ¶¶ 47-51.

79. *Id.* at annex III ¶ 48.

80. See Comm’n on the Status of Women, Rep. of the Comm’n On the Status of Women. On its Forty-First Session, U.N. DOC. CN.61/2000/9, at app. II ¶ 59, (Mar. 10-21, 1997) [hereinafter Forty-First Session Report].

81. *Id.*



more appropriate to the right of freedom from torture.<sup>82</sup> The prohibition of torture is the quintessence of civil and political rights; it “occupies a vital place in the human rights lexicon, a ‘no’ strongly and universally felt and expressed.”<sup>83</sup> Women’s human rights, by contrast, have struggled to gain the same universal consensus, as illustrated by the large number of broad reservations and general under-enforcement of CEDAW. Ultimately, a compromise position in line with CAT was adopted, whereby states could expressly opt-out of the Committee’s capacity to conduct an inquiry and follow-up under Article 8 of the Optional Protocol.<sup>84</sup> The opt-out provision merits consideration as a factor in shaping the Committee’s apparent reticence to utilize the inquiry procedure pending wider ratification of the Optional Protocol.

### *B. The Efficacy of the Inquiry Procedure to Date*

The precedent of the first inquiry under the CEDAW Optional Protocol, namely, the persistent and poorly-investigated deaths and disappearances of a large number of women on the Mexico-US border,<sup>85</sup> was widely understood to bear out concerns that the inquiry procedure would privilege civil and political rights violations. To quote the Committee members appointed to evaluate the Mexican request for an inquiry: “The situation presented to the Committee was an emblematic case of grave violations of women’s fundamental rights on a large and systematic scale, and therefore ideally suited to the type of inquiry foreseen under the Optional Protocol.”<sup>86</sup> The Committee concluded that grave and systematic violations of the rights guaranteed under CEDAW were taking place in the jurisdiction, in violation of the Convention and the Committee’s General Recommendation 19.<sup>87</sup> With the exception of Article 5’s obligation to challenge discriminatory social and cultural patterns, the identified violations largely pertained to discrimination in law and in the administration of justice, manifesting in

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82. *Id.*

83. HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 224 (3rd ed. 2008).

84. Optional Protocol, *supra* note 26, art. 10.

85. *See Rep. on Mexico, supra* note 5, at ¶ 3.

86. Maria Regina Tavares da Silva & Yolanda Ferrer Gómez, *The Juarez Murders and the Inquiry Procedure*, in *THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN* 298, 300 (Hanna-Beate Schöpp-Schilling & Cees Flinterman eds., 2007).

87. *See Rep. on Mexico, supra* note 5, at ¶ 259.

impunity for the violence.<sup>88</sup> The state was found to be acting in violation of its due diligence obligations to prohibit, prevent, and punish these manifestations of violence against women.<sup>89</sup> To a large extent, with the important exception of understanding the violations as gendered and as a manifestation of discriminatory social and cultural patterns, the violations identified by the Committee concern rights substantively guaranteed in other civil and political rights-focused human rights instruments. Moreover, in considering the evidence of grave or systematic violations, the Committee relied on reports of the UN Commission on Human Rights Special Rapporteurs on extrajudicial, summary, or arbitrary executions, and on the independence of judges and lawyers, once again indicating the interface—and overlap—with civil and political rights protections.<sup>90</sup>

The focus on grave and widespread violence against women in the CEDAW Committee's much later inquiry in Canada, while justified by the exigent circumstances of missing and murdered indigenous women, also worked to reinforce concern about the procedure's efficacy to protect the full panoply of women's rights guaranteed under the Convention.<sup>91</sup> In line with the Mexican precedent, the state was found to be acting in violation of its due diligence obligations to provide effective protection and conduct effective investigations and prosecutions, particularly in relation to missing and murdered aboriginal women, victims of violence, and their families.<sup>92</sup> The inquiry focused on violations to Article 1 (discrimination against women), Article 2 (obligation to change domestic constitutions, laws and policies), Article 3 (prohibition on discrimination), Article 5 (modify discriminatory social and cultural patterns), read together with General Recommendations 19 and 28.<sup>93</sup> On this occasion, the specific vulnerabilities and violations experienced by rural women and their families under Article 14 were identified.<sup>94</sup> Further, because of what the Committee identified as the state's failure to protect aboriginal women from discrimination by public

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88. CEDAW, *supra* note 12, at art. 5.; *see also* Rep. of Mexico, *supra* note 5, at ¶ 261 (describing how such impunity often arises from a culture of violence and discrimination based on women's perceived inferiority).

89. Rep. on Mexico, *supra* note 5, at ¶ 275 (noting a lack of sufficient resources and trained staff, as well as the fact that days sometimes pass before an investigation, as examples of the state's failure to exercise due diligence).

90. *Id.* at ¶ 4.

91. Rep. on Canada, *supra* note 7, at ¶ 3.

92. *Id.* at ¶ 210.

93. *Id.* at ¶ 211.

94. *Id.* at ¶ 204.

institutions, the violation of Article 15's equality under the law requirement was also identified.<sup>95</sup>

The human rights canon has undoubtedly evolved considerably in recent decades to broaden its concern beyond the male political actor. This evolution is signaled most forcefully by two decades of steady progressive development in the treaty, normative, and jurisprudential development of human rights to articulate due diligence obligations on states to prohibit, prevent, and punish violence perpetrated against women by private actors.<sup>96</sup> These developments did not emerge unprompted from the international community or the human rights system; rather they are the outcome of decades of concerted feminist advocacy and activism.<sup>97</sup> The evolution of the human rights canon to require states to prohibit, prevent, and punish violence against women has been an extraordinary success of global women's rights advocacy.<sup>98</sup> In their review of successful transnational advocacy campaigns, including the global campaign to end violence against women, Keck and Sikkink identify "issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility" as that which transnational advocacy networks organize around most effectively.<sup>99</sup> While substantial challenges persist in vindicating those rights, the doctrinal developments concerning violence against women as a human rights violation have been remarkable.<sup>100</sup> Nevertheless, these developments have occurred principally within a civil and political rights frame and continue to privilege violations that involve physical harm to the body.<sup>101</sup>

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95. *Id.* at ¶ 210.

96. *See generally* ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW 7-12 (2011) (providing a detailed overview of how the international human rights legal system has been influenced by the campaign for women's equality).

97. *See generally* NIAMH REILLY, WOMEN'S HUMAN RIGHTS: SEEKING GENDER JUSTICE IN A GLOBALISING AGE 12 (2009) (discussing the Global Campaign for Women's Human Rights, a coalition of women's organizations, that resulted in the adopted of CEDAW).

98. *See* EDWARDS, *supra* note 96, at 2 (drawing on feminist analysis of international law to illustrate the significant developments achieved through women's advocacy).

99. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 27 (1998).

100. *See generally* EDWARDS, *supra* note 96, at 7-12 (reviewing jurisprudential and treaty-based developments recognizing violence against women to be a violation of international human rights law).

101. *See id.* at 60 (arguing that while civil and political rights of women should receive

Even from the earliest days of transnational feminist advocacy for the recognition of violence against women as a human rights violation, caution was sounded about the potential of a focus on physical violence to the body—which aligns with the dominant focus of human rights—to overshadow other pernicious, endemic, yet largely non-physical harms of poverty and economic inequality experienced disproportionately by women.<sup>102</sup> In their analysis of the Declaration emerging from the 1993 World Conference on Human Rights, which brought violence against women to the fore as a human rights issue, Mertus and Goldberg cautioned:

To keep the women's human rights agenda intact and focused, we must be ever watchful that the issues of importance to women—issues such as development, literacy, and poverty—are not lost in the struggle to gain protection from the most visible and most obviously detrimental abuses that entail violence.<sup>103</sup>

The potential for violence against women to advance as a human rights issue, without the strengthening of a broader set of women's human rights, is usefully illustrated by the contrasting fates of violence against women and reproductive rights within the past two decades of human rights developments.<sup>104</sup> The receptiveness of the international human rights community and infrastructure to the issue of violence against women in the 1990s can be juxtaposed with the contestation and resistance encountered by reproductive rights activists in the same period.<sup>105</sup> In contrast to the efforts to have violence against women recognized as a human rights violation, the struggle to elaborate rights associated with women's sexual freedom and autonomy has floundered in the face of the perceived lack of "respectability" of those arguing for sexuality rights and ideological struggles among different religious and ethnic communities.<sup>106</sup> Furthermore, efforts to

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full protection, these are not the harms from which women need the most legal protection).

102. Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201, 208-09 (1994).

103. *Id.* at 216.

104. *Id.*

105. See JUTTA M. JOACHIM, *AGENDA SETTING, THE UN, AND NGOS: GENDER VIOLENCE AND REPRODUCTIVE RIGHTS* 133-58 (2007).

106. See Alice M. Miller, *Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, 4 HEALTH & HUM. RTS. 68, 70 (2000) (explaining that the conflation of sexual rights with reproduction rights has caused sexual rights to be considered a subset of reproductive rights, allowing such rights to disappear or be forgotten by states); see also Stanley J. Tambiah, *The Crisis of Secularism in India*,

enhance enforcement of the right to health endured substantial delay in the adoption of an Optional Protocol to the Covenant on Economic, Social and Cultural Rights, as well as persistent structural weaknesses in the procedures established.<sup>107</sup>

To illustrate the extent that robust enforcement measures are attached to women's reproductive rights, it is important to note the extent that they are articulated and understood as civil and political rights. In particular, significant human rights developments in state obligations to liberalise access to abortion have occurred within the mainstream and regional treaty based systems for the protection of civil and political rights.<sup>108</sup> There is recognition of the potential for highly restrictive abortion regimes to constitute violations of the right to freedom from torture, and cruel, inhuman, and degrading treatment, where the denial of abortion leads to the threshold level of physical and mental harm.<sup>109</sup> Consistent with this focus has been the right to life concerns raised by similar circumstances in which the denial of access to abortion has threatened the life of the pregnant woman.<sup>110</sup> Further, a related set of procedural obligations have been articulated, most notably by the European Court of Human Rights, around the need for an effective mechanism to vindicate rights to abortion where domestic regimes establish limited provision for lawful abortion.<sup>111</sup> Nevertheless, progress secured through civil and political rights avenues evidence a general reluctance to

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in SECULARISM AND ITS CRITICS 431 (Rajeev Bhargava ed., 1998) (describing difficulties faced by women seeking redress for women's human rights violations under Muslim personal law).

107. See Arne Vandenberg & Wouter Vandenhoe, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of Its Effectiveness in Light of the Drafting Process*, 10 HUM. RTS. L. REV. 207, 218 (2010) (noting that such delay may have been caused by states that opposed the Protocol); see also Catarina de Albuquerque, *Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights*, 32 HUM. RTS. Q. 144, 147 (2010).

108. See generally Christina Zampas & Jamie M. Gher, *Abortion as a Human Right: International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 251 (2008) (providing an overview of recent developments in the UN, Europe, and Inter-American and African human rights systems).

109. See H.R.C. Res., Karen Noelia Llantoy Huamán v. Peru, Communication No. 1153/2003, ¶¶ 3.1, 3.2(b), U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 3, 2005).

110. Zampas and Gher, *supra* note 108, at 255.

111. See e.g., Tysiac v. Poland, 5410/03 Eur. Ct. H.R. 219, 249 (2007); A, B and C v. Ireland, 25579/05 Eur. Ct. H.R. 195, 265 (2010); R.R. v. Poland, 27617/04 Eur. Ct. H.R. 209, 247 (2012).

engage with the substantive issues of gender equality, including the rights of individual women to appropriate healthcare and to control their reproduction and sexuality.

In light of the focus on the deaths and disappearances of women in the first and second inquiries, the concern in the third inquiry, with the inaccessibility of contraceptives to women in the Philippines capital, Manila, signaled an important expansion in the substantive focus of the inquiry procedure.<sup>112</sup> The articulation of state obligations to vindicate women's sexual and reproductive rights in the Philippines inquiry is therefore a cause for optimism. In addition to the substantive focus on contraception, the Philippines inquiry shares some important features with reproductive rights violations elsewhere, in particular in scrutinizing de jure and de facto protection of women's reproductive rights.<sup>113</sup> The Committee's scrutiny of both de jure and de facto protection of women's reproductive rights resonates importantly with many women's experiences of the law, which is that rights guaranteed on paper are often deficient in practice.<sup>114</sup> Moreover, the Committee's identification and robust denouncement of the gender stereotypes that informed the denial of publicly funded contraception to women in the capital reveals, once again, the critical role of the CEDAW Committee in advancing feminist-informed interpretations of the treaty's provisions.<sup>115</sup>

The Philippines inquiry did not, however, redress all identified concerns with the Committee's earlier focus on civil and political rights violations and

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112. Rep. on the Philippines, *supra* note 7, at ¶ 51(g).

113. *See id.* at ¶ 3.

114. *See generally* CAROL SMART, FEMINISM AND THE POWER OF LAW 138 (1989) (stating that the more that women, especially minority women, resort to law, the more backlash they may encounter, which results in the counter-use of the law).

115. *Id.*; *see* Rep. on the Philippines, *supra* note 7, at ¶¶ 42-43 (“[t]he Committee considers that article 5, read together with articles 12 and 16, requires States parties to eliminate gender stereotypes that impede equality in the health sector and in marriage and family relations . . . . [t]hus, the Committee finds that the implementation of Executive Orders Nos. 003 and 030 with regard to the delivery of reproductive health services and commodities in Manila reinforced gender stereotypes prejudicial to women, given that they incorporated and conveyed stereotyped images of women's primary role as child bearers and child rearers, thereby perpetuating discriminatory stereotypes already prevalent in Filipino society. Such stereotypes further contributed to the belief that it was acceptable to deny women access to modern methods of contraception because of their natural role as mothers and had the effect of impairing the enjoyment by women of their rights under Article 12 of the Convention. The Committee concludes that the State party has violated its obligations under Article 5 of the Convention.”).

harms to the body. In the Committee's limited consideration of the violations engendered by the absence of safe and legal abortion in the city (and, indeed, the country), the Committee frames the violation principally as a cause of maternal deaths.<sup>116</sup> The CEDAW violations inherent to the absence of safe and legal abortion are not, however, identified. Moreover, the nuanced feminist articulation of gender stereotypes and restrictions on sexual and reproductive rights receives no airing in the discussion of unsafe abortions. The broader implications of this narrow treatment by the Committee of access to abortion through the inquiry procedure were potentially significant. The approach in the Philippine's inquiry heavily circumscribed its relevance to the many other state parties with restrictive abortion laws, but where unsafe abortions are not in evidence. In the absence of a robust articulation of women's rights to reproductive autonomy guaranteed under the Convention, the transferability of the inquiry findings in the Philippines case would be limited. The substantive focus of the initial three inquiries on civil and political rights violations evidenced implicit gender hierarchies about the sorts of violations that meet the "grave or systematic" threshold. Given the emphasis in the preparatory documents on the need to avoid such hierarchies, a position which was ultimately endorsed in the text of the Optional Protocol, evidence of such hierarchies in the Committee's practice was concerning.

Against this backdrop, the Committee's determination that restrictive access to abortion in Northern Ireland constituted both "grave and systematic"<sup>117</sup> violations of the CEDAW carried enormous significance. Importantly, the report gives extensive and detailed consideration to the violation of social and economic rights caused by abortion law and policy in the jurisdiction. Women in Northern Ireland with unwanted pregnancies commonly travel to England and elsewhere in order to access a lawful abortion, involving considerable financial burden. The Committee was therefore alert to the "particularly adverse impact on women in situations of poverty."<sup>118</sup> The Committee gave thoughtful consideration to the relationship between the criminalization of abortion and women's socio-economic status in Northern Ireland, most notably "the link between the low control that women have over their fertility and the disproportionate risk of poverty faced by large families."<sup>119</sup> In addition, the Committee gave

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116. *See id.* at ¶¶ 11, 18.

117. Rep. on U.K., *supra* note 8, at ¶ 83.

118. *See id.* at ¶ 34.

119. *See id.* at ¶ 34.

extensive consideration to the “inadequacy of family planning support” in Northern Ireland. The Committee drew for particular complaint the high degree of school discretion over sexual health education and information,<sup>120</sup> coupled with inadequate state efforts to ensure access to reproductive health services and contraceptives.<sup>121</sup> The Committee’s robust statement of State party’s obligations with respect to women’s sexual health and reproductive rights, under both articles 12 and 16, was therefore a particularly important restatement of the indivisibility of women’s civil and political, economic, social and cultural human rights under CEDAW.<sup>122</sup>

### III. IMPROVING STATE COMPLIANCE

#### *A. The Challenge of Routine State Non-Compliance with CEDAW*

The problem of routine state non-compliance with CEDAW is best-captured by anthropologist Sally Engle Merry: “CEDAW is law without sanction.”<sup>123</sup> The challenge of state non-compliance is clearly linked to the broader structural weaknesses of the Convention; however, it also presents a more specific challenge to the Convention. Ongoing state non-compliance in response to the Committee’s Concluding Observations erodes the integrity of the Convention as a rights-guaranteeing instrument and undermines the confidence of women and civil society who engage with the Convention’s periodic state reporting.<sup>124</sup> It is a persistent and pernicious challenge to the Convention’s efficacy.

The Optional Protocol was intended to strengthen the Committee’s capacity to address state non-compliance in three important respects. Firstly, the Optional Protocol would empower the Committee to move beyond constructive dialogue with states by providing a means of *recourse* for women.<sup>125</sup> The uniqueness of this enforcement opportunity was underlined

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120. *See id.* at ¶¶ 43-44.

121. *See id.* at ¶¶ 45-47.

122. *See id.* at ¶¶ 54, 60, 72 (providing a general statement of the law and findings with respect to the U.K.).

123. Sally Engle Merry, *Constructing a Global Law – Violence Against Women and the Human Rights System*, 28 *LAW & SOC. INQUIRY* 941, 943 (2003) [hereinafter *Constructing a Global Law*].

124. *See Advocating Abortion Rights in Northern Ireland*, *supra* note 22, at 732 (including a case study in routine state non-compliance, where the author reviews the United Kingdom’s failure to implement successive recommendations from the Committee on access to lawful abortion in Northern Ireland).

125. *See Comparative Summary*, *supra* note 35, at ¶ 11 (emphasis added).



in discussions leading to the Optional Protocol, as there was a lack of specific procedures within the United Nations system allowing for the consideration of “specific cases or extensive violations, of women’s human rights, and providing for the possibility of redress for violations suffered.”<sup>126</sup> Secondly, the Optional Protocol established the possibility for the Committee to determine violations in specific incidences. The implementation of human rights treaties requires the adoption of national measures by States Parties to give effect to the provisions of the Convention and international measures and procedures for enforcing the Convention.<sup>127</sup> The importance of the ability to move beyond Concluding Observations to specific determinations on violations is symbolically and practically important: by determining that rights guaranteed under CEDAW have been violated, the Committee reaffirms that rights under the Convention are not merely aspirational; moreover, determining violations provides a baseline against which state parties can measure their performance.<sup>128</sup> Thirdly, the Optional Protocol offered a means to redress state non-compliance by establishing an integrated and ongoing system of state accountability for implementing the Committee’s recommendations.<sup>129</sup> Specific incidences of non-compliance can be challenged through individual communications and inquiries. Moreover, the Committee can provide detailed guidance to states parties in their efforts to implement the Convention with respect to these specific violations, while periodic state reporting provided accountability for broader issues of non-compliance.<sup>130</sup> The enforcement mechanisms established by the Optional Protocol provided the basis for a more integrated approach to redressing non-compliance in an ongoing way through individual communications, inquiries, and periodic state reporting.<sup>131</sup>

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126. *Additional Views*, *supra* note 33, at ¶ 15.

127. *Id.* at ¶ 16.

128. Audrey R. Chapman, *A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 38 (1996).

129. Comm’n on the Status of Women, *Convention on the Elimination of All Forms of Discrimination Against Women, Including the Elaboration of a Draft Protocol to the Convention: Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention*, ¶ 18, U.N. Doc. E/Cn6/1997/5 (1997).

130. U.N. Secretary-General, *Follow-Up to the Fourth World Conference on Women: Review of Mainstreaming in the Organizations of the United Nations System*, ¶¶ 48-51, U.N. Doc. E/CN. 6/1997/2 (Feb. 7, 1997) [hereinafter *Follow-Up*].

131. *Id.* at ¶¶ 54-57.

*B. The Efficacy of the Inquiry Procedure to Date*

From its limited utilization to date, the efficacy of the inquiry procedure in providing recourse to victims of “grave or systematic” violations has been significantly compromised by the timeline involved in activating the procedure. Writing in 2007, the two CEDAW Committee members who led the Mexico inquiry observed: “[c]ompared to the communication procedure, [the inquiry procedure] has the advantage of not requiring the exhaustion of domestic remedies and its less formal process makes a timely response possible.”<sup>132</sup> Despite this optimistic early assessment, the timelines involved in activating the inquiry procedure have been lengthy. While this assessment was arguably accurate in the case of the Mexico inquiry, the request for an inquiry that ultimately led to the publication of the inquiry report on Mexico in 2005 was first made October 2002 and it has not been true of the subsequent inquiries.<sup>133</sup> The Canadian inquiry report published in 2015 resulted from a request made in January 2011.<sup>134</sup> The timeline involved in the activation of the procedure in the Philippines and Northern Ireland cases are particularly striking. The request for an inquiry into the Philippines was first submitted to the Committee in June 2008.<sup>135</sup> The Committee decided relatively quickly, November 2009, to proceed to an inquiry, however all further stages of the procedure operated very slowly.<sup>136</sup> In July 2010, two Committee members were appointed to conduct the inquiry, and in November 2012, the Committee members visited Manila to investigate the alleged violations,<sup>137</sup> with the publication of the summary report in 2015. In the case of Northern Ireland, the initial request to conduct an inquiry was made in December 2010; in September 2016, designated members of the Committee visited the state party. The inquiry report was finally published in February 2018, more than seven years after the initial request. These lengthy timelines evidence real potential to corrode confidence in the procedure, as well as undermine one of the Committee’s stated motivations for the inquiry procedure in the first instance, namely, to be a “timely response” process to state non-compliance.<sup>138</sup>

More positively, in terms of providing recourse to victims of CEDAW

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132. See da Silva & Gómez, *supra* note 86, at 299.

133. Rep. on Mexico, *supra* note 5, at ¶ 3.

134. Rep. on Canada, *supra* note 7, at ¶ 3.

135. Rep. on the Philippines, *supra* note 7, at ¶ 1.

136. *Id.* at ¶ 4.

137. *Id.*

138. da Silva & Gómez, *supra* note 86, at 299.

violations, the Committee has emphasized throughout the inquiry reports to date that state parties cannot hide behind decentralized systems in order to negate state responsibility for grave or systematic violations.<sup>139</sup> A feature common to the four state parties scrutinized through the inquiry procedure is the operation of devolved or decentralized administrations. The Committee's determined rejection of state party efforts to abdicate responsibility for non-compliance is consistent with its articulations elsewhere of state responsibilities under the Convention.<sup>140</sup> Moreover, it provides a practical and unambiguous response to one of the most common state justifications for violations.<sup>141</sup>

In terms of empowering the Committee to identify violations of the Convention, continuing uncertainty around the precise thresholds to activate the inquiry procedure is unhelpful. In the three inquiries made public to date, the Committee has confirmed that the violations met the threshold of gravity to activate the procedure.<sup>142</sup> While the Committee declined to elaborate on the gravity criterion in the Mexico inquiry report, the definition advanced throughout the two subsequent inquiry reports has been consistent, namely "[t]he Committee's findings regarding the gravity of the violations must take into account, notably, the *scale, prevalence, nature* and *impact* of the violations found."<sup>143</sup> Committee practice in determining the "systematic" nature of the violation has, however, varied. Neither the Optional Protocol itself, nor the Committee's Rules of Procedure, offers any detail as to how the "systematic" threshold is defined or determined.<sup>144</sup> Further, in the Mexico inquiry report, the Committee declined the opportunity to elaborate the threshold for establishing "systematic" violations of the Convention.<sup>145</sup> Notably, in academic writing, members of the Committee advanced the

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139. See, e.g., Rep. on Canada, *supra* note 7, at ¶¶ 118, 195; see also Rep. on the Philippines, *supra* note 7, at ¶¶ 2, 9, 19, 23; see also Rep. on UK, *supra* note 8, at ¶¶ 52-53, 82.

140. Comm. on the Elimination of All Forms 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, ¶ 39, U.N. Doc. CEDAW/C/GC/28 (Oct. 19, 2010).

141. See, e.g., Rep. on Canada, *supra* note 7, at ¶¶ 118, 195; see also Rep. on the Philippines, *supra* note 7, at ¶¶ 2, 9, 19, 23; see also Rep. on UK, *supra* note 8, at ¶¶ 53.

142. See generally 2014 Annual Report, *supra* note 63.

143. See Rep. on Canada, *supra* note 7, at ¶ 213 (emphasis added); see also Rep. on the Philippines, *supra* note 7, at ¶ 47 (emphasis added).

144. See 2014 Annual Report, *supra* note 63.

145. *Id.*

following—useful—definition of the term:

Systematic violation means that the violation is not an isolated case, but rather a prevalent pattern in a specific situation; one that has occurred again and again, either deliberately with the intent of committing those acts, or as the result of customs and traditions, or even as the result of discriminatory laws or policies, with or without such purpose.<sup>146</sup>

The Committee's lengthiest deliberation to date on the threshold for the 'systematic' criterion is contained in the Philippines summary report, which echoes the definition above in determining that the violations can be systematic with or without the state's intent.<sup>147</sup> Further, the Committee determined that the "systematic nature of violations can also be assessed in the light of the presence of a significant and persistent pattern of acts that do not result from a random occurrence."<sup>148</sup> This standard was reiterated in the Northern Ireland inquiry report,<sup>149</sup> with a determination that:

The systematic nature of the violations stem from the deliberate retention of criminal laws and state policy disproportionately restricting access to sexual and reproductive rights, in general, and highly restrictive provision, in particular.<sup>150</sup>

Ultimately, however, fuller elaboration by the Committee of its reasoning in determining why "systematic" violation was not identified, as in the Canadian case, will be necessary.<sup>151</sup>

Finally, in terms of empowering the Committee to ensure continuing state accountability to the Committee on the implementation of those recommendations, there are promising signs of the useful linkage by the Committee of its decision to activate the procedure and state failure to implement recommendations contained in Concluding Observations. Both the Canadian and U.K. inquiries are procedurally important because their activation was directly connected to the state's failure to implement the Committee's recommendations in earlier Concluding Observations. In the 2008 periodic review, the Committee identified the cases of missing and murdered women in Canada as a priority issue, selecting its recommendations in this regard for "follow-up" prior to the State party's

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146. See da Silva & Gómez, *supra* note 86, at 300.

147. See Rep. on the Philippines, *supra* note 7, at ¶ 48.

148. *Id.*

149. Rep. on U.K., *supra* note 8, at ¶ 82.

150. See da Silva & Gómez, *supra* note 86, at 300.

151. See Rep. on Canada, *supra* note 7, at ¶ 213.

next scheduled periodic report.<sup>152</sup> When the Committee determined in January 2011 that the recommendation had not been implemented by Canada, and in October 2011 that the state had failed to provide further requested additional information on implementation, the Committee decided to activate the inquiry procedure with respect to Canada.<sup>153</sup> In Northern Ireland, also, the inquiry is procedurally important because its activation was directly connected to the state's failure to implement the Committee's recommendations in earlier Concluding Observations. After recommendations to the U.K. in 1999 calling for action on access to abortion,<sup>154</sup> the Committee's Concluding Observations in 2013 prioritized recommendations on abortion in Northern Ireland for "follow-up".<sup>155</sup> In November 2014, after determining that the U.K. had failed to implement its priority "follow-up" recommendations, the Committee opted to proceed with the inquiry.<sup>156</sup> Neither the Optional Protocol, nor the Committee's Rules of Procedure,<sup>157</sup> formally requires that the Committee first determine that the periodic reporting and follow-up procedures are exhausted before proceeding under Article 8. Also, the follow-up procedure utilized in this instance did not in fact exist at the time of the Mexican inquiry. The Canadian case is therefore valuable for illuminating further factors that may inform the Committee's determination to proceed with an inquiry. Further, it speaks in potentially important ways to the need to provide practical responses to CEDAW's under-enforcement. If non-implementation of the Committee's recommendations that are identified for priority "follow-up" carry the credible risk of the Committee activating the inquiry procedure, this development introduces consequences for the state of persistent non-compliance with the Committee's recommendations. It also stands to create a useful and constructive relationship between state periodic examinations, shadow reporting, and requests for an inquiry.

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152. *Id.* at ¶10.

153. *Id.* at ¶¶ 11-12.

154. Rep. of Comm. on the Elimination of Discrimination Against Women, Twenty-First Session (7-25 June 1999), ¶ 310, U.N. DOC. A/54/38/Rev.1, GAOR Fifty-Fourth Session Supplement No. 38 (1999).

155. Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, ¶ 68, U.N. DOC. CEDAW/C/GBR/CO/R7 (July 30, 2013).

156. Rep. on U.K., *supra* note 8, at ¶ 82.

157. Comm. on the Elimination of All Forms of Discrimination Against Women, Rules of Procedure of the Committee on the Elimination of Discrimination against Women, U.N. DOC. A/56/38 (SUPP) [hereinafter CEDAW Rules of Procedure].

## IV. CONCLUSION: WAYS FORWARD FOR THE INQUIRY PROCEDURE

The escalation in the public use of the inquiry procedure since 2015 signals the Committee's greater confidence in its utilization, as well as sending an important signal to state parties about the potential consequences of continued non-compliance. This Article finds that the promise of the inquiry procedure has, eighteen years after Optional Protocol's entry into force, not yet been delivered. Nevertheless, the Article has identified areas of good practice and issues for priority attention in order to ensure the inquiry procedure's efficacy into the future. While this Article identified the enduring salience of foundational feminist critiques of human rights in the Committee's practice to date through the inquiry procedure, the Article also proposes practical measures to ameliorate the most problematic issues identified. The Conclusion deals with these proposals in turn.

Firstly, the issue of timelines is a very real and practical obstacle to wider utilization of the inquiry procedure by civil society. Further, it bolsters state party perceptions that lengthy delays in communicating with the Committee serve state interests. Efforts by the Committee to build its capacity to respond to inquiry requests<sup>158</sup> would be very usefully accompanied by the Committee's consideration of an expedited procedure for considering requests and communicating with states. It is clear in both the Canadian and Philippines cases that delays were primarily due to the state party's delay in responding to requests for information and scheduling the visit to the state party's territory, and the Committee's capacity to redress such delays is admittedly limited. Nevertheless, the Committee has itself noted "the urgent need to decide on a methodology for conducting inquiries and to review existing rules of procedures on inquiries under Article 8 of the Optional Protocol,"<sup>159</sup> which suggests that there is scope for the Committee to streamline in its own procedures in order to reduce unnecessarily delay.<sup>160</sup> Further, the Committee is empowered to conduct an inquiry without a visit to the territory of the relevant state party. While this approach is clearly less desirable as a methodology, it is within the range of options open to the Committee in order to further expedite inquiry requests and may merit further consideration. The publication of two inquiry reports in 2015, followed by the 2018 publication of the U.K. report, may introduce new urgency in state responses to the Committee, as the prospect that an inquiry will proceed becomes more credible.

Secondly, incipient signs of a relationship between state failure to

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158. See 2013 Annual Report, *supra* note 61, at ¶27.

159. *Id.*

160. *Id.*

implement recommendations from the Committee's Concluding Observations—in particular where the “follow-up” procedure has been attached to particular recommendations, and the Committee's ultimate decision to conduct an inquiry—are positive. They could usefully be reinforced through greater elaboration of the relationship in any further inquiry reports.

Thirdly, there is a need for much greater legal clarity in the definition and threshold applied by the Committee in determining the “systematic” violation of the Convention. Practice to date has not been either entirely clear or consistent. Greater clarity could be ensured through amendment to the Rules of Procedure.<sup>161</sup> On the whole, the proposals here regarding timeline, relationship to concluding observations, and clarity in the legal standards applied, could all be usefully supported through the adoption of a General Recommendation by the Committee dedicated to clarifying procedural and substantive questions concerning the inquiry procedure.

Finally, the Committee is encouraged to continue its pursuit of bolder normative and doctrinal developments in interpreting Convention protections of social and economic rights through the inquiry procedure as evidenced in the Northern Ireland inquiry report. As the short discussion of European Court of Human Rights abortion jurisprudence illustrates, while the institutions and courts dedicated to the protection of civil and political rights are critical actors in advancing women's rights, it is the CEDAW Committee that is uniquely capable of developing of a broad swathe of women's rights through its robust interpretation of the Convention.<sup>162</sup> Experience from the campaign to recognize violence against women as a human rights violation evidences the importance of the CEDAW Committee in articulating and advancing subaltern interpretations of human rights obligations that ultimately penetrate the mainstream human rights system.<sup>163</sup> As Merry observes, culture is as much present in international human rights conferences and UN institutions as in local villages (though typically associated only with the latter).<sup>164</sup> The Committee has, to date, fostered broader cultural change within the international human rights system through constructive dialogue, General Recommendations, and, more recently, the jurisprudence developed under the individual communications. It is critical to do so also through focused use of the inquiry procedure.

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161. See generally CEDAW Rules of Procedure, *supra* note 157.

162. See *e.g.*, *Tysiac v. Poland*, 5410/03 EUR. CT. H.R. 219, 249 (2007); *A, B and C v. Ireland*, 25579/05 EUR. CT. H.R. 195, 265 (2010); *R.R. v. Poland*, 27617/04 EUR. CT. H.R. 209, 247 (2012).

163. See EDWARDS, *supra* note 96, at 168-72.

164. HUMAN RIGHTS & GENDER VIOLENCE, *supra* note 19, at 16.