



## Australian Government

### Australian Institute of Family Studies

Australian Centre for the Study of Sexual Assault

The Australian Centre for the Study of Sexual Assault aims to improve access to current information on sexual assault in order to assist policy makers and others interested in this area to develop evidence-based strategies to prevent, respond to, and ultimately reduce the incidence of sexual assault.

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# Addressing sexual assault

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Human rights discourse has become increasingly prominent in national and international politics, signified, for instance, through the introduction of the Victorian *Charter of Human Rights and Responsibilities Act* (2006) and debate regarding the merits of introducing a national *Human Rights Act* (Australian Human Rights Commission [AHRC], 2009; Lynch, 2010; Toy & Pearlman, 2009).<sup>1</sup> It is therefore timely to consider the use of existing human rights frameworks for addressing sexual violence against women.

A particularly promising development in the human rights field is the Australian government signing of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in late 2008, thus demonstrating a commitment to achieving the equal rights of women and men, and to the elimination of all forms of discrimination against women. The signing of the Optional Protocol introduces another level of accountability for nation states through the provision of a complaints mechanism open to individual citizens, helping the Australian government to continue to strive towards achieving gender equality and the provision of women's rights. It is worthwhile then to consider the implications and potential for the use of human rights mechanisms for promoting women's rights in Australia, particularly as they relate to freedom from sexual violence.

This article:

- provides an overview of human rights frameworks and their relevance to women's rights;
- outlines the mechanisms provided for by the Optional Protocol;
- considers how the Optional Protocol has been used elsewhere via the case study of Ciudad Juárez in Mexico;
- considers the rationale for signing the Optional Protocol; and
- considers the limitations and a feminist critique of human rights mechanisms to address sexual violence against women.

It concludes by suggesting that there are some notable limitations in the manner in which sexual violence, and women's rights more generally, are conceptualised in a rights discourse. Mechanisms such as the Optional Protocol represent an important and useful tool for addressing sexual violence against women.

<sup>1</sup> The Attorney-General has currently ruled out the possibility of a *Human Rights Act* being introduced in Australia (Australian Broadcasting Corporation, 2010).

# through human rights instruments

## The United Nations and human rights: A brief overview

Established in 1945 in the aftermath of the Second World War, the United Nations (UN) is an international body that facilitates international cooperation and communication around a number of global issues, including world peace and adherence to human rights standards. Based heavily on pre-existing liberal notions of rights, the development of a series of what are considered “universal” human rights has been integral to the goals and purpose of the UN.

In 1948, the Universal Declaration of Human Rights came into being. The declaration sets out a series of rights considered to be inherent to all human beings (by the very virtue of being human), and necessary for the attainment of the minimal standard of living and dignity of human kind. In principle, failure to meet this minimal standard is considered a breach of human rights. In this way, a breach is absolute, not relative; it does not matter if country A is not as bad as country B in its human rights abuses, country A has still breached its obligations.

Universal human rights standards were developed in response to, and with the hope of avoiding a repetition of, the atrocities of the Second World War (Wall, 2008). Thus, the formation of these rights is underpinned by the liberal philosophy that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Universal Declaration of Human Rights, 1948, Preamble, para. 1). Declarations are not legally binding under international law. As such, the many rights contained in this document have subsequently been covered in other legally recognised conventions, such as the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.<sup>2</sup>

<sup>2</sup> Declarations are generally non-binding. That is, the state does not have a legal obligation to uphold the standards or rights outlined in a declaration. Conventions or covenants are legally binding documents. States have an obligation to uphold the rights contained in a convention to which they are a signatory, with the exception of any reservations made to the convention.

## Human rights and/as women’s rights: Convention on the Elimination of All Forms of Discrimination Against Women

The Universal Declaration and subsequent rights protocols outline many now commonly recognised civil and political rights, including the right to life (Article 3), freedom from slavery (Article 4) and freedom of opinion and expression (Article 19). The goal of achieving gender equality is also incorporated into the Declaration of Human Rights. The preamble to the declaration states:

Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in *the equal rights of men and women* [my emphasis] and have determined to promote social progress and better standards of life in larger freedom. (para. 5)

Likewise, Article 2 of the Declaration sets forth 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 [my emphasis] ... or other status.

Despite this formal commitment towards equal enjoyment of human rights, it subsequently became apparent that this was insufficient to motivate substantive change in striving towards gender equality (UN Division for the Advancement of Women [UN DAW], 2009) and “failed to deal with



discrimination against women in a comprehensive way” (UN DAW, 2009, para. 5). Furthermore, the declaration and subsequent rights conventions did not adequately address the specific needs of women or identify the gender-specific mechanisms used to deny women their human rights, such as sexual violence and limits to reproductive rights. As a result of lobbying by the women’s movement, as well as recognition from within the UN of the failure to achieve equal rights for both men and women, the Convention on the Elimination of All Forms of Discrimination Against Women was introduced on 18 December 1979. Australia has been a signatory to CEDAW since 1983.

CEDAW seeks to uphold and strengthen a range of women’s rights relating to the discrimination faced by women, including:

- elimination of harmful cultural practices and stereotypes based on the inferiority of women (Article 5);
- trafficking and prostitution of women (Article 6);
- the right to vote and participate in government (Article 7 & 8);
- equality in employment (Article 11);
- reproductive rights (Article 16); and
- many other civil, political, and economic rights, including forms of gender-based discrimination not explicitly mentioned in the protocol.

The convention is a binding protocol under international law. Member states are obliged to ensure women enjoy the rights that CEDAW

provides, as well as rights outlined in all other UN conventions and treaties to which the country is a signatory (Byrnes, Graterol, & Chartres, 2007). This obligation may be fulfilled in a variety of ways; for example, by incorporating the protection of human rights standards into domestic legislation (e.g., the Australian *Sex Discrimination Act*), through policies promoting and upholding human rights (e.g., through social policy initiatives, violence against women campaigns, etc.), and via independent monitoring bodies such as the Australian Human Rights Commission. States are also required to periodically report to the CEDAW committee<sup>3</sup> in relation to their efforts and progress in upholding the rights provided for in the convention. Substantive (rather than formal) equality is a primary aim of CEDAW. As such, legislative and policy change alone is insufficient to fulfil government obligations under CEDAW—these formal actions must be met with actual improvement to the equality of women (McQuigg, 2007, p. 462; Public Interest Law Clearing House, Victoria, 2009). As Amnesty International Australia (2008) suggested, efforts to meet government obligations under CEDAW (through the implementation of a National Plan of Action) should be “built around targets and timeframes, and linked to accountability mechanisms” (p. 6), demonstrating the need for substantive change to be generated.

CEDAW has faced a high number of reservations from member states, meaning that the full scope of women’s human rights is generally not upheld or well enforced in many countries (Evatt, 2002; Kelly, 2005). Indeed, in some instances such reservations are so substantial that they completely compromise the purposes of CEDAW (Charlesworth & Chinkin, 2000, p. 220; Stamatopoulou, 1995, p. 38). While members to CEDAW and other rights conventions are considered bound by the convention under international law, an absence of accountability mechanisms has meant a distinct lack of consequence for non-compliance—other than potential international embarrassment and shaming. The introduction of the CEDAW Optional Protocol provides an avenue to address this lack of consequence. The key elements of the protocol are summarised in Box 1. The following section

<sup>3</sup> The CEDAW committee comprises 23 experts on gender and women’s issues selected from around the world.



### Box 1. The CEDAW Optional Protocol

- The Optional Protocol was introduced by the UN on 6 October 1999.
- The protocol is a complaints mechanism for CEDAW.
- Previously, citizens did not have the ability to contest rights violations under CEDAW.
- Previously, there was no way for the CEDAW committee to enforce its findings or recommendations to a country. The Optional Protocol gives it “teeth”.
- Australia acceded to (signed and ratified) the Optional Protocol on 4 December 2008.
- all domestic legal avenues generally need to have been exhausted; and
- the incident must have occurred after the state ratified the Optional Protocol.
- If a communication is deemed admissible, the state has a right of reply before the CEDAW committee makes its final decision and recommendations.
- Refer to the Optional Protocol for a complete overview of submission requirements.

There are two avenues of complaint provided for by the Optional Protocol: the Communication Procedure and the Inquiry Procedure.

#### Communication Procedure

- This procedure is outlined in Article 2 of the Optional Protocol.
- Individuals or groups of women can submit a written complaint to the CEDAW committee regarding a specific rights violation under CEDAW.
- Complaints may be submitted on behalf of the individual or group by a third party (such as a women’s rights group).
- There are some restrictions as to when a communication can be submitted, including that:

#### Inquiry Procedure

- This procedure is outlined in Article 8 of the Optional Protocol.
- The CEDAW committee is permitted to establish an investigation upon receiving “reliable information of grave or systematic violations” of rights by a member state.
- With the permission of the state, the committee may conduct a site visit in order to investigate the situation.
- The committee provides detailed findings and recommendations for action to the state concerned.
- The committee will conduct a follow-up procedure to ensure that the state has taken reasonable action based on the committee’s recommendations.

considers how this mechanism has so far been used to address sexual violence.

### The case of Ciudad Juárez

Given the limited period of time that the CEDAW Optional Protocol has been in force, only a limited body of “case law”, or precedent, has been established. Nonetheless, it is worthwhile considering the implications of previous decisions of the committee in order to demonstrate how the Inquiry Procedure may be used in addressing gender-based violence. The case of Ciudad Juárez will be employed as a key paradigm for exploring

this. This particular case study has been selected because:

- it pertains in part to sexual violence (rape);
- it pertains in its entirety to violence against women (murder and abduction/“disappearing” of women); and
- the case was brought before the committee as part of the Inquiry Procedure.

Given that the case relates to a wide range of rights violations, rather than specific/individualised issues, it has been identified as having broader implications for other countries (Ensalaco, 2006, p. 417).

It should be noted that this is intended as a theoretical/speculative discussion only—the content of this discussion does not necessarily imply that the Australian government would be found to be in breach of CEDAW should an Australian communication be brought before the CEDAW committee.

## Ciudad Juárez: An overview

Throughout the 1990s and early 2000s, the Mexican city of Ciudad Juárez bore witness to the widespread, systematic abduction and eventual murder of an estimated 400 women. Approximately one-third of these women were also believed to have been sexually assaulted or raped prior to death, although due to poor criminal and forensic investigation, it is likely that these numbers are even higher (UN CEDAW, 2005). Some further 4,500 women<sup>4</sup> “disappeared” during this time, with their whereabouts or fates unknown. These heinous crimes against women took place in an environment of impunity, with the police and criminal justice system failing to investigate, charge or punish perpetrators. The investigations that did take place were frequently mismanaged, and local police were accused of corruption (UN CEDAW, 2005).

## The application of the Optional Protocol

Upon receiving accurate and specific information pertaining to these systematic and/or grave rights violations from Mexican and US non-government organisations, as well as from the government of Mexico, the CEDAW committee launched an Inquiry Procedure in Ciudad Juárez. In order to fully investigate and establish the extent of the situation in Ciudad Juárez, the committee, was invited by the Mexican government to conduct a site visit. The committee (UN CEDAW, 2005) subsequently determined the following issues were relevant to the case:

- Rapid social change (initiated by rapid population and economic growth) had not been “accompanied by a change in traditionally patriarchal attitudes” (p. 9).

<sup>4</sup> The Mexican government claims that this number reflects the number of reports of missing women, rather than the actual number of women “disappeared” (UN CEDAW, 2005, p. 52).

- This had led to a culture of impunity, creating an atmosphere in which violations of human rights may occur. As a result, violence against women became prevalent, and intensified between 1993 and 2003.
- There was a failure of government and criminal justice agencies to adequately investigate and punish offenders. Investigations were often severely inadequate—marked by failures to collect relevant (and crucial) evidence, accurately identify victims, and significant delays in initiating an investigation and processing cases.
- There was a failure to recognise the structurally and culturally embedded nature of the offences—that they were not isolated incidents, but were instead the result of an ingrained culture that was supportive of violence against women.

While the Mexican government did implement policy and legislation prior to the Inquiry Procedure in an attempt to address these crimes, the CEDAW committee held these official measures to be ineffective and insufficient, as they did not result in any marked improvement in the levels of violence against women. As the committee report on Mexico noted (UN CEDAW, 2005):

The policies adopted and the measures taken since 1993 in the areas of prevention, investigation and punishment of crimes of violence against women have been ineffective and have fostered a climate of impunity and lack of confidence in the justice system which are incompatible with the duties of the State. (p. 14)

Furthermore, these policy changes failed to recognise the gendered (and socially embedded) nature of these crimes, and resorted to victim blaming and stereotyping rather than attempting to institute real social change. This indicates that policy and legislative changes alone cannot be viewed as being sufficient for fulfilling a state’s obligations under CEDAW. The CEDAW committee has since worked closely with the Mexican government to ensure that effective and appropriate changes are made to their policies and legislation (UN CEDAW, 2005). Some of the initiatives introduced or pending (at time of the 2005 report) include:

- establishing programs to combat trafficking in women and prostitution;
- establishing domestic violence shelters;

- establishing support and legal assistance for relatives of victims; and
- introducing public awareness and information campaigns on violence. (p. 31)

Many of these initiatives appear to represent positive developments; however, as the CEDAW committee noted, it is too early to determine whether these efforts have been effective in promoting actual change to levels of gender-based violence (UN CEDAW, 2005, p. 33).

The circumstances surrounding the Ciudad Juárez case were unique, and in many respects this represents an extreme example of violence against women, as the victims were murdered as well as in many cases being sexually assaulted and tortured. That the cases resulted in death in addition to sexual and physical violence may have influenced the need to investigate the case as a pressing human rights matter. According to the Mexican Government, a significant proportion of the murders in Mexico were linked to “ordinary” family and domestic violence (UN CEDAW, 2005), while other cases conformed more closely to a “stereotypical” stranger rape scenario, with the women abused and murdered by men unknown to them, at night-time and in isolated public locations (Ensalaco, 2006, p. 420). It is unclear what proportions of the cases involving sexual assault occurred within the context of domestic violence or as “stranger” rape/murder. Consequently, it is not clear whether the findings of the Inquiry Procedure necessarily relate to the “everyday” and less extreme (or “non-lethal”) forms of sexual violence experienced by women. Furthermore, the social and political circumstances of the Ciudad Juárez case were marked by a culture of organised crime, drug and sex trafficking, and rapid social and population change, which are acknowledged as contributing to these crimes, in conjunction with embedded social attitudes towards women and violence (UN CEDAW, 2005).

## What was the rationale for signing the Optional Protocol by Australia?

Since its introduction in 1999, 94 countries have become parties to the CEDAW Optional Protocol. Australia’s reasons for doing so in 2008 were explained by the Minister for the Status of Women, the Hon. Tanya Plibersek MP and the



Attorney-General, the Hon. Robert McClelland, MP (Plibersek & McClelland, 2008):

By becoming a party to the Optional Protocol, the Government is making a powerful statement that discrimination against women in any form is unacceptable ... Acceding to the protocol will send a strong message that Australia is serious about promoting gender equality and that we are prepared to be judged by international human rights standards. (para. 4 & 8)

As Box 1 describes, signing the protocol provides a new complaints mechanism when there is a breach of existing rights that have been in force since the government became a party to CEDAW (Department of Families, Housing, Community Services and Indigenous Affairs [FaHCSIA], 2009). It is open to any individual who, after all domestic options have been exhausted, feels that there has been a violation of Australia’s obligations under CEDAW (Plibersek & McClelland, 2008). These rights broadly refer to political participation, health, employment, marriage, family relations and equality before the law. The CEDAW committee can also investigate claims of serious violations of CEDAW in Australia through an Inquiry Procedure (FaHCSIA, 2009).

One of purposes of the protocol is to encourage not only the development of policies and laws that uphold CEDAW obligations, but that these be effective, in substance, in protecting or bolstering

women's human rights. The Australian Human Rights Commission (n. d.) argued that the Optional Protocol was an important addition for countries that have already signed CEDAW and provided five reasons for this:

- The Optional Protocol provides a “backup” for domestic mechanisms to ensure that they are adequate and effective.
- Domestic mechanisms often have gaps so that some women are not able to access them—the Optional Protocol ensure[s] that an enforcement mechanism is available to them.
- In nation States with a federalist system [such as Australia], regional and federal governments may have separate and independent legislative power. Therefore, the actions of one level of government may be contrary to CEDAW while the other is not. An Optional Protocol would help to ensure that all levels of government find domestic methods to set uniform standards in accordance with CEDAW.
- Governments change, as do systems of power and cultural attitudes. Even though one nation's government may seem supportive of women's rights now, they may not be so in the future.
- It is important for nations with good domestic protection for women to become a party to the Optional Protocol to demonstrate leadership for other women in the region from nations with less effective mechanisms. (AHRC, n.d.)

How the Optional Protocol will be used is open to question. The Australian Human Rights Commission (n. d.) noted that there may be a gap between formal legislative provisions and their implementation, application or enforcement in particular circumstances. The Optional Protocol may be a useful mechanism to resolve such discrepancies.

It is unclear how the Optional Protocol would be used to respond to possible breaches to CEDAW obligations in matters of sexual assault. Partly, this relates to the issue of “gravity” or seriousness should an investigation ever be launched following claims of a breach. Sexual assault is prevalent in Australia and the patterns of victimisation are predictable. The CEDAW committee has in the past criticised Australia regarding the high rate of sexual and domestic violence against women, poor legal and law enforcement responses, and poor legal outcomes (UN CEDAW, 2006b). Yet, it is not clear whether

this actually constitutes a failure to uphold our obligations under human rights law. For instance, it has not been clearly established what level of action or inaction is required by a state in order for it to be meeting its international obligations (Libal & Parekh, 2009). While a state can always do more to address sexual violence, it can be difficult to “make the case that the state has failed to protect women” (Libal & Parekh, 2009, p. 1484) where laws are enacted and other official action is taken (such as provision of funding and anti-violence campaigns).

A second issue to consider is the extent to which human rights frameworks and instruments in fact address sexual assault. This is an issue taken up in the subsequent sections of this paper.

## Feminist theory and human rights

So far, it has been suggested that the Optional Protocol may provide a pathway for instigating change to current approaches to addressing sexual violence, as well as providing a means for addressing specific rights violations under CEDAW. However, it is important to note that the discourse and associated frameworks of human rights have been widely criticised by feminist scholars and other advocates for women's rights. This section aims to outline some of the major concerns directed at human rights frameworks more broadly by feminist and other critical theorists. In doing so, it is suggested that human rights law should not be considered an unproblematic mechanism for use by women, although it is certainly a useful mechanism in many respects.

## Human rights and violence against women

While the case study discussed above shows that human rights frameworks can be used as a means to address sexual violence against women, the manner in which sexual violence (and violence against women more generally) is included and defined within these frameworks is more problematic. Violence against women has only recently been incorporated into a human rights discourse (see Box 2 for an overview). As noted, there is no explicit mention of violence against women within the CEDAW protocol, although the protocol has been interpreted to include violence against women.

Subsequent rights documents have more explicitly located violence against women as a human rights abuse. It is the 1995 Beijing Declaration and Platform for Action that perhaps most strongly recognises and defines violence against women as a rights violation, denouncing it as:

an obstacle to the achievement of the objectives of equality, development and peace. Violence against women violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms ... [and] is a matter of concern to all States and should be addressed (sec. D, 112)

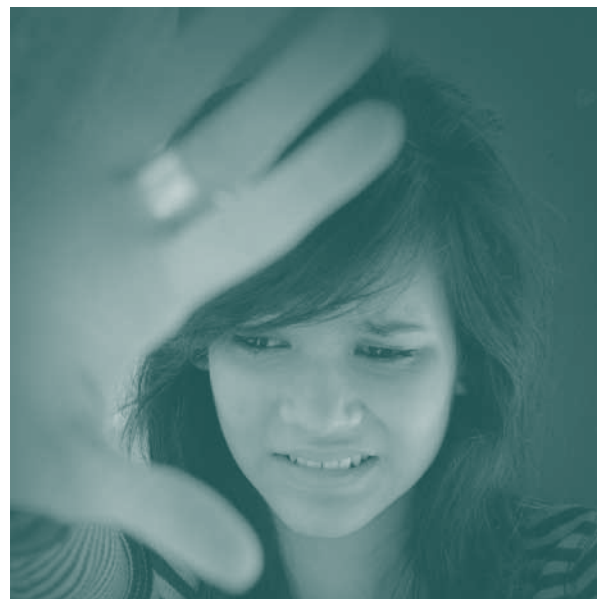
Certainly, the Beijing Declaration represented a positive development for women's rights, and requires member states to take action on this issue. Indeed, as indicated in Box 2 (see page 10), sexual violence is defined in a comprehensive manner that reflects feminist understandings of gender-based violence. However, while the manner in which sexual violence is conceptualised is particularly promising, the phrasing used in defining violence against women as a rights issue gives cause for concern. It is apparent from the language used above that sexual violence and violence against women are considered as violations in so far as they prevent women from enjoying their other "universal" human rights (O'Hare, 1999, p. 377). Freedom from violence against women is not explicitly labelled a human right in and of itself (Kelly, 2005, p. 482; Otto, 1996, p. 17). According to this conceptualisation, the harm or violation of sexual (and other) violence lies in its impingement on women's ability to enjoy their "other" rights rather than being intrinsic to the act itself. Furthermore, by failing to include freedom from sexual violence as an explicit human right, a human rights discourse can exclude and marginalise women's experiences of violation.

### Human rights as men's rights

Despite claims within rights documents deeming human rights to be "universal" (such as the Universal Declaration of Human Rights), feminist critics have argued that a human rights discourse strives to uphold those rights most pertinent to the lives of (Western) men (Friedman, 2003; Kelly, 2005; MacKinnon, 2006; O'Hare, 1999). Indeed, it would seem that many of the rights upheld in rights covenants are directly at odds with women's rights,

and are clearly in opposition to the goals of the feminist movement(s) more generally. For instance, Article 16(3) of the Universal Declaration of Human Rights states that "the family is the natural and fundamental group unit of society and is entitled to protection". Yet feminist scholarship and research has suggested that the family and private sphere are key sites of women's oppression and abuse (Boyd, 1997; Koshan, 1997; MacKinnon, 1989; Russell, 1982; VicHealth, 2007). As human rights ideology stems from a liberal political philosophy, protection of the "private" sphere was seen as fundamental to a rights discourse, resulting in a reluctance to intervene in "private" family life, and consequently rendering the discourse of rights as unable to locate sexual violence in the private sphere as a rights violation (Sullivan, 1995). It is indeed difficult to imagine how women could be afforded their full human rights when the institutions and ideologies central to their abuse are simultaneously protected by a rights discourse (Charlesworth & Chinkin, 2000, p. 230).

Many of the violations experienced by women on a daily basis were not (and in many cases still are not) defined as human rights abuses in many of the mainstream rights conventions (Bunch, 1995; Libal & Parekh, 2009, p. 1481; O'Hare, 1999, p. 364). An initial failure to include human rights that are essential to women's being (e.g., reproductive rights, freedom from sexual violence) may have occurred





## Box 2. Sexual violence in human rights discourse

Sexual violence is not explicitly mentioned in CEDAW. However, CEDAW defines discrimination as:

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. (Article 1)

As discrimination is referred to as any distinction, exclusion or restriction, this implies that actions constituting discrimination against women not explicitly mentioned in CEDAW are also covered by this protocol (Evatt, 2002; see McQuigg, 2007, p. 461, for a discussion on this in relation to domestic violence), and this has been interpreted to include violence against women. For instance, several cases heard by the CEDAW committee have related to violence against women (such as the Ciudad Juárez case, UN CEDAW, 2005), and states are expected to include information regarding their efforts to prevent violence against women in their reports to the CEDAW committee. Violence against women is also explicitly addressed in the CEDAW committee's general recommendations under Article 19 (UN CEDAW, 1992), noting that "gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence" (para. 6).

As a result of continued lobbying by women's rights groups on an international level, violence against women and sexual violence were incorporated into non-binding declarations, such as the Vienna (1993) and Beijing (1995) Declarations (Friedman, 2003; Kelly,

2005). It is within these declarations that sexual and physical violence have been firmly and explicitly located as rights violations.

What constitutes sexual violence is defined broadly within the Beijing Declaration and includes, but is not limited to:

- violence occurring in the family and within the general community;
- sexual abuse of female children;
- marital rape;
- rape;
- sexual abuse;
- sexual harassment and intimidation; and
- sexual violence perpetrated or condoned by the state.

Importantly, the Beijing Declaration acknowledges that sexual (and other) violence against women occurs as a result of embedded social values, cultural beliefs and unequal power relations (sec. 117–118). Violence against women forms "one of the crucial social mechanisms by which women are forced into a subordinate position compared with men" (sec. 117). Complicity of the state is also recognised as contributing to the cycle of violence experienced by many women, as "there is often a failure to protect victims or punish perpetrators" (sec. 117). Thus, a comprehensive, multi-faceted approach is taken to defining sexual violence and its causes (Amnesty International Australia, 2008). Sexual violence is identified within the Beijing and Vienna Declarations as a structural issue, rooted in power and gender relations, rather than being an individual anomaly, in keeping with feminist conceptions of sexual and other forms of gendered violence (O'Hare, 1999, pp. 374–375).

simply as a product of the historical time at which these human rights documents were developed. As O'Hare (1999) noted, "male hegemony over public life and institutions meant that rights came to be defined by men" (pp. 366–367). That women's human rights are still not adequately addressed and included by mainstream rights covenants or regulatory bodies is perhaps more troublesome, in that it indicates that human rights bodies are

still ingrained in patriarchal values, functioning to exclude women, despite being responsible for promoting the inclusion and equality of women across the globe (O'Hare, 1999; Charlesworth & Chinkin, 2000; Charlesworth, 1995).

For example, a recent study by Puechguibril (2010, p. 173) critiques the masculine language of UN documents for perpetuating "a vision of gender roles that reinforces inequalities and prevents

progress on gender mainstreaming”. Her content analysis of reports released by the Secretary-General demonstrates that the language used positions women in relation to children (through use of the phrase “women and children”)—thus, “women are defined predominantly as mothers and always associated with children” (2010, p. 175)—and depicts women as vulnerable or as victims, consequently denying women agency. This suggests that the language used in UN communications tends to reinforce negative stereotypes of women, thus reflecting patriarchal values and beliefs.

The language and content of mainstream rights protocols is itself inherently masculine, as most “international documents continue to use the generic male pronoun” (Charlesworth & Chinkin, 2000, p. 49) when referring to “universal” rights—although the Universal Declaration of Human Rights remains the most striking example of this embedded masculinity. Language referring to “man”, or the need to “act towards one another in a spirit of brotherhood” (Article 1) directly excludes women from human rights discourse and, consequently, labels them as something less than human (Bunch, 1995, p. 12; MacKinnon, 2006). Indeed, women become “human” only in respect to their (clearly hierarchical and possessive) relationships with men, and where their rights and experiences of violation happen to correlate with those of men (MacKinnon, 2006).

### “Ghettoisation”: The sidelining of women’s rights

Given that “women’s issues” are not heard within “mainstream” rights bodies,<sup>5</sup> it has been suggested by several commentators that women’s rights are consequently “ghettoised”, or marginalised, within the UN (Charlesworth & Chinkin, 2000, p. 219). As Bunch (1995) asserts, “this separation of women’s rights from human rights has perpetuated the secondary status of women” (p. 12). Furthermore, the bodies responsible for monitoring and upholding women’s rights are generally seen to have limited access to resources and have weaker enforcement

mechanisms than other rights bodies (McQuigg 2007; O’Hare, 1999, pp. 367–368).

While the “ghettoisation” of women’s rights is certainly problematic, recent initiatives have also moved away from this and represent positive developments in the field of women’s rights. For instance, a lack of accountability mechanisms, or “teeth”, has been viewed as one of the primary causes of the “ghettoisation” of CEDAW and women’s human rights (McQuigg, 2007). However, the introduction of the Optional Protocol goes some way to reversing this by providing an official means to challenge state action (or inaction) over potential human rights abuses. Indeed, as MacKinnon (2006) noted, the Optional Protocol “put a new legal tool into the hands of women, empowering them to claim their internationally protected rights” (p. 64).

Later documents, such as the Vienna and Beijing Declarations, have shifted away from the male-centric nature of rights protocols, and represent the re-orientation of a human rights discourse towards a more inclusive approach to women’s/human rights (O’Hare 1999, p. 365). While it may be ideal to have women’s rights recognised and incorporated into “mainstream” rights protocols, the developments mentioned above and earlier in this piece clearly demonstrate concern for, and inclusion of, violence against women as a human rights issue.

### The problem of non-state actors and human rights

Rights discourses have been fiercely criticised for failing to consider the actions of non-state actors (or, conversely, only focusing on the actions or failures to act of the state), resulting in an inability to recognise potential rights abuses occurring in the private sphere—which is also the site where women experience the most abuse—and maintains the public/private dichotomy critiqued by feminists (Libal & Parekh, 2009; MacKinnon, 2006). However, while human rights bodies may be unable to directly reprimand non-state actors for committing rights violations, it has subsequently been made clear by various UN bodies and conventions that it is the responsibility of the state party to ensure that its citizens do not commit acts that violate the state’s rights obligations. For instance, the CEDAW committee’s General Recommendation 19 expressly

<sup>5</sup> The covenants on civil and political rights, and economic and social rights are generally considered to be “mainstream” rights bodies, as they are addressing “universal” rights as opposed to “women’s” rights only.

### Box 3. Key resources

#### Declaration and conventions

Universal Declaration of Human Rights <[www.un.org/en/documents/udhr](http://www.un.org/en/documents/udhr)>

International Covenant on Civil and Political Rights <[www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm)>

International Covenant on Economic, Social and Cultural Rights <[www2.ohchr.org/english/law/pdf/cescr.pdf](http://www2.ohchr.org/english/law/pdf/cescr.pdf)>

Convention on the Elimination of All Forms of Discrimination Against Women <[www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm)>

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women <[www.un.org/womenwatch/daw/cedaw/protocol/text.htm](http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm)>

#### Declarations and Programmes for Action

Vienna Declaration and Programme of Action <[www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.CONF.157.23.En?OpenDocument)>

Beijing Declaration and Platform for Action <[www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf](http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf)>

states that “discrimination under the Convention is not restricted to action by or on behalf of Governments” (para. 9), and similar precedents have been set by other human rights committees and monitoring bodies (see Sullivan, 1995, p. 130). Actions of non-state actors can therefore clearly constitute rights violations; however, the concern of human rights law and enforcement bodies lies with the failure of states to prevent or punish the actions of its citizens, rather than with directly reprimanding the non-state actor who committed the violation.

## Conclusion

Despite the clear limitations of a human rights discourse in protecting the rights of women, human

rights mechanisms also represent a powerful and politically salient means of generating real change in the lives of women (Charlesworth & Chinkin, 2000; Kelly, 2005; Sullivan, 1995). In Australia alone a number of legislative and other initiatives can be attributed to our human rights obligations and use of a human rights framework, including:

- *Sexual Discrimination Act* (1986);
- Victorian *Charter of Rights and Responsibilities Act* (2006);
- the implementation of various national plans aimed at responding to and reducing violence against women (e.g. *A Time for Action*, 2009);
- the establishment of the Australian Human Rights Commission; and
- a constellation of initiatives that have been introduced to attempt to realise human rights in the domestic agenda.

Furthermore, as O'Hare (1999) suggested, a human rights discourse “offers a vocabulary for women to assert their needs in the language of the powerful” (p. 380). While questions may be raised as to whether this “language” is the most appropriate tool for acquiring women's rights (in that the language of the powerful presumably reflects the needs of the powerful), it undoubtedly has the ability to express women's rights in a manner that resonates with those in a position of power and influence (who may be able to instigate institutional change), and requires state action (though states may not always respond as they should) (Charlesworth & Chinkin, 2000, p. 210; Kelly, 2005). This provides a powerful lobbying tool for those working within the violence against women field (Kelly, 2005). Indeed, the use of optional protocols for other rights covenants has resulted in direct legislative change in Australia, most clearly demonstrated by changes to Tasmanian law, achieved in the Toonen case under the Optional Protocol to the International Covenant on Civil and Political Rights (Greenleaf, 1994).

Although human rights are not an unproblematic concept from a feminist standpoint, this should not be viewed as sufficient reason to ignore or avoid altogether human rights mechanisms such as use of the Optional Protocol. Rather, human rights approaches to addressing sexual violence need be used with caution and awareness of the limitations posed—both conceptually, and practically, given the great time and potential expense of launching a

complaint under the Optional Protocol. Use of the Optional Protocol constitutes one arm of a multi-faceted approach to combating sexual violence that is not limited to the use of rights mechanisms to push for change. Such an approach would be inclusive of other mechanisms and frameworks, such as the National Plan to Reduce Violence against Women and their Children, whole-of-government strategies for prevention, capacity-building at local and community levels and social change campaigns, which can complement, as well as “fill gaps” left by, the use of human rights mechanisms. In this way, we will be able to more wholly address (respond and prevent) the gamut of violations experienced by women.

Sexual violence has been discussed in a very broad and general manner throughout this article, and issues such as ethnicity, physical disability and refugee status, among others, have not been discussed here; however, these issues all intersect with both sexual violence and human rights frameworks, resulting in distinct differences in the needs and experiences of each group. Consequently, certain social groups may face more grave rights violations than others, and this is likely to have a bearing on the implications and potential use of the Optional Protocol.

While there are some practical and theoretical limitations to the use of human rights mechanisms, they are nonetheless an important aspect of broader efforts to combat sexual violence against women.

## References

- Amnesty International Australia. (2008). *Setting the standard: International good practice to inform an Australian national plan of action to eliminate violence against women*. Broadway, NSW: Amnesty International Australia.
- Australian Broadcasting Corporation. (2010, 21 April). A-G rules out bill of rights. *ABC News*. Retrieved from <[www.abc.net.au/news/stories/2010/04/21/2879078.htm](http://www.abc.net.au/news/stories/2010/04/21/2879078.htm)>.
- Australian Human Rights Commission. (n. d.). *Women of the world: Know your international human rights. The Optional Protocol to CEDAW*. Retrieved from <[www.hreoc.gov.au/sex\\_discrimination/publication/archive/cedaw/the\\_optional\\_protocol.html](http://www.hreoc.gov.au/sex_discrimination/publication/archive/cedaw/the_optional_protocol.html)>.
- Australian Human Rights Commission. (2002). *The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*. Sydney: AHRC. Retrieved from <[www.hreoc.gov.au/sex\\_discrimination/publication/optional\\_protocol](http://www.hreoc.gov.au/sex_discrimination/publication/optional_protocol)>
- Australian Human Rights Commission. (2009, 19 October). Will Australia join the rest of the Western world and agree to a national charter of fundamental rights and values? (Media Release). Sydney: AHRC. Retrieved from <[www.hreoc.gov.au/about/media/media\\_releases/2009/97\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/97_09.html)>.
- Boyd, S. (1997) Challenging the public/private divide: An overview. In S. Boyd (Ed.), *Challenging the public/private divide: Feminism, law, and public policy* (pp. 3–36). Toronto: University of Toronto Press.
- Bunch, C. (1995). Transforming human rights from a feminist perspective. In J. Peters, & A. Wolper (Eds.), *Women's rights human rights: International feminist perspectives* (pp. 11–17). New York: Routledge.
- Byrnes, A., Graterol, M. H., & Chartres, R. (2007). *State obligation and the convention on the elimination of all forms of discrimination against women* (University of New South Wales Faculty of Law Research Series No. 48). Sydney: University of New South Wales, Faculty of Law.
- Charlesworth, H., & Chinkin, C. (2000). *The boundaries of international law: A feminist analysis*. Manchester: Manchester University Press.
- Department of Families, Housing, Community Services and Indigenous Affairs. (2009). *Women of the world: Know your international human rights. 8. Optional Protocol to CEDAW*. Canberra: FaHCSIA. Retrieved from <[www.fahcsia.gov.au/sa/women/pubs/govtint/know\\_int\\_humrights/Pages/optional\\_protocol\\_cedaw.aspx](http://www.fahcsia.gov.au/sa/women/pubs/govtint/know_int_humrights/Pages/optional_protocol_cedaw.aspx)>.
- Ensalaco, M. (2006). Murder in Ciudad Juárez: A parable of women's struggle for human rights. *Violence Against Women*, 12(5), 417–440
- Evatt, E. (2002). Women and human rights. *Monash University Law Review*, 28(1), 1–16.
- Friedman, E. J. (2003). Gendering the agenda: The impact of the transnational women's rights movement at the UN conferences of the 1990s. *Women's Studies International Forum*, 26(4), 313–331.
- Greenleaf, G. (1994). Toonen v. Australia. *Privacy Law and Policy Reporter*, 1(3). 33. Retrieved from <<http://www.austlii.edu.au/au/journals/PLPR/1994/33.html>>.
- Kelly, L. (2005). Inside outsiders: Mainstreaming violence against women into human rights discourse and practice. *International Feminist Journal of Politics*, 7(4), 471–495.
- Koshan, J. (1997). Sounds of silence: The public/private dichotomy, violence, & Aboriginal women. In S. Boyd (Ed.), *Challenging the public/private divide: Feminism, law and public policy* (pp. 87–112). Toronto: University of Toronto Press.

- Libal, K., & Parekh, S. (2009). Reframing violence against women as a human rights violation: Evan Stark's coercive control. *Violence Against Women*, 15(12), 1477–1489.
- Lynch, P. (2010, 1 March). Rights bill is long overdue. *The Age*. Retrieved from <www.theage.com.au/opinion/politics/rights-bill-is-long-overdue-20100228-pb4s.html>.
- MacKinnon, C. (1989). *Towards a feminist theory of the state*. Cambridge, MA: Harvard University Press Cambridge.
- MacKinnon, C. (2006). *Are women human? And other international dialogues*. Cambridge, MA: Harvard University Press.
- McQuigg, R. J. A. (2007). The responses of states to the comments of the CEDAW committee on domestic violence. *International Journal of Human Rights*, 11(4), 461–479.
- O'Hare, U. (1999). Realising human rights for women. *Human Rights Quarterly*, 21, 364–402.
- Otto, D. (1996). Holding up half the sky, but for whose benefit? A critical analysis of the Fourth World Conference on Women. *Australian Feminist Law Journal*, 6, 7–28.
- Plibersek, T., & McClelland, R. (2008, 24 November). *Australia comes in from the cold on women's rights* (joint media release). Canberra: Office for Women & Attorney-General's Department.
- Public Interest Law Clearing House, Victoria. (2009, 17 November). *Protecting and promoting women's rights: Using the optional protocol to the UN Women's Convention*. Paper presented at PILCH Equality Seminar, Melbourne. Retrieved from <www.pilch.org.au/humanrights/equality/seminars/#5>.
- Puechguibrat, N. (2010). Discourses on gender, patriarchy and resolution 1325: A textual analysis of UN documents. *International Peacekeeping*, 17(2), 172–187.
- Russell, D. E. H. (1982). *Rape in marriage*. New York: Macmillan.
- Stamatopoulou, E. (1995). Women's rights and the United Nations. In J. Peters, & A. Wolper (Eds.), *Women's rights, human rights: International feminist perspectives* (pp. 36–50). New York: Routledge.
- Sullivan, D. (1995). The public/private distinction in international human rights law. In J. Peters, & A. Wolper (Eds.), *Women's rights, human rights: International feminist perspectives* (pp. 126–134). New York: Routledge.
- Toy, M. A. & Pearlman, J. (2009, 9 October). Human rights act would give Canberra final say. *The Age*. Retrieved from <www.theage.com.au/national/human-rights-act-would-give-canberra-final-say-20091008-gp2d.html>.
- United Nations Committee on the Elimination of Discrimination Against Women. (1992). *General recommendations made by the Committee on the Elimination of Discrimination Against Women, General Recommendation 19*. New York: CEDAW. Retrieved from <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.
- United Nations Committee on the Elimination of Discrimination Against Women. (2005). *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico* (UN Doc. CEDAW/C/2005/OP.8/MEXICO). New York: CEDAW. Retrieved from <www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf>.
- United Nations Convention on the Elimination of All Forms of Discrimination Against Women. (2006a). *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women* (UN Doc. CEDAW/SP/2006/2). New York: CEDAW. Retrieved from <daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement>
- United Nations Convention on the Elimination of All Forms of Discrimination against Women. (2006b). *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia* (UN Doc CEDAW/C/AUL/CO/5). New York: CEDAW. Retrieved from <daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/237/98/PDF/N0623798.pdf?OpenElement>
- United Nations. Division for the Advancement of Women. (2009). *Convention on the Elimination of All Forms of Discrimination Against Women: Short history of CEDAW Convention*. New York: United Nations. Retrieved from <www.un.org/womenwatch/daw/cedaw/history.htm>
- VicHealth. (2007). *Preventing violence before it occurs: A framework and background paper to guide the primary prevention of violence against women in Victoria*. Melbourne: VicHealth.
- Wall, I. (2008). On pain and the sense of human rights. *Australian Feminist Law Journal*, 29, 53–76.

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