



The Misconception of Women's Rights and The Failed International Legal System

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Abstract

The Declaration and Conventions on Human Rights are treated as a sub-category of the universal rights regime and formulated as 'protective' measures rather than as human rights that can be enforced at international or national courts. There have been many efforts to address the resulting marginalisation of women's rights, including the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the mainstreaming of women's human rights. While these efforts have been successful in many respects, there are continuing conceptual and practical problems including, not only the limitations of anti-discrimination law but the danger that specific recognition of women's rights violations may simply reproduce women's secondary status but not the legal rights enforce by international or national law. This article will attempt to discuss the problematic aspect of enforcing women's right at the corporate and national level. It will also examine the North Mara Gold Mine Ltd allegations of sexual abuse at the Mine, that the Mine has ignored or neglected the victims of those alleged abuses.

1. Introduction

International human rights law prohibits discrimination against women in their enjoyment of all human rights and the fundamental freedoms enshrined in the Universal Declaration of Human Rights (UDHR) 1948.¹ While non-discrimination against women is an essential component to the realisation of women's rights in law and practice, its comparative approach measures women's equality against men's enjoyment of rights, reinforcing the masculinity of the universal principle of human rights law, whose rights are fully promoted and explicitly protected. To the extent that violations experienced by women is exclusively or primarily expressly and recognised in the founding declarations and human rights instruments. Thus, attaining equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and United Nations values.² Women around the world nevertheless regularly suffer violations of their human rights throughout their lives, and realising women's human rights has not always been a priority for the vast national states.³ Achieving equality between women and men requires a comprehensive understanding of the ways in which women experience discrimination and are denied equality so as to develop appropriate strategies to eliminate such discrimination.

Also, the United Nations has a long history of addressing women's human rights and much progress has been made in securing women's rights across the world in recent decades.⁴ However, important gaps remain and women's realities are constantly changing, with new manifestations of discrimination against them regularly emerging.⁵ Some groups of women face additional forms of discrimination based on their age, ethnicity, nationality, religion, health status, marital status, education, disability and socioeconomic status, among other grounds.⁶ These intersecting forms of discrimination must be taken into account when developing measures and responses to combat human rights violations against women at both the national

¹ *Universal Declaration of Human Rights* (United Nations Publications 2008).

² Hillkka Pietilä and Jeanne Vickers, *Making Women Matter: the Role of the United Nations* (Zed Books 1990).

³ Newman Wadesango, Symphorosa Rembe and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13 (2) *Anthropologist* 121, 129.

⁴ Julie Stone Peters and Andrea Wolper, eds. *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 2018).

⁵ Jennifer L. Berdahl and Celia Moore, 'Workplace Harassment: Double Jeopardy for Minority Women' (2006) 91 (2) *Journal of Applied Psychology* 426.

⁶ Raymond F. Gregory, *Women and Workplace Discrimination: Overcoming Barriers to Gender Equality* (Rutgers University Press 2003).

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and international level.⁷ In 1945, the Charter of the United Nations (UN Charter) recognised the principle that human rights and fundamental freedoms should be enjoyed by everyone ‘without distinction as to sex.’⁸ In addition, it is affirmed in the Universal Declaration of Human Rights 1948 that;

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.’⁹

What is important to note from the text of the UDR 1948 is that, international human rights instruments have repeatedly affirmed that women and men must equally enjoy the human rights they enumerate, without discrimination on the ground of sex.¹⁰ This new age of universal human rights promised women, for the first time in international law, the full recognition of their humanity, marking a decisive break with the long-standing legal representation of women as lacking full legal and civil capacity.¹¹ Significantly, the promise of equality also extended to the private realm of the family.¹² In this understanding women were no longer to be treated as the dependents of men, or as the property of their fathers or husbands.

⁷ United Nations Human Rights Commissioner, *Women`s Rights are Human Rights* (United Nations Press 2014)

⁸ Dan Sarooshi, *The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999).

⁹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 19 August 2018.

¹⁰ *Ibid.* Article 16 (1) ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.’

¹¹ Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights* (1990) *12 Human Rights Quarterly* 486.

¹² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 <<http://www.refworld.org/docid/3ae6b3aa0.html>> accessed 19 August 2018 1.. The

family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

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Yet there has been widespread resistance to taking these obligations seriously in some national states,¹³ as evidenced by the many sweeping reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁴ some of which clearly defeat its object and purpose.¹⁵ As noted by the former UN High Commissioner for Human Rights Arbour in a statement to the Human Rights Council in 2008,

‘women and girls continue to be regarded as lesser beings in many corners of the world’, despite the adoption of the Universal Declaration of Human Rights (UDHR) 60 years earlier.¹⁶ Restrictions on women’s freedom of movement, discriminatory property and inheritance laws, and practices such as male guardianship continue to¹⁷ ‘put women at the risk of being subjected to abuse, violence and oppression, both inside and outside their homes’.¹⁸

This is partly because international law and human rights have failed to understand the conceptual parameter of what constitutes women’s rights and the legal element of human rights. In some countries, past hard-won advances towards the recognition of women’s rights are now under threat, or have been wound back, in the face of cultural or religious ‘fundamentalisms’¹⁹ or in the name of thwarting international terrorism.²⁰ The United Nations defines violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’²¹ It includes: domestic violence (this includes violence from an intimate partner and family members), rape and other forms of sexual violence, female genital mutilation, early and forced marriage, economic control, coercion and emotional abuse, but it takes many forms. This violation constitutes the abuse of

¹³Lila Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Tts Others’ (2002) 104 (3) *American Anthropologist* 783, 790.

¹⁴International Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW)

¹⁵Belinda Clark, ‘The Vienna Convention Reservations Regime and the Convention on Discrimination against Women’ (1991) 85 (5) *American Journal of International Law* 281, 321.

¹⁶ ‘Statement by Louise Arbour, UN High Commissioner for Human Rights, on the occasion of the 8th Session of the Human Rights Council’, Meeting on Human Rights of Women, Geneva, 5 June 2008.

¹⁷Report of the Secretary-General, ‘In-depth study on all forms of violence against women’, A/61/122/Add.1, 6 July 2006, para 58

¹⁸*Ibid.*

¹⁹*Ibid.*

²⁰Susan Faludi, *The Terror Dream: Fear and Fantasy in post-9/11 America* (Macmillan 2007).

²¹Charlotte Watts and Cathy Zimmerman, ‘Violence against Women: Global Scope and Magnitude’ (2002) 359 (9313) *The lancet* 1232, 1237.

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women's fundamental human rights, often with devastating consequences and negative impact on individual women's livelihoods.²²

Though, there are several international human rights agreements which require states to prevent and respond to violence against women, such as UDR 1948²³ and the ICCPR 1966.²⁴ However, it can be contest that legislation alone is not enough, it must be promoted and enforced at national court or by appropriate legal authority. Support services must be available to women escaping violence, including access to shelters. Nonetheless, ultimately the key to ending violence against women and girls is in transforming traditional gender roles and power relations, changing the attitudes and beliefs which allow violence to continue. Although, it is possible to argue that the grim reality is that women fare considerably worse than men on almost every indicator of social well-being, despite the assumption by all states of at least some international legal obligations to promote their equal enjoyment of human rights, and despite many good intentions. Violence against women continues to be pervasive around the world, endangering women's lives in both public and private spheres without any protection for the victims.²⁵

A research by the World Health Organisation estimates that, every day, 1,500 women and girls die of preventable complications related to pregnancy and child-birth.²⁶ As an international group of eminent global leaders, brought together by Mandela, recently observed, religious teachings and customary practices;

'have been [mis]used throughout the centuries to justify and entrench inequality and discrimination against women and girls', denying them 'fair access to education, health, employment, property and influence within their own communities.'²⁷

Despite these development, women's inequality is still widely regarded as 'natural' and as prescribed by religious teachings and cultural traditions.²⁸ Even though the lack of political will

²²Hersh Lauterpacht, *International Law and Human Rights* (Shoe String PressInc 1950).

²³Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999).

²⁴Rights, Cultural, and Political Rights ICCPR, 'International Covenant on Economic, Social and Cultural Rights' (1966) *Office of the United*.

²⁵*Ibid* (no 15).

²⁶Human Rights Council, 'Preventable maternal mortality and morbidity and human rights', Res 11/8, 27th meeting, 17 June 2008, paras 1 and 2.

²⁷The Elders, 'Equality for Women and Girls', 2 July 2009, < <http://www.theelders.org/womensinitiatives>> accessed 19 august 2018.

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presents an extremely significant barrier to the realisation of women's rights and equality at national level in some states, it is not the only problem. International human rights law itself presents some obstacles for the realisation of women's right.²⁹ As stated by Douzinas, human rights 'construct humans', rather than the reverse, and therefore '[a] human being is someone who can successfully claim rights.'³⁰ This presents a conundrum for women's human rights advocates because, in crafting laws that respond to the gendered realities of women's lives, there is the risk of reconstituting gender stereotypes through reproducing those realities, rather than challenging them. At the same time, 'special' measures designed to address women's specific injuries and disadvantage continue to affirm the maleness of the universal subject of human rights law, who needs no special enumeration of his gender-specific injuries.³¹ In the words of Charlesworth the 'paradox of feminism'; whether women's rights are best protected through general norms that treat women as the same as men, or through specific norms applicable only to women.³²

A possible implication is that, the paradox forces the legal systems to ask hard questions about how women's inclusion as full subjects the universal regime of human rights law might be achieved. Thus, this article examines women's equality and rights through international human rights law and discusses some of the ongoing dilemmas facing the enforcement of human rights at domestic courts, where the corporation have violated the rights of women through it business activities. The first section of the article will discuss the treatment of women in international law prior to the adoption of the UN Charter, in order to emphasise the significance of the shift to the promotion of women's rights across the globe, the second part of the article will focus on the international legal instrument available for women to enforce their rights, while the third part looks at a case studying of unreported allegations of sexual abuse at the Barrick Gold's North Mara Mine, before concluding on an initiative which human rights advocates could deploy to protect women rights.

²⁸Xiaorong Li, 'Gender Inequality in China and Cultural Relativism' (1995) 20 *Women, Culture, and Development* 407, 426.

²⁹Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 (2) *Human Rights Law Review* 207, 248.

³⁰Costas Douzinas, 'The end (s) of Human Rights' (2002) 26 *Melbourne University Law Review* 445.

³¹Dianne Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' (2006).

³²Hilary Charlesworth, 'Not waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1.

2. History of International Human Rights Laws and Mechanisms

2.1. Human Rights Treaties Post 1948

After the adoption of the Universal Declaration, the Commission on Human Rights began drafting two human rights treaties, the International Covenant on Civil and Political Rights³³ and the International Covenant on Economic, Social and Cultural Rights.³⁴ Together with the Universal Declaration, these make up the International Bill of Human Rights.³⁵ The provisions of the two Covenants, as well as other human rights treaties, are legally binding on the States that ratify or accede to them. States that ratify these treaties periodically report to bodies of experts, which issue recommendations on the steps required to meet the obligations laid out in the treaties. These treaty-monitoring bodies also provide authoritative interpretations of the treaties and, if States have agreed, they also consider individual complaints of alleged violations.³⁶

Both Covenants use the same wording to prohibit discrimination based on, inter alia, sex (art. 2), as well as to ensure the equal right of men and women to the enjoyment of all rights contained in them (art. 3). The ICCPR guarantees,³⁷ among other rights, the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, rights relating to due process in criminal and legal proceedings, equality before the law, freedom of movement, freedom of thought, conscience and religion, freedom of association, rights relating to family life and children, rights relating to citizenship and political participation, and minority groups' rights to their culture, religion and language.³⁸ The International Covenant on Economic, Social and Cultural Rights guarantees, for instance, the right to work, the right to form trade unions, rights relating to marriage, maternity and child protection, the right to an adequate standard of living, the right to health, the right to education, and rights relating to culture and science.³⁹

³³UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171 <<http://www.refworld.org/docid/3ae6b3bf0.html>>accessed 21 August 2018.

³⁴UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, <<http://www.refworld.org/docid/3ae6b36c0.html>>accessed 21 August 2018.

³⁵Amnesty International Publications, *International Bill of Human Rights* (1978).

³⁶For more information on the human rights treaty system, see OHCHR, Fact Sheet No. 30: The United Nations Human Rights Treaty System and OHCHR, Fact Sheet No. 7: Individual Complaint Procedures under the United Nations Human Rights Treaties.

³⁷Robert WHOag, *International Covenant on Civil and Political Rights: Encyclopedia of Global Justice* (Springer Dordrecht 2011).

³⁸United Nations, 'International Covenant on Civil and Political Rights' (1988)15 *Annual review of population law* 148.

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

In 1967, United Nations Member States adopted the Declaration on the Elimination of Discrimination against Women, which states that discrimination against women is an offence against human dignity and calls on States to ‘abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women.’⁴⁰ Less than a year later a proposal for a legally binding treaty on women’s rights was made. The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979.⁴¹ Its preamble explains that, despite the existence of other instruments, women still do not enjoy equal rights with men.⁴²

The Convention articulates the nature and meaning of sex-based discrimination, and lays out State obligations to eliminate discrimination and achieve substantive equality that is, equality in outcome. As with all human rights treaties, only States incur obligations through ratification. However, the Convention articulates State obligations to address not only discriminatory laws, but also practices and customs, and discrimination against women by private actors.⁴³ Nonetheless, a point to note here is that the Convention have failed to lay appropriate procedures for the state to take, in order to implement or achieve the human rights duties imposed on the members. The fundamental flaw in this Conventions is one of liability, remedy and enforcement. Even though the text of the Convention is clear on its face, there still exists a lack of liability, remedy and enforcement. Without these three elements [liability, remedy and enforcement] it is difficult to see the significant effect this Convention will have on the national legal system or change of attitude at the national level.

³⁹*Covenant on Economic, Social and Cultural Rights: Economic, Social and Cultural Rights* (Routledge 2017).

⁴⁰United Nations. General Assembly. *Convention on the Elimination of all forms of Discrimination against Women* (UN 1979).

⁴¹Charlotte Bunch, ‘Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights’ (1990) *12 Human Rights Quarterly* 486.

⁴²Julie A Minor, ‘An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women’ (1994) *24 Georgia Journal of International & Comparative Law* 137.

⁴³Laura Reanda, ‘Human Rights and Women’s Rights: The United Nations Approach’ (1981) *3 Human Rights Quarterly* 11.

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Though, with these general principles as an overarching framework, the specific obligations of States to eliminate discrimination against women in political, social, economic and cultural fields are laid out in 16 substantive articles.⁴⁴ The Convention covers both civil and political rights (rights to vote, to participate in public life, to acquire, change or retain one's nationality, equality before the law and freedom of movement) and economic, social and cultural rights (rights to education, work, health and financial credit).⁴⁵ The Convention also pays specific attention to particular phenomena such as trafficking, to certain groups of women, for instance rural women, and to specific matters where there are special risks to women's full enjoyment of their human rights, for example marriage and the family.⁴⁶

The Convention defines discrimination in its article 1 "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."⁴⁷ In critical examining the Convention, what is clear is that discrimination encompasses any difference in treatment on the grounds of sex which:

- Intentionally or unintentionally disadvantages women;
- Prevents society as a whole from recognising women's rights in both the private and the public spheres;
- Prevents women from exercising the human rights and fundamental freedoms to which they are entitled.⁴⁸

⁴⁴ Julia Ernst, 'US Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women' (1995) 3 *Michigan Journal of Gender & Law* 299.

⁴⁵ Noreen Burrows, 'The 1979 Convention on the Elimination of all Forms of Discrimination against Women' (1985) 32 (2) *Netherlands International Law Review* 419, 460.

⁴⁶ Sarah C Zearfoss, 'Note, the Convention for the Elimination of All Forms of Discrimination against Women: Radical, Reasonable, or Reactionary' (1990) 12 *Michigan Journal of International Law* 903.

⁴⁷ Andrew C Byrnes, 'The Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale Journal of International Law* 1.

⁴⁸ Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*. [Published for the Institute of Jewish Affairs, London, in Association with the World Jewish Congress] (Brill 1980).

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Although, the Convention also specifies the different ways in which State parties are to eliminate discrimination, such as through appropriate legislation prohibiting discrimination, ensuring the legal protection of women's rights, refraining from discriminatory actions, protecting women against discrimination by any person, organisation or enterprise, and modifying or abolishing discriminatory legislation, regulations and penal provisions. The Convention foresees that achieving equality may require positive action on the part of the State to improve the status of women in good faith. This means that to accelerate women's actual equality in all spheres of life, States are permitted to use temporary special measures for as long as inequalities continue to exist. Having said that, the Convention thus reaches beyond the narrow concept of formal equality and aims for equality of opportunity and equality of outcome, but there still exists a gap in implementation and enforcement of the Convention at the domestic level. However, the temporary special measures are both lawful and necessary to achieve these goals. In principle, these measures should be removed once equal status has been achieved, but recent evidence of women's rights violations show otherwise.⁴⁹ Importantly, the Convention adds new, substantive provisions to the other instruments which also deal with equality and non-discrimination. Article 5 establishes that in addition to recognising women's legal equality and promoting their de facto equality, States should also strive to eliminate the social, cultural and traditional patterns that perpetuate harmful gender stereotypes and to create an overall framework in society that promotes the realisation of women's full rights.⁵⁰

2.3. Other International Legal Instruments

Also, the Convention on the Rights of the Child (art. 2)⁵¹ and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) also prohibit discrimination based on sex.⁵² The Convention on the Rights of Persons with

⁴⁹Catharine A MacKinnon, *Rape, genocide, and women's human rights; Genocide and Human Rights* (Routledge 2017).

⁵⁰Venkatraman, Bharathi Anandhi. "Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination against Women: Are the Shari'a and the Convention Compatible" (1994) 44 *American University Law Review* 1949.

⁵¹Unicef, *Implementation Handbook for the Convention on the Rights of the Child* (Unicef 2007).

⁵²Carla Edelenbos, 'The International Convention on the Protection of the Rights of all Migrant Workers and

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Disabilities (art. 6) recognises the multiple discrimination that women with disabilities are subjected to, and requires State parties to address this by taking ‘all appropriate measures to ensure the full development, advancement and empowerment of women’ in the enjoyment of their human rights.⁵³ In its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee on the Elimination of Racial Discrimination, which oversees compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, also recognised the gender dimensions of racial discrimination and said it would ‘endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination.’⁵⁴ The Committee against Torture, which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also regularly addresses issues of violence against women and girls.⁵⁵

2.4. Western Hegemonic Values

However, it is often argued that human rights law and Convention began in the West.⁵⁶ While one can contest whether it is possible (or purposeful) to seek locating the birthplace of human rights law, in contradistinction from its development, not many will argue that human rights law faces severe challenges in enforcing women’s rights in developing world in contrast to the developed world. In the developing world, the first problem of human rights law is lack of its popularity. This can be seen through a combination of lack of awareness, of most legal experts, about the utility and relevance of human rights law to their societies.⁵⁷ Also, the marketing of international institution and materials, has almost a Western bias: international institutions such as the United Nations, and other international institutions such as the World Bank, are all located in the West and are seen to enforce West notion of human rights.

Most importantly human rights law books report cases and jurisdictions that are preponderant Western as if cases and courts in developing countries make no contribution to human rights law

Members of their Families’ (2005) 24 (4) *Refugee Survey Quarterly* 93, 98.

⁵³ Aart Hendricks, ‘UN Convention on the Rights of Persons with Disabilities’ (2007) 14 *European Journal of Health Law* 273.

⁵⁴ Gay J McDougall, ‘Toward a Meaningful International Regime: the Domestic Relevance of International Efforts to Eliminate all forms of Racial Discrimination’ (1996) 40 *Howard Law Journal* 571.

⁵⁵ Maxime Tardu, *The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; International Geneva Yearbook* (Springer Dordrecht 1988).

⁵⁶ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2009).

⁵⁷ David L Richards, Ronald D Gelleny and David H Sacko, ‘Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries’ (2001) 45 (2) *International Studies Quarterly* 219, 239.

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development. This itself have created a fundamental gap in enforcing women's rights at national level in developing countries. Similarly, the Western view and bias approach to the enforcement of human rights and women's at the international served as an obstacle for the recognition and development of women's rights across the globe. In general, addressing the problematic aspect of women's call these calls for a greater balancing acts in the citing and administration of international institutions; it requires a more even coverage of women's rights across the globe; it necessitates making women's right more visible to developing countries, and making their contributions to the development of human right law more visible to the world. On their own, developing countries must also do more to popularize women's rights in their academic curricula, expose their judges more greatly to human rights law, and afford international lawyers from the developing countries more opportunity in the dissemination and practice of human rights law.

3. Regional Human Rights Instruments

3.1. *Treaties*

In addition to international human rights standards, regional human rights treaties, too, include crucial provisions aimed at promoting and protecting women's human rights.⁵⁸ The African (Banjul) Charter on Human and Peoples' Rights was adopted in 1981 by the Organisation of African Unity.⁵⁹ Its article 2 prohibits discrimination on any grounds, including sex, in the enjoyment of the rights guaranteed by the Charter. Article 18 specifically mentions the obligation of African States to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'⁶⁰ The Charter's Protocol on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003.⁶¹

⁵⁸Regional human rights treaties also have oversight mechanisms to assess compliance with their provisions by the States that have ratified them. These include the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the Council of Europe and the European Court of Human Rights. Some of their work is highlighted in this publication.

⁵⁹African Union, 'African (Banjul) Charter on Human and Peoples' Rights' (2015).

⁶⁰Richard N Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 (1) *American Journal of International Law* 80,101.

⁶¹Frans Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009)16 *Washington and Lee Journal of Civil Rights and Social Justice* 11.

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The Charter of the Organisation of American States includes a non-discrimination provision in its chapter II, article 3 (1), and the American Convention on Human Rights in its article 1. Moreover, in 1994 the Organisation adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention).⁶² The European Convention on Human Rights and Fundamental Freedoms prohibits discrimination on any grounds, including sex, in the enjoyment of rights contained in the Convention (art. 14).⁶³ Since 1998 individuals can bring complaints to the European Court of Human Rights based on allegations of violations of the Convention.⁶⁴ In 2011 the Council of Europe adopted a new Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).⁶⁵ Regional political organisations, including the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Economic Community of West African States and the Southern African Development Community, have also adopted protocols and resolutions and issued declarations pertaining to women's human rights. All these human rights instruments show that there has been a significant development of women's rights instrument at the international level. Despite this, women rights violations are still being documented across the globe,⁶⁶ which does highlight the failure in the current international human rights system.

3.2. Conferences

Though there is something to celebrate for, women's rights have been at the heart of a series of international conferences that have produced significant political commitments to women's human rights and equality. Starting in 1975, which was also International Women's Year, Mexico City hosted the World Conference on the International Women's Year, which resulted in the World Plan of Action and the designation of 1975–1985 as the United Nations Decade for Women.⁶⁷ In 1980, another international conference on women was held in Copenhagen and the

⁶²Organization of American States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ("Convención of Belem do Pará") (1994).

⁶³ Arthur Henry Robertson and John Graham Merrills, *Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester University Press 1993).

⁶⁴ Alice Donald, Jane Gordon and Philip Leach, 'The UK and the European Court of Human Rights' (2012) 83 *Equality and Human Rights Commission: Research report* 33.

⁶⁵ Dubravka Simonovic, 'Global and Regional Standards on Violence against Women: the Evolution and Synergy of the CEDAW and Istanbul Conventions' (2014) 36 *Human Rights Quarterly* 590.

⁶⁶ Lynn L Amowitz, et al, 'Human Rights Abuses and Concerns About Women's Health and Human Rights in Southern Iraq' (2004) 291 (12) *Jama* 1471, 1479.

⁶⁷ Martha Alter Chen, 'Engendering World Conferences: the International Women's Movement and the United Nations' (1995) 16 (3) *Third World Quarterly* 477, 494.

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Convention on the Elimination of All Forms of Discrimination against Women was opened for signature.⁶⁸ The third World Conference on Women was held in Nairobi, with the Committee on the Elimination of Discrimination against Women having begun its work in 1982.

These three world conferences witnessed extraordinary activism on the part of women from around the world and laid the groundwork for the world conferences in the 1990s to address women's rights, including the Fourth World Conference on Women held in Beijing in 1995. In addition, the rights of women belonging to particular groups, such as older women, ethnic minority women or women with disabilities, have been also addressed in various other international policy documents such as the International Plans of Action on Ageing (Vienna, 1982 and Madrid, 2002), the Durban Declaration and Programme of Action (2001) and the World Programme of Action concerning Disabled Persons (1982). Thus, it possible to argue that women's rights have entered a new face, where the national legal system will be able to enforce the rights of women in its jurisdiction. Even though the might be a strong argument against enforcing women's rights at some legal system due to governance and jurisdictional gap, I argue that this is the best way forward if we are to achieve a full woman's rights enforcement.

4. The Disparities between the concept of Women's Rights and International Law

4.1. Status of Women in International Legal Texts before 1945

Since the founding of the United Nations, equality between men and women has been among the most fundamental guarantees of human rights.⁶⁹ Adopted in 1945, the Charter of the United Nations sets out as one of its goals 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women'.⁷⁰

⁶⁸Catherine Tinker, 'Human Rights for Women: The UN Convention on the Elimination of All Forms of Discrimination Against Women' (1981) 3 *Human Rights Quarterly* 32.

⁶⁹Edward R Stettinius, 'Human Rights in the United Nations Charter' (1946) 243 (1) *Annals of the American Academy of Political and Social Science* 1, 3.

⁷⁰Ruth B Russell, *A History of the United Nations Charter: The Role of the United States, 1940-1945* (Brookings Institution 1958).

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Furthermore, Article 1 of the Charter stipulates that one of the purposes of the United Nations is to promote respect for human rights and fundamental freedoms “without distinction as to race, sex, language or religion”. This prohibition of discrimination based on sex is repeated in its Articles 13 (mandate of the General Assembly) and 55 (promotion of universal human rights).⁷¹

In 1948, the Universal Declaration of Human Rights was adopted.⁷² It, too, proclaimed the equal entitlements of women and men to the rights contained in it, ‘without distinction of any kind, such as sex,’⁷³ In drafting the Declaration, there was considerable discussion about the use of the term ‘all men’ rather than a gender-neutral term.¹ The Declaration was eventually adopted using the terms ‘all human beings’ and ‘everyone’ in order to leave no doubt that the Universal Declaration was intended for everyone, men and women alike.⁷⁴ While the UN Charter was the first international treaty to promote women’s equality with men, it was not the first time that women were constituted as a category in international law. This part of the article will briefly describe how women appeared in earlier international legal texts before examining how women’s rights were recognised by the foundational human rights instruments. Although the idea of women’s equality with men was a radical and visionary development, of great importance to women (and men), it is argued that this approach failed to acknowledge the specificity of many human rights violations suffered exclusively or predominantly by women and therefore failed to construct them as fully human. The key problem with this explanation is that the international legal system has always seen women’s rights as a secondary right, instead of including women’s rights as a fundamental part of human dignity. Before 1945, international law had taken a paternalistic or ‘protective’ approach to women, treating them as the property, extension or dependents of men, as primarily mothers and wives, and as incapable of full autonomy and agency.⁷⁵ One major drawback of this approach is that international law did not see women as right bearer, but rather secondary rights holder. This view by the international legal system have

⁷¹Bruno Simma, Hermann Mosler, Andreas Paulus and Eleni Chaitidou, eds. *The Charter of the United Nations: a Commentary* (Vol. 1. Oxford: Oxford University Press 2002).

⁷²Josef L Kunz, ‘The United Nations Declaration of Human Rights’ (1949) 43 (2) *American Journal of International Law* 316, 323.

⁷³Antônio Augusto Cançado Trindade, ‘Universal Declaration of Human Rights’ (2008) *Audiovisual Library of International Law*.

⁷⁴James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987).

⁷⁵Natalie Kaufman Hevener, ‘International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women’ (1978) 1 *Harvard Women's Law Journal* 131.

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created fundamental flaws in women's rights since the beginning of the international law.⁷⁶ Similarly, women were valued for their pre-marriage chastity, their prioritisation of motherhood and domesticity, and their acceptance of the heterosexual family hierarchy and the paternal protection of the state and its laws. Therefore, what have been clear before 1945 is that international law saw women as sex objects and called 'bid' for those they considered attractive and 'offer only' for those they disliked.

This flawed perception of international law allows men to say what they liked. A possible explanation for this might be that international law view women's rights in a different conceptual parameter. What this means is that women's rights did not exist under the international legal system, but can only exist under the rights of men. Also, the laws of war, for example, required an occupying power to respect 'family honour and rights,' treating women as part of (male) family property and reputation to be protected by the law.⁷⁷ Early international labour conventions prohibited women from certain types of work, like night work and mining, on the basis that this interfered with their domestic and reproductive responsibilities.⁷⁸ Anti-trafficking conventions made women's consent to working in the sex industry irrelevant, thereby treating all sex workers as victims, needing rescue and rehabilitation.⁷⁹ None of these conventions constructed women as rights bearers. Instead, women were granted 'protections', sometimes in the form of 'privileged' treatment, because of their socially ascribed secondary status.

4.2. Recognition of Women's Rights Under International HR Instruments

Following World War II, the shift from protectionism to universal human rights promised to recognise women as fully human, for the first time, by granting them the same human rights as men. This is the first effort for achieving women's equality that is adopted by the drafters of the Universal Declaration of Human Rights 1948.⁸⁰ At this point the UDHR 1948 prohibit discrimination based

⁷⁶Mary Ann Glendon, *A world Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2002).

⁷⁷Convention Respecting the Laws and Customs of War on Land (Hague Convention II), 29 July 1899, art 46; and Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), 18 October 1907, 36 Stat 2277, 1 Bevans 631, art 46

⁷⁸International Labour Organisation, Maternity Protection Convention 1919 (Convention 3); International Labour Organisation, Convention Concerning Night Work of Women Employed in Industry, 1919 (Convention 4); International Labour Organisation, Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds 1935 (Convention 45).

⁷⁹International Agreement for the Suppression of the White Slave Traffic 1904, 1 LNTS 83; International Convention for the Suppression of White Slave Traffic 1910, 1912 Gr Brit T S No.20 at 267; International Convention for the Suppression of the Traffic in Women and Children 1921, 9 LNTS 415; Convention for the Suppression of the Traffic in Women of Full Age 1933, 53 UNTS 13.

⁸⁰Christina M Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in

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on sex in the enjoyment of universal rights and freedoms.⁸¹ This approach was chosen instead of recognising rights that were specific to women's experience, fearing the latter would compromise the idea of 'universality' and wrongly emphasise women's difference from men rather than their common humanity.⁸² In transforming the UDHR into legally binding instruments, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ICCPR followed suit, relying largely on the prohibition of sex discrimination in the enjoyment of the rights they enumerated to achieve women's equality.⁸³

As the Covenants did not define 'discrimination' or 'equality', it was not clear whether states parties were expected to achieve formal or substantive equality. Nevertheless, an additional provision was included as common article 3 of the Covenants, which required states parties to ensure 'the equal right of men and women to the enjoyment of all [rights] set forth in the present Covenant', indicating that special attention must be paid to achieving women's equality and, by the use of the term 'enjoyment', suggesting that equality in outcome (substantive equality) was the goal.⁸⁴ The duties to ensure that women enjoy the same rights as men was a very significant step forward for women. States parties were required to treat women and men alike when they are in a comparable situation. Think, for example, of the importance to women of the universal franchise, the freedom to move and to express their opinions to the same extent as men, of equal pay and education on the same basis as men. In addition, the unprecedented acknowledgment that women and men 'are entitled to equal rights as to marriage, during marriage and at its dissolution'⁸⁵ broke through the tradition in liberal legal thinking that exempted the private sphere from legal scrutiny,⁸⁶ although this development was in tension with

Different Socio-Cultural Contexts' (1994) 16 *Human Rights Quarterly* 740.

⁸¹ Art 2. This kind of non-discrimination provision is described as a 'subordinate norm' in chpt 14, because it prohibits discrimination only with respect to the rights and freedoms set out in the instrument

⁸² Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *Human Rights Quarterly* 229.

⁸³ Steven Arrigg Koh, Jocelyn E Getgen and Kalantry Sital, *Enhancing Enforcement of Economic, Social, and Cultural Rights using Indicators: A focus on The Right to Education in the ICESCR* (Routledge 2017) and Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Oxford University Press USA 1991).

⁸⁴ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (NP Engel 1993).

⁸⁵ UDHR art 16(1); and ICCPR art 23(4)

⁸⁶ Celina Romany, 'State Responsibility Goes Private: a Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1994) *Human Rights of Women: National and International Perspectives* 85,115.

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state's responsibilities to protect the institution of the family and enshrine the right to privacy within families.⁸⁷

For many Non-Western women, the issue of private actors violating their rights was not only a concern within their communitarian and extended-family networks, but also an issue of the unregulated activities of global private actors, like transnational corporations and banks.⁸⁸ These developments left little doubt that the differences between women and men that had previously been treated as immutable and used to justify women's inequality, were to be understood as socially constructed and therefore changeable. At the same time this fact have neglected the broader spectrum of the problem and exclude the problems that Western women went through before and after the war. In addition, international human rights law had the potential to challenge the 'naturalness' of many discriminatory beliefs and practices, and assist in the task of changing oppressive stereotypes about 'women' and, simultaneously, challenging dominating stereotypes about 'men'. While clearly ground-breaking, the preferred method of realising women's full humanity by promoting their equal and non-discriminatory enjoyment of human rights soon proved to have a number of problems, both conceptually and in practice. After explaining the instrument developed to enforce women's rights, the next section of this article will focus on a case study on women's rights violation.

5. Gaps in Public and Private Sector Accountability

5.1. The Case of North Mara Gold Mine Limited

The North Mara Gold Mine Ltd ('NMGML' or 'the Mine') provide its position on what are very serious and troubling allegations now raised by MiningWatch Canada ('MiningWatch').⁸⁹ Titled 'Women Speak Out About Abuse at Barrick Gold's North Mara Mine in Tanzania', MiningWatch's new blog post and video incorrectly suggest that there are new and previously unreported allegations of sexual abuse at the Mine, which and that the Mine has ignored or neglected the victims of those alleged abuses. According to the Mine itself, the video itself shows this not to be true, however, it does not discuss or raise new allegations of abuse and, as far as the Mine is aware, there have not been any such new allegations. At Barrick's controversial North Mara gold mine in Tanzania, investigators have interviewed about 10

⁸⁷UDHR arts 12 and 16(3); ICCPR arts 17(1) and 23(1).

⁸⁸Joseph Oloka-Onyango and Sylvia Tamale, 'The Personal is Political, or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 691.

⁸⁹Business and Human Rights, 'Response to a June 2018 blog post and video by MiningWatch Canada' (2018).

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women who allege that they were arrested at the mine site and sexually assaulted by company security guards or Tanzanian police over the past several years. The allegations were discovered in the course of a review into a separate human-rights issue at the mine. A preliminary investigation by Barrick's subsidiary, African Barrick Gold, found that the allegations were credible. African Barrick has sent in a team of independent investigators, headed by a former Australian police detective, to gather evidence in the case. The company has also given the evidence to the Tanzanian police, who have promised their own high-level investigation. The company says it is insisting on a full police investigation.

In most or all of the cases, the women told the investigators that they were taken to holding cells and coerced into sex by police and security guards, who threatened them with imprisonment if they refused. Barrick said the allegations were highly disturbing and will be fully investigated and publicly reported. It also pledged to dismiss any employee involved in human-rights violations, or any employee who has knowledge of human-rights abuses and fails to report them. “Barrick is deeply distressed by the evidence that has emerged,” the company said.

“These deplorable crimes, if confirmed, are neither acceptable nor excusable. They send a clear message to us that we have not met the promises we have made to the community, and to ourselves, to pursue responsible mining in every location where we and our affiliates operate. We can, and will, do more.” For years, thousands of impoverished villagers around North Mara have routinely invaded the mine to grab rocks from its waste heaps, which can be processed into tiny bits of gold. There are daily confrontations between the invaders and the mine's security guards, usually reinforced by Tanzanian police.

On May 16, when an estimated 1,500 people invaded the mine, police opened fire and killed seven of them, according to a statement by Barrick. Twelve others were injured by the police gunfire. Police commanders have insisted that the police were acting in self-defence. In previous clashes at North Mara over the past several years, at least seven other people and perhaps many more have been shot dead by police, according to Tanzanian media and other reports. Witnesses say the invaders are generally unarmed, although some carry hammers to break up the waste rocks and some throw stones at security vehicles when the guards try to disperse them.

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In the remote highlands of Papua New Guinea, where Barrick owns 95 per cent of the Porgera gold mine, a report by Human Rights Watch this year concluded that the mine's private security force is implicated in “a pattern of violent abuses, including horrifying acts of gang rape.” The report documented five alleged incidents of gang rape by mine security personnel in 2009 and 2010, and a sixth case in 2008. One woman said she was gang raped by six guards after one of them kicked her in the face and shattered her teeth. Another said she and three other women were raped by 10 security guards, who forced her to swallow a used condom.

After it was contacted by the human-rights group, Barrick launched a series of investigations and eventually acknowledged there was disturbing evidence of abuses by some of its security personnel. It dismissed a number of employees, including some who knew of the misconduct and failed to report it. It also requested a police investigation, which led to a number of arrests. The background on historical allegations of abuse and remedy provided The Mine has been engaging for many years with the challenges facing the women of North Mara.⁹⁰ As the Mine reported to Business and Human Rights 2011 (with an update in 2013), the Mine heard disturbing allegations regarding sexual assaults committed by Mine security or members of the Tanzanian Police Force against women trespassing on the mine site or in neighbouring communities in 2011. Ultimately, the Mine decided to provide remedies to the women who made these 2011 allegations, without individual determination whether the allegations were well-founded or could be proven, and without an assessment or admission of any legal liability or accountability on the Mine requiring it to do so.⁹¹ Though the remedies provided were identified through extensive consultation with the women themselves, and reflected advice from external experts. Since the women received their remedies during 2013, the recipients have not expressed concerns to the Mine about their adequacy or appropriateness.⁹²

Commitment to respect human rights The Mine and its parent company Acacia Mining are steadfast in their commitment to respect for human rights and corporate social responsibility.

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In keeping with those commitments, the Mine operates a Community Grievance Process (‘CGP’) through which members of the North Mara communities may have grievances regarding possible adverse impacts, including with respect to human rights, involving the Mine considered and, where appropriate, responded to with remedies. The Mine has chosen to extend the scope of the CGP to cover grievances not only about the activities of the Mine but also about the activities of third parties linked to the Mine or who enter the Mine site on occasion, including the police, to the extent that impacted community members fail to seek and obtain effective redress from those third parties through other remedy processes available in Tanzania (e.g. through State-based or judicial processes). Through the CGP the Mine aims to provide access to remedies that are proportionate, individually tailored, culturally appropriate and compatible with the nature and gravity of any adverse impact. Remedies for security-related impacts on human rights are evaluated against a framework of Tanzanian and international standards for reparation, including methodologies developed by Tanzanian courts and international human rights tribunals were never achieved. As a guiding principle though, remedies in the CGP aim to restore, as far as possible, the situation that existed before the adverse impact occurred, but not to alleviate underlying or pre-existing economic or social conditions or to enrich an individual recipient. Separately, the Mine engages with local stakeholders and invests in a range of initiatives in the area around the mine site as part of the Mine’s broader commitment to promote the development of sustainable communities at North Mara.

MiningWatch’s assertions have been extensively refuted by the Mine here. MiningWatch’s assertions may arise from its lack of understanding of or familiarity with the details of the CGP itself, although the Mine has produced publically available and detailed process documentation on the business and human rights website. The CGP is explicitly aligned with the United Nations Guiding Principles on Business and Human Rights (‘UNGPs’) and its effectiveness criteria for operational-level grievance mechanisms. The Mine’s CGP is not, contrary to MiningWatch’s apparent assumptions, intended to be a judicial or State-run tribunal, investigating and deciding

⁹⁰Jacob Mulikuza, *The Dynamics of Conflict of the Kuria Tribe Around North Mara Mine*. Diss (The Open University of Tanzania 2015).

⁹¹Sarah Lauwo, and Olatunde Julius Otusanya ‘Corporate Accountability and Human Rights Disclosures: A case Study of Barrick Gold Mine in Tanzania’ (Vol. 38. No. 2. Elsevier 2014).

⁹²Devin Holterman, ‘Slow Violence, Extraction and Human Rights Defence in Tanzania: Notes from the Field’ (2014) 40 *Resources Policy* 59, 65.

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on legal liabilities in respect of breaches of the law or human rights violations. Invitation to return to the CGP The Mine's CGP is designed and implemented to seek to determine questions of adequacy or rights-compatibility of remedies, by reference to a sustainable and principled human rights framework. The fundamental question here in relations to the North Mara Gold Mine Ltd case, procedure and remedy awarded to the women is one of legal, technical and enforcement of human rights at the national level. A possible explanation for this is that State are the sole bearer of human rights duties and are required to enforce human rights law in its jurisdiction.⁹³ This is because States are the sole holders of human rights and fundamental freedoms, all individuals, peoples and communities in the exercise of their rights and freedoms, have the duty and responsibility to respect those of others, and a duty to strive for the promotion and observance thereof.⁹⁴ Taken this view, corporation are not require to bear human rights duties but rather to respect human rights duties enforced by states in its jurisdiction. To understands why the North Mara Gold Mine Ltd were able to violate the women's rights in the first place, one need to first examine the content and scope of the Conventions of human rights. However, this short article will only focus on the content and scope of the Convention on the Elimination of All Forms of Discrimination Against Women to explain why the State failed to protect women's rights in its jurisdiction.

5.2. The Convention on the Elimination of All Forms of Discrimination Against Women - An Analysis

In an attempt to counter the marginalisation of women within the general framework and application of international human rights law at national Sates, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly and opened for ratification in 1979.⁹⁵ Although CEDAW takes the same general approach as the Covenants by promoting sex non-discrimination and women's equality

⁹³Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).

⁹⁴Hugh Breakey, 'Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities; (2015) 63 (5) *Political Studies* 1198, 1215.

⁹⁵UN General Assembly, 'Convention on the Elimination of all Forms of Discrimination against Women (2006).

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with men at the national level, it highlights the specificity of women's experience of discrimination and advances a strong form of women's substantive equality as the international norm. Though this a positive development to women's rights taken by CEDAW, there still remain some limitations of enforcing women's rights at the national level. This section will start examining the CEDAW to promote a robust understanding of women's rights: the adoption of a comprehensive definition of discrimination against women, the promotion of the use of temporary and permanent 'special measures' to address the institutionalised effects of women's historical disadvantage and to counter disadvantage that might otherwise be associated with women's reproductive functions, and the requirement that states parties tackle the causes of women's inequality by promoting social change in all spheres of life, including in families.

5.2.1. *Defining 'Discrimination'*

Thus, the initial step towards advancing women's substantive rights is the provision of a comprehensive definition of 'discrimination against women' in article 1

[it] shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹⁶

The definition covers a wide range of conduct and, importantly, prohibits discriminatory treatment (direct discrimination) as well as discriminatory outcome (indirect discrimination), and intended (purposive) discrimination as well as unintended discrimination (discrimination in effect). Both 'sex' and 'marital status' are specified as prohibited grounds of discrimination against women, and it should further be noted that some other provisions in CEDAW also prohibit discrimination on the grounds of 'pregnancy' and 'maternity', as in article 11(2) in the field of employment.

The definition specifically promotes substantive equality by requiring that women must be able to 'enjoy' or 'exercise' their human rights and fundamental freedoms, and makes it clear that the prohibition of discrimination against women applies to all fields of life, not just the public sphere. Indeed, the application of CEDAW to private actors is made explicit in many places in the text.⁹⁷ The CEDAW Committee, which monitors its implementation, has made it clear that

⁹⁶ *Ibid.*

⁹⁷ Articles 2(e), 2(f), 3, 5 and 6.

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states parties have the obligation to act with ‘due diligence’ to ensure that private actors do not violate CEDAW.⁹⁸ The Committee has also reinforced a substantive approach to women’s equality in its interpretations of CEDAW, constituting a more gender-inclusive subject of human rights law. For example, the Committee has urged states parties to adopt criteria in the determination of equal pay that facilitate the comparison of the value of the work usually done by women with the value of those more highly paid jobs usually done by men,⁹⁹ and to implement health measures that address ‘the distinctive features and factors that differ for women in comparison with men.’¹⁰⁰

5.2.2. *Special Measures*

The second way that CEDAW reinforces the norm of women’s substantive equality is by making it clear that non-identical treatment aimed at addressing women’s specific experiences of disadvantage may be necessary to hasten the achievement of women’s equality. The CEDAW distinguishes between temporary and permanent measures. Article 4(1) promotes the use of ‘special temporary measures’ (also known as ‘affirmative action’, ‘positive action’ or ‘reverse discrimination’), which are directed towards ‘accelerating de facto equality between women and men’ by remedying the effects of past or present discrimination against women and promoting the structural, social and cultural changes necessary to support the realisation of women’s substantive equality.¹⁰¹ Such discriminatory measures are not prohibited, as long as they do not entail ‘the maintenance of unequal or separate standards’ for women and men and are discontinued when their objectives have been achieved. Thus ‘temporary’ may result in application of the measures for a sustained period of time, until their objectives have been realised.¹⁰² Some specific references to temporary special measures can be found in the text of CEDAW, such as measures in the field of education that increase women’s functional literacy (article 10(c)) and reduce the drop-out rates of female students (article 10(f)). On many

⁹⁸ CEDAW, ‘General Recommendation No 19, Violence against Women’ (1992).

⁹⁹ CEDAW, ‘General Recommendation No 13: Equal Remuneration for Work of Equal Value’ (1989).

¹⁰⁰ CEDAW, ‘General Recommendation No 24: Article 12 Women and Health’ (1999).

¹⁰¹ CEDAW, ‘General Recommendation No 25: Article 4, paragraph 1, of the Convention (temporary special measures)’ (2004).

¹⁰² CEDAW, ‘General Recommendation No 23, Political and public life’ (1997).

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occasions the CEDAW Committee has advocated special temporary measures, like the adoption of quotas to achieve gender balance in political bodies.¹⁰³

The CEDAW supports permanent ‘special measures’ to ensure that non-identical treatment of women due to their biological differences from men is not considered discriminatory and does not work to their disadvantage. Article 4(2) makes it clear that measures ‘aimed at protecting maternity’ are not discriminatory, and the point is reinforced by other more specific provisions including measures safeguarding women’s reproductive capacities in the field of employment (article 11(1)(f)) and measures that provide women with appropriate reproductive health services (article 12(2)). Recognising that these provisions have a ‘protective’ orientation, the CEDAW Committee has emphasised that the term ‘special’, when used in the context of CEDAW, breaks with the past paternalistic usage of the term to indicate that a group negative view of social, religious and cultural traditions, it must be remembered that they can also lend valuable support to women’s equality.¹⁰⁴

5.2.3. *Limitations*

Though, the approach taken by CEDAW also has some limitations, four of which will highlight in this article: its continuing reliance on a comparison with men, the lack of reference to violence against women, the assumption of normative married heterosexuality and the very limited acknowledgment of multiple and intersectional forms of discrimination. The CEDAW Committee has ameliorated many of these problems by treating CEDAW as a dynamic instrument that must be read in light of changing circumstances, and progressively interpreting its provisions in Concluding Observations to States party’s periodic reports and in General Recommendations. However, it is difficult for these efforts to completely overcome the limitations in CEDAW’s text and approach without supporting interpretations from other human rights bodies and good faith implementation by states parties. Whiles, the principle of ‘Good Faith’ mean honesty; a sincere intention to deal fairly with others. Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire

¹⁰³ *Ibid.* (n 100)

¹⁰⁴ Celestine Nyamu-Musembi, ‘*Are Local Norms and Practices Fences or Pathways?: The example of Womens Property Rights* in Abdullahi An-Naim, Ed. *Cultural Transformation and Human Rights in Africa* (London/NY: Zed Book 2002).

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to defraud others. It derives from the translation of the Latin term *bona fide*, and courts use the two terms interchangeably.¹⁰⁵ As a 'general principle', good faith forms part of the sources of international law. Therefore, it fundamentally, limits the application and enforcement of women's rights through the principle of sovereignty,¹⁰⁶ albeit one that is necessary, as it protects other States and their trust and reliance in international law. Even though this article acknowledges the principle of 'good faith' as an important element of international law, I argue that human rights law should not rest on the principle of 'good faith', but rather on a principle of legality and enforcement.¹⁰⁷

Also, one of the CEDAW's limitations is that the approach still relies fundamentally on a comparison between women and men, like the Covenants. This is limiting in two dimensions. The first, it does not allow women to claim rights that men do not enjoy, except as 'special measures'. Consider the example of women's reproductive rights, like access to information, advice and services related to family planning (articles 10(h) and 12(1)) and the right to 'decide freely and responsibly [sic] on the number and spacing of their children' (article 16(1)(e)), which are all to be enjoyed 'on a basis of equality of men and women'. This leaves little room, if any, for recognition of women's specific, stand-alone reproductive rights, like contraception and abortion, unless they qualify as 'measures protecting maternity' (art 4(2)). The secondly, CEDAW's reliance on comparing women with similarly situated men does not address discrimination between different groups of women. For example, denying unmarried women access to reproductive technologies is prohibited by CEDAW only if unmarried men (the relevant comparator) are able to access the technology.¹⁰⁸ The comparison does not do justice to women's interests because men have very different needs for reproductive assistance than women. Another example is the cultural practise of evicting a widow from her deceased husband's family home,¹⁰⁹ which is clearly adverse treatment due to sex and marital status, but is not discrimination prohibited by CEDAW because there is no relevant male comparator. It is

¹⁰⁵ Steven Reinhold, 'Good Faith in International Law' (2013) 2 *UCL international Law Journal* 2 40.

¹⁰⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Vol. 37 Cambridge University Press 2007).

¹⁰⁷ Henry J Steiner, Philip Alston and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).

¹⁰⁸ Arundhati Char, Minna Saavala and Teija Kulmala, 'Assessing Young Unmarried Men's Access to Reproductive Health Information and Services in Rural India' (2011) 11 (1) *BMC Public Health* 476.

¹⁰⁹ Samson O Gunga, 'The Politics of Widowhood and Re-marriage Among the Luo of Kenya' (2009) 1 (1) *Thought and Practice* 165, 178.

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generally not the practise that husbands live in the family home of their wives, let alone face eviction if they are widowed.¹¹⁰

Furthermore, the limitation of CEDAW is its lack of reference to violence against women, which is a silence that may be explained by the reliance on a comparative model, because gendered violence does not affect men in the same way as women. The failure in CEDAW to make specific reference to rights associated with security of the person suggests that at the time of drafting, such abuses were thought of as primarily affecting men. Much has changed since then, and gendered violence has come to be recognised as ‘one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.’¹¹¹ The CEDAW Committee addressed this omission in General Recommendation 19 by recognising gender-based violence as a form of ‘discrimination against women’ that is prohibited by CEDAW and, therefore, that violence ‘directed against a woman because she is a woman or affects women disproportionately’ will breach specific CEDAW provisions, even though they do not expressly make reference to violence.¹¹² This approach has been applied in the jurisprudence of the CEDAW Committee under its Optional Protocol procedure,¹¹³ which has found violations of articles 1, 2, 3, 5(a) and 16 where states parties have not met the standard of due diligence in protecting the complainants domestic violence.¹¹⁴ Treating violence against women as a form of discrimination is not an effective way to ensure that CEDAW obligations incorporate the issue. However, the anti-discrimination framework prevents the CEDAW Committee from recognised gendered violence as a direct human rights violation, such as a violation of the right to life or the right to be free from torture or cruel, inhuman and degrading treatment, without the complication of a comparison with men.

Also, I argue that, like the Covenants, CEDAW assumes that women’s experience of family life is married and heterosexual (article 16(1)), except in their rights as a parent which are to be enjoyed regardless of marital status (article 16(1)(d)). One result of the emphasis on ‘marriage’

¹¹⁰Friday Asiazobor Eboiyehi and Akanni Ibukun Akinyemi, ‘We Are Strangers in Our Homes: Older Widows and Property Inheritance among the Esan of South-South Nigeria’ (2016) *Ageing in Developing Countries* 90.

¹¹¹CEDAW, General Recommendation No 19) paras 1 and 6.

¹¹²*Ibid.*

¹¹³Optional Protocol to CEDAW, A/RES/54/4, 14 October 1999, entered into force Dec. 22, 2000.

¹¹⁴AT v Hungary, Communication No 2/2003, 26 January 2005, UN Doc A/60/38, Annex III; Goekce v Austria, Communication No 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005; *Yildirim v Austria*, Communication No 6/2005, 1 October 2007, CEDAW/C/39/D/6/2005.

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and the equal rights of ‘spouses’ is that the diversity of family forms within which women live, including customary and de facto heterosexual and lesbian partnerships, is rendered invisible. Consequently, the text ignores human rights violations that take place within different family formations, like the unequal sharing of income and assets in a customary marriage or violence in a lesbian relationship, and fails to protect women’s equal rights when a non-marital relationship breaks down. The CEDAW Committee has gone some way towards rectifying this problem by acknowledging that various forms of the family exist, by using the terminology of ‘spouse or partner’,¹¹⁵ and by insisting that women and men are treated equally in families, whatever form they take,¹¹⁶ but it has not yet dealt explicitly with the issue of same-sex partnerships. A second result of CEDAW’s normative focus on heterosexual marriage is that women’s sexuality is reduced to procreative concerns, like family planning and the spacing of children. This means that CEDAW also fails to address the discrimination that many women face for expressing their sexuality outside of marriage, whether in committed relationships, in pursuit of sexual pleasure, as lovers of other women, or as sex workers.

Finally, the CEDAW largely treats ‘women’ as a homogeneous group who share the same experience of discrimination. Yet sex discrimination can intersect with other forms of discrimination and create experiences of discrimination that are not fully comprehended by the concept of sex discrimination. This has been called ‘compound’ or ‘intersectional’ discrimination¹¹⁷, and its most extreme forms are experienced by the most disadvantaged groups of women.¹¹⁸ While CEDAW makes some limited distinctions between women, on the basis of maternity, and age in respect of child marriage, there is only one significant exception to the general pattern. Article 14 requires that states parties ‘take into account the specific problems faced by rural women and the significant roles which rural women play in the economic survival of their families.’¹¹⁹ and many of the rights it enumerates do not rely on a comparison with men. This usefully enables the CEDAW Committee to draw comparisons between rural and urban women, and the Committee has interpreted ‘rural’ very broadly in many of its Concluding Observations in order to discuss intersectional forms of discrimination faced by rural women, such as age,

¹¹⁵ CEDAW, General Recommendation No 21, Equality in marriage and family relations’ (1994) para 22.

¹¹⁶ *Ibid.* 13, 18, 29, 33 and 39.

¹¹⁷ CEDAW, ‘General Recommendation No 24, Women and Health (article 12),’ (1999) para 6.

¹¹⁸ India. 01/02/2000, A/54/38, paras 51-53; China 03/02/99, A/54/38, para 294.

¹¹⁹ *Ibid.*

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ethnic, caste and indigenous discrimination.¹²⁰ While only occasionally used terms like ‘multiple’ or ‘double’ discrimination, the CEDAW Committee has also drawn attention to discrimination faced by specific groups in the context of article 5(a), which requires modification of social and cultural attitudes and practises that are inconsistent with women’s equality. A number of General Recommendations have been adopted that focus on CEDAW’s application to specific groups of women,¹²¹ and others have stressed that special attention must be paid to the needs of women belonging to vulnerable and disadvantaged groups.¹²² Despite this, the CEDAW Committee has not yet drawn attention to the intersectionality of the discrimination experienced by complainants under the Optional Protocol, despite four of its first five decisions on the merits involving immigrant or minority women.¹²³

Observing these limitations, there is a little doubt the almost universal ratification of CEDAW,¹²⁴ the work of the CEDAW Committee, and the efforts of many women’s rights and human rights NGOs,¹²⁵ has advanced the project of making international human rights law more gender inclusive. However, the adoption of a specialist women’s rights treaty also, in many respects, reinforced women’s marginalisation. As the most highly reserved of all the human rights treaties, CEDAW tends to undermine the idea that women’s equality and rights are universal. Rather than prompting the other human rights treaty committees to take women’s rights more seriously, it had the opposite effect of ghettoising women’s rights in CEDAW.¹²⁶ Exacerbating its isolation, the CEDAW Committee met in New York until recently, rather than in Geneva where all the other treaty committees met,¹²⁷ making it difficult to mainstream the CEDAW Committee’s interpretative work and coordinate approaches to women’s equality and rights across the regime. While a specific convention focusing on women’s equality was necessary to address women’s

¹²⁰CEDAW, ‘General Recommendation No 18, Disabled women’ (1991); ‘General Recommendation No 26 on women migrant workers’ (2008); General Recommendation on older women (forthcoming)

¹²¹*Nguyen v The Netherlands*, Communication No 3/2004, 14 August 2006, CEDAW A/61/38; *Szjijarto v Hungary*, Communication No 4/2004, 14 August 2006, CEDAW A/61/36; *Goekce v Austria* (n 46)

¹²²*Ibid.*

¹²³*Ibid.*

¹²⁴CEDAW had 186 States parties at 20 July 2009.

¹²⁵HannaBeate Schopp-Schilling, and Cees Flinterman. *Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination against Women* (The Feminist Press 2007).

¹²⁶Andrew C Byrnes, ‘The Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women’ (1989) 14 *Yale Journal of International Law* 1.

¹²⁷This practise was changed from 1 January 2008, when responsibility for servicing the CEDAW Committee was transferred from the Division for the Advancement of Women (DAW) in New York to the Office of the High Commissioner for Human Rights in Geneva, which also services the other human rights treaty bodies.

marginalisation in international human rights law, it was not sufficient to address the major issues facing women.

5.3. Analysis of Other Legal Instruments

As a result of CEDAW's limited impact, another major effort to advance the prospects of women successfully claiming their human rights emerged, which refocused attention on the general human rights instruments and promoted the 'mainstreaming' of women's human rights.¹²⁸ 'Gender mainstreaming' was adopted as a system-wide strategy by the 1993 Vienna World Conference on Human Rights and reaffirmed by the 1995 Beijing World Conference on Women.¹²⁹ These developments prompted the chairpersons of the human rights treaty committees to commit to fully integrating gender perspectives into their working methods.¹³⁰ This led eventually to the adoption of General Comments by four treaty committees, which aim to comprehensively incorporate women's experience of human rights violations into the coverage of their respective treaty texts. The Human Rights Committee (HRC), which monitors the ICCPR, led the way with the adoption of General Comment 28 on equality between men and women in 2000.¹³¹ The General Comment works through each of the ICCPR rights, bringing gender specific violations into the mainstream by re-imagining the subject of the ICCPR as a woman.

For example, it is recognised that the right to life (article 6) may be violated if women have no option but to resort to backyard abortions or if they are living in extreme poverty,¹³² and the right to be free from torture and other cruel, inhuman and degrading treatment (article 7) may be violated if a State Party fails to protect women from domestic violence.¹³³ The General Comment

¹²⁸Sari Kouvo, *Making Just Rights?: Mainstreaming Women's Human Rights and a Gender Perspective* (Iustus Forlag, Uppsala 2004).

¹²⁹World Conference on Women and United Nations. *Report of the Fourth World Conference on Women: Beijing, 4-15 September* (1995).

¹³⁰Report of the Sixth Meeting of Persons Chairing the Human Rights Treaty, UN Doc. A/50/505 (1995) para 34 (a)-(f).

¹³¹Dianne Otto, 'Gender comment: Why does the UN Committee on Economic, Social and Cultural Rights need a general comment on women' (2002) 14 *Canadian Journal of Women and the Law* 1.

¹³²HRC, General Comment 28 paras 8, 10, 11, 12, 16 and 22.

¹³³Lisa A Crooms, 'Indivisible Rights and Intersectional Identities or, What do Women's Human Rights have to Do with the Race Convention' (1996) 40 *Howard Law Journal* 619.

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clearly promotes women's equality as a substantive concept and accepts that different treatment of women and men may be necessary to achieve equality. The result is an ambitious and creative 'feminisation' of ICCPR rights.¹³⁴ However, some of the problems associated with seeking to include women by reference to their 'difference' are also evident. The extensive cataloguing of women's specific injuries and disadvantages, particularly the emphasis on violence, threatens to reproduce women's marginalisation by inviting protective responses. Indeed, the frequent use of the language of 'protection' is disquieting.¹³⁵ It recalls the historically conditioned tendency to slide into protective responses when thinking about women as 'victims' of gendered and sexual violence, working against legal responses that empower women as full subjects of human rights law.

The Committee on Racial Discrimination, which monitors implementation of the Convention on the Elimination of Racial Discrimination (CERD), was initially resistant to the idea of gender mainstreaming.¹³⁶ Nevertheless, it eventually adopted General Recommendation XXV on the 'gender-related dimensions of racial discrimination.'¹³⁷ Rather than identifying the gender issues associated with each of the substantive rights recognised by CERD, as in ICCPR General Comment 28, it elaborates a methodology for analysing the relationship between gender and racial discrimination, which will enable the Committee to develop 'a more systematic and consistent approach', in conjunction with States parties.¹³⁸

The method requires particular consideration of gender in (1) the form and manifestation of racial discrimination; (2) the circumstances in which it occurs; (3) its consequences; and (4) the availability and accessibility of remedies.¹³⁹ This approach opens the way to a deeper understanding of the structural dimensions of the intersection of race and gender discrimination and how they work together to intensify women's inequality. The methodology is very flexible, allowing for diverse and shifting conceptions of race, which, like gender, is socially constructed. Though, like General Comment 28, the few examples of the intersectional discrimination

¹³⁴ CERD, 'General Recommendation XXV: Gender-Related Dimensions of Racial Discrimination' (2001), 56th Session, 2000, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001.

¹³⁵ *Ibid.*

¹³⁶ Anne Gallagher, 'Ending the Marginalisation: Strategies for Incorporating Women into the United Nations

¹³⁷ *Ibid.* (n 135).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

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provided are dominated by a concern with addressing violence against women,¹⁴⁰ also running the risk of eliciting protective responses. General Recommendation XXV is notable for its use of the language of ‘gender’. The discourse of gender has the advantage of acknowledging the relational quality of the gender stereotypes that privilege men and disadvantage women, and thus points to the necessity of changing the stereotypes that benefit men as well as those that normalise women’s disadvantage. On the other hand, the language of gender has its dangers, foremost among them being the tendency for men’s interests to again dominate.¹⁴¹

The risk that ‘gender’ mainstreaming will refocus attention away from women’s disadvantage and back on men is evident in General Comment 16, adopted in 2005 by the Committee on Economic, Social and Cultural Rights, which monitors the ICESCR.¹⁴² In many respects, the approach taken is similar to ICCPR General Comment 28, especially in the attention given to identifying the gender dimensions of each of the rights enumerated in ICESCR and the emphasis on addressing gendered violence. Its distinctiveness lies in its identification of men, as well as women, as potentially suffering sex discrimination and inequality in the enjoyment of ICESCR rights. General Comment 16 even suggests that men may be victims of domestic violence perpetrated against them by women.¹⁴³ This position is controversial because it appears to deny the persistent reality of women’s inequality vis a vis man by approaching sex inequality as a problem without a hierarchy. Ultimately, it is hard to decide whether this is a deeply conservative denial of the systemic nature of women’s inequality, or a radical attempt to recognise the social construction of the male/female gender dichotomy and the importance of changing the way ‘men’ are imagined in the process of reimagining ‘women’ as equal.

Similarly, in 2008, the Committee that monitors the implementation of the Convention Against Torture (CAT) adopted a General Comment on implementation obligations which makes some important observations about the gender dimensions of CAT.¹⁴⁴ It is emphasised that special

¹⁴⁰ *Ibid.*

¹⁴¹ Sally Baden and Anne Marie Goet, ‘Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing’ (1997) 56 (1) *Feminist Review*, 25.

¹⁴² CESCR, ‘General Comment No 28, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)’ (2005), E/C.12/2005/4, 11 August 2005.

¹⁴³ *Ibid.*

¹⁴⁴ CAT, General Comment No 2: Implementation of Article 2 by States Parties’ (2008), CAT/C/GC/2, 24 January 2008

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attention must be given to protecting marginalised groups or individuals who are ‘especially at risk of torture’, including those who may be at risk because of ‘gender, sexual orientation, transgender identity or any other status or adverse distinction.’¹⁴⁵ States parties are requested to provide additional information in their periodic reports about the implementation of CAT with respect to women, keeping in mind that ‘gender is a key factor’ that can intersect with other characteristics of a person to make them more vulnerable to torture or ill-treatment.¹⁴⁶ The Committee notes that women are particularly at risk in contexts that include ‘deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.’¹⁴⁷ Notably, the Committee uses the terminology of ‘gender’ and takes a similar approach to the ICESCR Committee by observing that men too may be subject to gendered violations of CAT, ‘such as rape or sexual violence and abuse’, and that men and boys, as well as women and girls, may be subject to violations ‘on the basis of their actual or perceived non-conformity with socially determined gender roles.’¹⁴⁸ Unlike ICESCR General Comment 16, this approach achieves the recognition of gendered human rights violations that are experienced solely or primarily by men, without collapsing the gender hierarchy.

While all the General Comments aimed at gender mainstreaming promote sex nondiscrimination and women’s equal enjoyment of human rights in a substantive sense, taking their lead from CEDAW, they also reinterpret mainstream human rights to be more inclusive of women’s experience.¹⁴⁹ These reinterpretations alleviate the need to compare women’s experience with that of men’s by reconstructing the universal standard itself, so that it is more gender inclusive. Positive as these developments are, the real test is whether the Committees are able to integrate their new interpretations into all aspects of their work, and hold States parties accountable for their implementation. Although it is early days, the record so far has been patchy and States have failed to enforce human rights in their jurisdiction.¹⁵⁰ Furthermore, I will argue that the old women’s rights developed to protect women is rather a delusionary and continues to be seductive

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Dianne Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade’ (2009) 10 *Melbourne Journal of International Law* 11.

¹⁴⁹ Anne Hellum and Henriette Sinding Aasen, eds. *Women's Human Rights: CEDAW in International, Regional and National Law* (Vol. 3. Cambridge University Press 2013).

¹⁵⁰ Rarna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal* 1.

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and does not work,¹⁵¹ particularly when it comes to women from the Third World.¹⁵² Pursuing women's right in this path will prove costly for women's 'inclusion' and will result to their marginalisation in society.

Additionally, human rights abuses against women are not just about violations of the integrity of a person, who happens to be female. They stem from deep-seated cultural attitudes which denigrate the female sex to an inferior status with huge implications in terms of a woman's employment opportunities, enjoyment of good health, protection from coercion and violence, and her legal status, required a collaborative and enforcement approach at both national and international level. Having said that the strong cultural influence also makes its harder for human rights law to develop in the area of women's human rights because the element of state practise or *opinio juris* will be weaker, thereby impairing the development of customary law at national level. I will argue that human rights for women requires firstly the setting of human rights standards that can be enforce at the national level, their acknowledgement by the international community and their adherence by state parties, but also the challenging of a wide range of fundamental cultural and religious beliefs. These may be hundreds of years old and may be as embedded in the mind-sets of the female members of society as those of male members, is also an obstacle for enforcing women's right.

Finally, abuses of women's human rights take place predominantly in the private sphere by non-state actors (eg in the area of employment or the family). This impedes their status further because in the public/private distinction of human rights abuses, those which occur in the public sphere i.e. by the State and which are covered by the International Covenant on Civil and Political Rights (ICCPR), are taken more seriously and have a higher status within the human rights arena. Also, other human rights treaties are careful to protect the family as a social unit, thereby reinforcing the impotence of women in situations of domestic violence or slavery. Article 10 of the International Covenant on Economic, Social and Cultural Rights for example states that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while

¹⁵¹ *Ibid.* (n 149).

¹⁵² Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences' (1998) 13 (2) *Hypatia* 32,52.

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it is responsible for the care and education of dependent children.’¹⁵³ However, the CEDAW Committee is unequivocal in its holding of States responsible for private violations. In its General Recommendations following its 11th session in 1992, the Committee reinforced the fact that ‘under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’¹⁵⁴

This has not prevented States from wishing to avoid such accountability, notably the United States which prepared a reservation to CEDAW stating ‘The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.’¹⁵⁵ Advocates of women’s human rights can therefore be seen to be blurring the distinction between the public and private spheres of human rights and challenging governments to take responsibility for both arenas. This is particularly relevant in an era of globalisation where big business is considered to have equal if not more authority and power than State Governments and is a major perpetrator of human rights violations.

6. Conclusion

Women’s human rights are an extremely challenging area, interweaving issues of gender, race, religion and cultural relativism. Demanding respect for the human rights of women is therefore also about challenging and reassessing the fundamental tenets of our society. Every achievement in human rights for women should therefore be acknowledged as an individual breakthrough and a great deal of resistance to future progress is to be expected and should not be taken as failure or a sign of lack of progress. Human rights abuses against women are perpetual, systematic and pandemic and yet the last 5 years alone has seen two incredibly important verdicts for women in International law. In 1998, the International criminal tribunal for Rwanda declared rape to be an

¹⁵³UN General Assembly, ‘International Covenant on Economic, Social and Cultural Rights’ (1966) 993 (3) *United Nations Treaty Series*

¹⁵⁴Silvia Cartwright, ‘Rights and Remedies: The Drafting of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1997) 9 *Otago Law Review* 239.

¹⁵⁵Louis Henkin, ‘US Ratification of Human Rights Conventions: The Ghost of Senator Bricker’ (1995) 89 (2) *American Journal of International Law* 341, 350.

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act of genocide in its Akayesu verdict.¹⁵⁶ It was also the first time an international court has punished sexual violence in a civil war. This was followed in February 2001, by another precedent, this time set by the International Criminal Tribunal for the former Yugoslavia which issued a landmark verdict stating that rape and enslavement rose to the level of crimes against humanity in Foca, Bosnia.¹⁵⁷

So it is that human rights abuses against women are slowly being recognised on an individual scale, with the promise of the Optional Protocol to CEDAW and on a global scale through verdicts such as those above. So, there is hope for progress in relation to women and human rights, albeit slow. The history of women's rights in international human rights law reveals a conundrum: how to insist on the recognition of women's specific human rights abuses without reproducing their secondary status and encouraging protective responses. While every effort to more fully recognise women's rights in the development, interpretation and implementation of international human rights law has met with some success, these efforts have also highlighted new challenges. While anti-discrimination law can be a very powerful means of promoting women's enjoyment of human rights, the comparative standard that it relies upon presents quandaries about how best to frame, measure and realise women's substantive equality, which have yet to be resolved.

While recognising gendered violence as a violation of women's human rights has been a massive achievement, the historical pull towards embracing protective responses highlights the challenge of promoting, instead, a rights-based response that takes women's sexual injuries seriously while also respecting women's sexual agency. While the need to take account of other forms of discrimination which intersect with or compound discrimination against women is increasingly acknowledged, there remain many conceptual and practical problems about how to make such discrimination legally recognisable and hold states parties accountable for addressing it. Finally, while gender mainstreaming has led to radical reinterpretations of mainstream human rights instruments, emphasising the interdependence of ideas about 'men' and 'women' and the realisation that women's equality depends on challenging accepted wisdom about dominant

¹⁵⁶Jonathan MH Short, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2002) 8 *Michigan Journal of Race & Law* 503.

¹⁵⁷Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 *Case Western Reserve Journal of International Law* 305.

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masculinities, it has highlighted the dilemma of how to fully embrace 'gender' as a socially constructed category. While there is still a long way to go before the present-day realities of human rights abuses suffered by women become fully legally cognisable, there is also need of new thinking about legal representations that will challenge the gender stereotypes that underpin gendered human rights abuses.