

**PROTECTING WOMEN'S RIGHTS?
PROSPECTS UNDER THE U.N. HUMAN RIGHTS TREATY SYSTEM:
A CASE STUDY ON INDIA 2005-2017**

by

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Dedication

I dedicate this thesis to my Late Grand Father Chatter Pal Singh (Nana) who understood the value of education and always encouraged and supported me in many diverse ways to become successful in career.

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Abstract

The establishment of the United Nations Treaty System was the fundamental step for the protection and enforcement of women's rights. The system is designed to monitor the human rights standards in countries that have ratified the treaties, called state parties. However, the system is facing several challenges that have compromised its effective working for the protection and enforcement of women's rights. The thesis seeks to explain the challenges to the effective working of the system, that is, why the system does not work as designed in protecting women's rights against three specific issues: domestic violence, sexual trafficking, and reproductive rights. The thesis through a case study in India examines whether the system is working as intended in protecting women's rights in India. The purpose of thesis is to identify the opportunities to improve the working of the U.N. treaty system to effectively protect and promote women's rights.

List of Abbreviations Used

1. CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment
2. CEDAW Convention on Elimination of All Forms of Discrimination against Women
3. CRC Convention on the Rights of the Child
4. CRPD Convention on the Rights of Persons with Disabilities
5. HRTD Human Rights Treaties Division
6. ICCPR International Covenant on Civil and Political Rights
7. ICERD International Convention on the Elimination of All Forms of Racial Discrimination
8. ICESCR International Covenant on Economic, Social and Cultural Rights
9. ICMW International Convention on the Protection of the Rights of All Migrant Workers and Families
10. ICPED International Convention for the Protection of All Persons from Enforced Disappearance
11. IGMSY Indira Gandhi Matritva Sahyog Yojana
12. JSY Janani Suraksha Yojana
13. MCTS Mother and Child Tracking System
14. NCRB National Crime Records Bureau
15. NGOs Non-Governmental Organizations
16. NHRC National Human Rights Commission
17. NHRIs National Human Rights Institutions

- 18. NRHM National Rural Health Mission
- 19. OHCHR Office of the High Commissioner for Human Rights
- 20. RCH Reproductive and Child Health
- 21. SHRC State Human Rights Council
- 22. UDHR Universal Declaration of Human Rights
- 23. U.N. United Nations
- 24. UNHCHR U.N. High Commissioners for Human Rights
- 25. UPR Universal Periodical Review

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Chapter-1: Introduction

To deny people their human rights is to challenge their very humanity.
Nelson Mandela¹

1.1 Background

The human rights treaty system is one of the central components of the United Nations (U.N.). It is considered “one of the greatest achievements in the history of the global struggle for human rights”.² The U.N. human rights treaty system has been the promise to the international community regarding the protection and enforcement of human rights. The system has grown over the past decades with an increasing number of treaties and ratification of those treaties by State parties.³ One fundamental principle of this system is the “equal rights of men and women”.⁴ Gender equality is thus at the heart of the U.N. human rights treaty system.⁵

The human rights treaty bodies play a crucial role in monitoring the observation of the core international human rights treaties by State parties.⁶ State parties that have ratified U.N. treaties are obligated to submit periodical reports to the treaty bodies which review State action, including

¹ Andrea Mohin, “The Mandel Visit; Excerpts from Mandela Speech to Joint Meeting of Congress” *The New York Times* (27 June 1990), online:<<http://www.nytimes.com/1990/06/27/world/the-mandel-visit-excerpts-from-mandela-speech-to-joint-meeting-of-congress>>.

²Navneethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, (26 June 2012), Geneva: OHCHR, at 7, online:<<http://www2.ohchr.org/english/bodies/HRTD/>> [UNHCHR Report].

³ *Ibid* at 1.

⁴United Nations “Women’s Rights as Human Rights” *UN Chronicle*, 45: 2&3 (April 2008), online:<<https://unchronicle.un.org/article/womens-rights-human-rights>>.

⁵ United Nations Office of High Commissioner of Human Rights, “Women’s Human Rights and Gender Equality” online:<<http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/WRGSIndex.aspx>>.

⁶United Nations Office of High Commissioner of Human Rights, “Monitoring the Core of International Human Rights Treaties” online:<<http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>>.

legislation and policies, to assess its compliance with treaty provisions and thus the implementation of international human rights at the domestic level, that is, within State parties.⁷ Despite the formal recognition of women's rights within multiple U.N. treaties, the enforcement of women's rights is still a major concern under the U.N. system.⁸ Millions of women around the world continue to suffer violations of their rights.⁹ Although in theory the system has the tools to protect and enforce women's rights, in reality, the results have been less impressive, falling short of the objectives of the system. This failure raises concerns for the continued status of and respect for the human rights treaty system, and for peoples' belief in its capacity to bring about meaningful change in the protection and enforcement of women's rights. Scholar Douglass Cassel observes: "[T]he institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to protection of rights, or at least promise eventually to do so."¹⁰

Human rights scholars have identified several challenges in the effective working of the system,¹¹ which various U.N. High Commissioners for Human Rights (UNHCHR) have recognized and promised to address. In 2009, Navneethem Pillay, then High Commissioner, announced a "...process of reflection on how to streamline and strengthen the treaty body system"

⁷ *Ibid.*

⁸ United Nations Office of High Commissioner of Human Rights, *Women's Rights are Human Rights* (New York and Geneva: OHCHR, 2014) at 4, online:<<http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>>.

⁹ *Ibid.*

¹⁰ Douglass Cassel, "Does International Human Rights Law Make a Difference?" 2:1 (2001) *Chicago Journal of International Law* 121 at 127 online:<<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1122&context=cjil>>.

¹¹ Suzanne Egan, "Strengthening the United Nations Human Rights Treaty Body System" (2013) 13:2 *Hum Rts L Rev* 209 at 212-216 [Suzanne Egan]; Michael O' Flaherty, "The Dublin statement on the Process of strengthening of the United Nations Human Rights treaty body system (2007) 7:1 *Human Rights Law Review* 141 at 144.

involving extensive consultations with key stakeholders, including the States parties, treaty body members, national human rights institutions (NHRIs) and civil society.¹² Her much anticipated report, *Strengthening the United Nations Human Rights Treaty Body System*, addressed the challenges that the system is facing and sought to stimulate debate and offer suggestions for reform.¹³ This initiative by Navneethem Pillay provided a pathway to U.N. General Assembly for the adoption of landmark resolution 68/268 on 14 April 2014 for strengthening and enhancing the effective functioning of the treaty body system.¹⁴ This resolution set out major steps that are required to be taken for the protection and enforcement of human rights and to tackle the challenges of the U.N. human rights treaty system.¹⁵

The key challenges that are central tenets to the discussion of this thesis are as follows:

Cultural Relativism is one of the major challenges that has compromised the effective working of the U.N. treaty system for the protection and enforcement of human rights. The concept of human rights acknowledges their “universalism”, meaning that every human being is entitled to enjoy human rights without distinction as to race, color, sex, language, religion, political, birth or nationality across the world.¹⁶ The treaty bodies system is designed to ensure the effective protection and enforcement of human rights in countries that have ratified the treaties.¹⁷ The treaty

¹² Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights at the 12th session of the Human Rights Council, 14th September 2009, online:<<http://www2.ohchr.org/english/bodies/HRTD/>>.

¹³ UNHCHR Report, *supra* note 2 at 10.

¹⁴ *Strengthening and enhancing the effective functioning of the human rights treaty body system*, GA Res 68/268 UNGAOR, 68th Sess, UN Doc A/68/268 [GA Res 68/268] online:<http://www.ohchr.org/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf>.

¹⁵ *Ibid.*

¹⁶ *Universal Declaration of Human Rights*, GA Res 217 A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at 2 [UDHR].

¹⁷ John Morijin, “Reforming United Nations Human Rights Treaty Monitoring Reform” (2011) 58:3 *Netherlands International Law Review* 295 at 299.

bodies system promotes a culture of human rights, and focuses on state obligations to take measures to enable people to enjoy human rights.¹⁸ There are several cultural practices that curtail women and other specialized groups to enjoy their basic human rights guaranteed by U.N. treaties.

The second key challenge that limits the working of treaty bodies system is the weak reporting system. Under the treaty body system State parties are required to show their full compliance by submitting their State reports to treaty bodies in timely manner.¹⁹ This is a very important function that States are required to perform for the effective working of the treaty system. Since 2004, the treaty system has doubled in size with the creation of new treaties and State ratifications, due to which the non-compliance of reporting obligations by State parties have come under scrutiny.²⁰

The third major obstacle that has compromised the effective working of the U.N. treaty system is the poor quality of concluding observations issued by treaty bodies.²¹ The objective of issuance of these observations by treaty bodies is to provide guidance to State parties for the protection and enforcement of human rights in their jurisdictions.²² Many times, these bodies issue only normative guidance or give diplomatic response to State parties' reports.²³

¹⁸ A Handbook for Civil Society, *Working with the United Nations Human Rights Programme* (New York: OHCHR, 2008) Online<<http://www.ohchr.org/civilsocietyhandbook/>>.

¹⁹ Philip Alston, Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System, E/CN.4/1997/74 (27 March 1997) at para 14-36 [Philip Alston].

²⁰ UNHCHR Report, *supra* note 2 at 17.

²¹ GA Res 68/268, *supra* note 14 at paras 6 and 9.

²² Michael O'Flaherty, "The Dublin statement on the Process of strengthening of the United Nations Human Rights treaty body system (2007) 7:1 Human Rights Law Review 141 at 144.

²³ UNHCHR Report, *supra* note 2 at 60-62.

The fourth major challenge that has limited the effective working of the U.N. treaty system is the limited implementation of treaty bodies' recommendations by State parties.²⁴ One of the major aims of the human rights treaty system is to promote the culture of human rights by encouraging States to review their national laws, policies, and regulations and to engage in reform.²⁵ This signifies that State action is required for the proper implementation of treaty standards and recommendations at the national level. The poor commitment of State parties for proper implementation of recommendations provided by treaty bodies compromises the effective working of treaty bodies to achieve desired result in the protection and promotion of human rights in their national jurisdictions.²⁶

The other major obstacle that has impeded effective working of the system is the limited role for Non-Governmental Organizations (NGOs) on reporting and discussing human rights concerns.²⁷ NGOs play an effective role in the reporting system through submitting their shadow reports to the treaty bodies and highlighting the issues that remain unanswered in the state periodical reports.²⁸ The limited role of NGOs in reporting obligations have limited treaty bodies to scrutinize the human rights issues that have not been raised by State parties, thereby limiting the effective working of the U.N. treaty system.

²⁴*Ibid.*

²⁵ Pradeep Shankar Wagle, "Significance of Treaty Bodies in the Implementation of Treaties" (2003) Kathmandu Law School Paper 79 at 87 [Pradeep Wagle].

²⁶ Rosanne van Alebeek and Andre Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law, in Keller, Helen and Ulfstein Geir, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012).

²⁷ UNHCHR Report, *supra* note 2 at 29.

²⁸ Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System* (New York: Transnational Publications 2002) at 5.

These are the major challenges that need to be addressed to ensure the proper working of the U.N. treaty system.²⁹ My thesis seeks to contribute to the literatures on: (a) the workings and reform of the U.N. treaty system, and (b) the effective protection and promotion of women's international human rights in the domestic context. The objective of this thesis is to develop a better understanding of the challenges in the effective working of the U.N. human rights treaty system through a case study on the protection and enforcement of women's human rights in India. India was selected as a country case study because of widespread and systemic violations of women's rights, and thus the recognized need for effective systems of protection and enforcement. This thesis discusses the structure and functions of the treaty bodies' enforcement mechanisms for rights protection and enforcement with regards to women's rights in India, to identify the challenges that must be addressed to bring some noticeable effectiveness to its compliance monitoring and oversight activities.

1.2 Thesis Roadmap

Chapter 2 describes the U.N. human rights system, including the main human rights treaties, and their monitoring/enforcement mechanisms and implementation procedures. These mechanisms include human rights treaty bodies or Committees, and other special procedures. The chapter then reviews secondary literature on current debates regarding the advantages and challenges to the effective working of the monitoring and enforcement mechanisms of the U.N. treaty system. The issues in particular are examined: cultural relativism; State reporting, quality of concluding observations and general comments; limited implementation of recommendations; and a limited role for NGOs in the system.

²⁹ F. J. Hampson, "An Overview of the Reform of the UN Human Rights Machinery", *Human Rights Law Review* 7 (2007) 1 at 8.

Chapter 3 describes in depth the protection of women's rights in the U.N. human rights treaty system. The Chapter begins by discussing three women's rights issues in detail: domestic violence, sex trafficking, and reproductive rights. The chapter then reviews secondary literature on current challenges that prevent the U.N. treaty system from working effectively to protect and promote women's rights with particular reference to the three women's rights issues set out in preceding sections. The challenges discussed here include: cultural relativism; the problems of State reporting; the quality of Committee observations and comments; inadequate State implementation of recommendations; and the limited role of NGOs in treaty implementation.

Chapter 4 reviews the work of the U.N. treaty bodies system to protect and enforce women's rights in India. This chapter analyzes State reporting and compliance, and the guidance issued by treaty bodies to identify successes and challenges of the treaty bodies system in ensuring the domestic protection and fulfillment of women's rights in India on the issues of domestic violence, sexual trafficking, and reproductive rights. This chapter argues that the current challenges of the U.N. treaty system have played out to impede the protection and enforcement of women's rights in India. The case study involves a review of primary U.N. human rights treaty materials relating to women's rights in India between 2005-2017.

The conclusion of the thesis highlights the main point of the discussion and use the issue-specific analysis to develop a more generalized claim about the role and effective working of the U.N. treaty bodies system to protect and enforce women's rights. It identifies challenges that reduce the impact of the system at the domestic level, including the limited engagement of civil society organizations.

Chapter-2: The U.N. Human Rights Treaty System - Its Prospects, Mechanisms and Challenges

2.1 Introduction

The United Nations (U.N.) system was created on 24 October 1945 on the ashes of the Second World War.³⁰ Its foundation was the promise to recognize human dignity by promoting respect and protection of human rights.³¹ The U.N. drafted nine core human rights treaties and created institutional mechanisms for their implementation. Together, these constitute the international human rights system.

A treaty or convention is an international legal instrument that imposes binding legal obligations on a State that is a party to it. A State becomes a party to a treaty by ratifying it.³² The date the State deposits its instrument of ratification with the Secretary General of the United Nations is the date the State becomes bound by the treaty obligations. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. The implementation mechanisms of the U.N. treaty system include human rights bodies consisting of independent expert(s) and other institutional mechanisms, such as Special Procedures including Special Rapporteurs, Universal Periodical Review, and the Human Rights Treaties Division, that monitor implementation of the core international human rights treaties.³³

³⁰ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

³¹ Anne F Bayefsky, *The UN Human Rights System in the 21st Century* (New York: Transnational Publications 2000) at xvii [Anne F Bayefsky].

³² *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 2(1)(a) [Vienna Convention].

³³ UDHR, *supra* note 16 at preamble.

This chapter describes the U.N. human rights system, including the main human rights treaties (section 2.2); human rights treaty monitoring mechanisms (section 2.3); and current debates about treaty monitoring mechanisms (section 2.4).

2.1.1 Objective and Methodology of Literature Review

This chapter begins with a basic description of the U.N. human rights treaty system, including its monitoring mechanisms and their functions. This description is based on a review of primary materials, including U.N. treaties and reports, of the human rights treaty division of the Office of the High Commissioner for Human Rights. These primary materials include the texts of the nine core treaties, U.N. special rapporteurs' reports, the mandates of the treaty bodies, and the Universal Periodical Review (UPR).

Second, the review focuses on the existing body of secondary literature on current debates about the strengths and weaknesses of the institutional implementation or enforcement mechanisms of the international human rights system. The goal of this literature review is to situate this thesis within the body of legal literature assessing the working of the U.N. human rights treaty system.

2.2 U.N. Human Rights Treaties

The *Universal Declaration of Human Rights* (UDHR) was adopted in 1948 and is derived from the United Nations Charter.³⁴ The UDHR enumerated several civil, political, economic, social, and cultural rights that were subsequently incorporated into two binding treaties: The International

³⁴ *Ibid* at preamble.

Covenant on Civil and Political Rights,³⁵ and the International Convention on Economic, Social and Cultural Rights³⁶. Together, these conventions form the International Bill of Rights.³⁷

These treaties are designed to promote and protect human rights worldwide. A State voluntarily decides to become a member of a treaty and to be bound by its provisions.³⁸ By ratification of a treaty, the State becomes obligated under international human rights law to implement the provisions of that treaty and to demonstrate that its domestic legislation, as well as judicial and executive actions, conform with the provisions of the treaty.³⁹ It is thus incumbent on the sovereign State parties to use their powers to implement them at their national levels.⁴⁰ In general, however, States have autonomy regarding programmes and policies for realizing the treaty rights.⁴¹ This means States are subjected to international obligations and have primary responsibility for the promotion and protection of human rights in their national jurisdictions, once they become parties to the treaties.

State parties carry both positive and negative obligations to promote human rights at the national level.⁴² Positively, they must take all necessary protective measures to guarantee protection of individual and collective rights within their national jurisdictions, and to ensure that the rights become attainable for all people. Negatively, they are required not to curtail or interfere

³⁵ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976) [ICCPR].

³⁶ *The Convention on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

³⁷ OHCHR, “*The United Nation Human Rights Treaties System*” (2012) online:<<http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>> at 6-9.

³⁸ Vienna Convention, *supra* note 32, article 17.

³⁹ *Ibid.*

⁴⁰ Monica Hakimi, “State Bystander Responsibility” (2010) 21:2 EJIL at 350.

⁴¹ ICESCR, *supra* note 36 at article 2(1).

⁴² Rashee Jain, *A study of Human Rights* (Delhi: Central Law Publication, 2008) at 24 [Rashee Jain].

in the enjoyment of the rights. Each State party to a treaty, therefore, has an obligation to respect, protect and fulfill the human rights commitments enumerated by that treaty, which include rights applicable to individuals and groups. The obligation to respect means that the State must not take any actions that interfere with or curtail the enjoyment of rights.⁴³ The obligation to protect requires the State to protect individuals and groups against human rights abuses by third parties, including business enterprises.⁴⁴ The obligation to fulfill means that the State must take positive action to facilitate the enjoyment of basic human rights by enacting new or amending existing legislation that promotes and protects economic, social, and cultural rights.⁴⁵ Through ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations.

Since the international bill of rights, several other international human rights treaties have come into existence, conferring legal form on recognized human rights and further developing the body of international human rights law.⁴⁶ Together, these treaties are known as the ‘core’ treaties and they set out the basic human rights legal standards. The nine core international human rights treaties address a range of economic, social, and cultural rights, civil and political rights, as well as the elimination of racial and gender discrimination, protection against torture and forced disappearances, and the rights of women, children, migrants, and persons with disabilities.⁴⁷

⁴³ICESCR, *supra* note 36, article 2 (1); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of State Parties’ Obligations (Art.2, Para 1, of the Covenant)*, UN Doc. E/1991/23, online:<<http://www.refworld.org/docid/4538838e10.html>> [ICESCR, General Comment No. 3].

⁴⁴ICESCR, General Comment No. 3, *supra* note 43.

⁴⁵ *Ibid*

⁴⁶ *Supra* note 18.

⁴⁷ Helen Keller and Ulfstein Geir, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Pres, 2012) at 1 [Helen Keller and Ulfstein Geir].

These treaties are:

- the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴⁸;
- the International Covenant on Civil and Political rights (ICCPR)⁴⁹;
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁰;
- the Convention on Elimination of All Forms of Discrimination against Women (CEDAW)⁵¹;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁵²;
- the Convention on the Rights of the Child (CRC)⁵³;
- the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICMW)⁵⁴;
- the Convention for the Protection of All Persons from Enforced Disappearance (ICPED)⁵⁵ and;

⁴⁸ *The Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 95 (entered into force 4 January 1969).

⁴⁹ ICCPR, *supra* note 35.

⁵⁰ ICESCR, *supra* note 36.

⁵¹ *The Convention on the Elimination of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁵² *The Convention against Torture*, 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

⁵³ *The Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁵⁴ *The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families*, GA Res 45/158, UNGAOR, 1990, 220 UNTS 93.

⁵⁵ *The International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, A/61/53 (entered into force 23 December 2010).

- the Convention on the Rights of Persons with Disabilities (CRPD)⁵⁶.

This thesis studies relevant provisions of five of these nine core treaties. I describe in detail below, the contents of the five.

a. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD was adopted by the U.N. General Assembly on 21 December 1965, and came into force on 4 January 1969. The ICERD is the principal international treaty on the elimination of racism, racial discrimination, and other forms of intolerance. ICERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights in the field of public life, including political, economic, social or cultural life.”⁵⁷ Consequently, ICERD prohibits distinctions based on race, color, descent, and national and ethnic origin, and sets out in six detailed articles the obligation of States parties to guarantee the rights recognized under it.⁵⁸ ICERD requires a State, at all levels, to take appropriate measures against racial discrimination rooted in society. ICERD also sets out an extensive series of human rights in civil, political, economic, social, and cultural spheres to guarantee protection from racial discrimination.⁵⁹ Overall, the Convention establishes a basic right for effective remedy against acts of racial discrimination.

⁵⁶ *The Convention on the Rights of Persons with Disabilities*, UN Doc. A/61/611, (entered into force 3 May 2008).

⁵⁷ ICERD, *supra* note 48, article 1(1).

⁵⁸ *Ibid*, article 2.

⁵⁹ *Ibid*, article 14.

b. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by the U.N. General Assembly on 16 December 1966, and elaborates civil and political rights.⁶⁰ The Covenant provides for a right to self-determination, which recognizes that people have a right to freely determine their political status and freely pursue their own economic, social and cultural development.⁶¹ The Covenant also requires that respective State parties guarantee rights recognized under it without discrimination of any kind.⁶² ICCPR therefore guarantees the equal rights of men and women for the enjoyment of all rights contained in it.⁶³ The treaty does not only guarantee civil and political rights, but also requires effective State measures to ensure equal respect for the civil and political rights of women.⁶⁴

c. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR recognizes several economic, social, and cultural rights, including the right to an adequate standard of living, the right to health, and the right to education.⁶⁵ ICESCR was adopted by the General Assembly on 16 December 1966 and came into force on 3 January 1976. The Covenant specifies various steps required for the full realization of rights. These include imposing a duty on State parties to take steps individually and through international assistance and cooperation, especially economic and technical, to utilize available resources with a view to achieving full realization of the rights recognized in the Covenant by all appropriate means, including the adoption of legislative measures.⁶⁶ ICESCR also guarantees that the rights

⁶⁰ ICCPR, *supra* note 35 at preambular para 3.

⁶¹ *Ibid.*

⁶² *Ibid* at part II of Covenant.

⁶³ *Ibid*, article 3.

⁶⁴ *Ibid*, article 2(2).

⁶⁵ ICESCR, *supra* note 36, articles 11,12, and 13.

⁶⁶ *Ibid*, article 2(1).

enunciated under it will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁷

d. The Convention on the Elimination of Discrimination against Women (CEDAW)

The CEDAW was adopted by the U.N. General Assembly in 1979. Its preamble explains that, despite the existence of other instruments, women still do not enjoy equal rights with men.⁶⁸ CEDAW is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. CEDAW covers both civil and political rights (including 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 (including rights to education, work, health and financial credit) to guarantee equal status to women.⁶⁹ The Convention also pays specific attention to particular phenomena such as trafficking, discrimination against certain groups of women, for instance, rural women, and specific matters where there are special risks to women's full enjoyment of their human rights, for example, marriage and the family.⁷⁰

The Convention also specifies the different ways in which State parties are to eliminate discrimination, such as through enacting appropriate legislation for prohibiting discrimination, ensuring the legal protection of women's rights, refraining from discriminatory actions, protecting women against discrimination by any person, organization or enterprise, and modifying or

⁶⁷ *Ibid*, article 2(2).

⁶⁸ CEDAW, *supra* note 51 at preamble para 6.

⁶⁹ *Ibid*, articles 2, 3,7(a), 7(b), 9,10,11,12,13, and 14.

⁷⁰ *Ibid*, articles 5, 6, 10, and 16.

abolishing discriminatory legislation, regulations and penal provisions.⁷¹ CEDAW is rooted in the goals of the U.N. to reaffirm faith in the fundamental human rights of women. It acknowledges that no discrimination or distinction against women should be allowed on the basis of sex.⁷²

e. The Convention on the Rights of the Child (CRC)

The first treaty to deal comprehensively with the rights of a specific group of people is the Convention on the Rights of the Child (CRC). The CRC was adopted by the General Assembly on 2 September 1990. The grave affliction suffered by children all over the world, such as infant mortality, deficient health care and limited opportunities for basic education, as well as child exploitation, prostitution, and labor, led the U.N. to codify children's rights in a comprehensive manner.⁷³ The Convention recognizes several rights for children. It obliges "State parties to respect and ensure the rights of each child within their jurisdiction without any discrimination irrespective of the child's, or his or her parent's or legal guardian's race, color, sex, disability, or other status".⁷⁴ One of the guiding principles of the Convention which highlights the importance of this is that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or legislative bodies, the best interests of the child shall be primary considerations.⁷⁵ CRC enumerates rights to protect children against all kinds of exploitation and social injustices.⁷⁶

⁷¹ *Ibid*, articles 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g) and 18(1).

⁷² *Ibid*, article 1.

⁷³ CRC, *supra* note 53 at preambular para 6.

⁷⁴ *Ibid* at preambular para 3 and article 2(1).

⁷⁵ *Ibid*, article 3 (1) and 3(2).

⁷⁶ *Ibid*, article 4.

2.3 U.N. Enforcement Mechanisms and their Implementation Procedures

As observed in the above section, States have obligations to protect, promote, and respect human rights. To ensure that a State performs its obligation adequately, there are various enforcement mechanisms which have a responsibility to take actions to ensure rights are protected. The international human rights mechanisms supervise the protection and enforcement of human rights at the national level.⁷⁷ The U.N. enforcement mechanisms include bodies, special procedures including Special Rapporteurs, Universal Periodic Review, and the Human Rights Treaties Division of the Office of the High Commissioner for Human Rights.

2.3.1 Human Rights Treaty Bodies (Committees)

The promotion and protection of the human rights set out in each treaty requires proper monitoring and implementation at the domestic level. A dedicated Committee monitors the implementation of each international treaty. The term ‘monitoring’ implies that these treaty bodies examine the level of a State party’s implementation of its obligations under the treaties.⁷⁸ Treaty bodies are also referred as “Committees”. They were created to monitor and encourage States to perform their international obligations. At present, there are ten bodies monitoring the implementation of nine core international human rights treaties and one optional protocol. The treaty bodies that monitor the application of the above discussed human rights treaties are as follows:

- a) The Committee on the Elimination of Racial Discrimination is the first treaty body to be established. It monitors the implementation of ICERD as from 1969.⁷⁹
- b) The Human Rights Committee created in 1976 to review the application of the ICCPR.⁸⁰

⁷⁷ ICESCR, General Comment No. 3, *supra* note 43 at 12.

⁷⁸ Philip Alston, *supra* note 19 at para 9.

⁷⁹ ICERD, *supra* note 48, article 8(1).

⁸⁰ ICCPR, *supra* note 35, article 28(1).

- c) The Committee on Economic, Social and Cultural Rights created in 1985 to carry out the functions of the Economic and Social Council under the ICESCR.⁸¹
- d) The Committee on the Elimination of Discrimination against Women monitors the implementation of the CEDAW by its State parties.⁸²
- e) The Committee on the Rights of the Child, since 1991, monitors the application of the CRC, and its Optional Protocols relating to the involvement of children in armed conflicts, the sale of children, child prostitution and child pornography.⁸³

These U.N. bodies perform several important roles for the promotion and protection of human rights. They have a supervisory role in the protection and enforcement of human rights at the national level.⁸⁴ They encourage and give advice to the State parties for the enforcement of human rights so that such rights may be enjoyed by all men, women, children, and marginalized peoples without any discrimination.⁸⁵ They also strengthen human rights in the domestic context by expressing opinions and giving specific guidance in the urgent matters that need special attention. Again, they provide practical advice and assistance to States parties so that they can effectively implement human rights.⁸⁶ Their several functions are discussed below.

2.3.2 Functions of Treaty Bodies (Committees)

Human rights treaty bodies are required to carry out several functions in fulfilling their mandate to monitor the implementation of the human rights treaties. All treaty bodies except the U.N.

⁸¹ ICESCR, *supra* note 36, article 16(2).

⁸² CEDAW, *supra* note 51, article 17(1).

⁸³ CRC, *supra* note 53, article 43(1).

⁸⁴ ICESCR, General Comment No. 3, *supra* note 43 at 14.

⁸⁵ *Ibid.*

⁸⁶ Matthew C R Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995) at 170.

Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) receive and consider reports submitted by States parties.⁸⁷ Some treaty bodies are also mandated to perform other functions, such as looking into individual complaints and inter-State complaints, and initiating inquiries.⁸⁸ The supervisory functions of treaty bodies mainly include the examination of reports from States parties on the fulfillment of treaty obligations. These functions are discussed in detail below.

a. Reporting Procedures

When a State becomes a party to an international human rights treaty, it is obliged to submit periodic reports to the treaty body.⁸⁹ Ideally, this reporting requirement provides an opportunity for the body to assess and discuss the human rights issues in the country and to identify problems that require special attention regarding the protection and promotion of human rights at the national level.⁹⁰ The main purpose of the reporting system is to examine the level of a State's implementation of its legal obligations arising under the treaty. Shadow reporting is also an important tool for Non-Governmental Organizations (NGOs). By submitting a shadow report to a U.N. treaty body, NGOs can highlight issues not raised by a State party and point out issues where the government may be misleading the Committee from the real situation in the country.⁹¹

⁸⁷ International Service for Human Rights, “*Simple Guide to the United Treaty Bodies*”, (9July2010) online<<http://www.ishr.ch/sites/default/files/article/files/ISHR%20Simple%20Guide%20to%20the%20UN%20Treaty%20Bodies.pdf>> at 15 [ISHR Guide].

⁸⁸ CAT, *supra* note 52, article 20; and CEDAW, *supra* note 51, articles 8-10.

⁸⁹ ICCPR, *supra* note 35 article 40; ICESCR, *supra* note 36, article 16; CERD, *supra* note 48, article 9(1); CEDAW, *supra* note 51, article 19; CAT, *supra* note 52, article 19; CRC, *supra* note 53, article 44; ICRMW, *supra* note 54, article 73; CPED, *supra* note 55, article 29; and CRPD, *supra* note 56, article 35.

⁹⁰ *Ibid.*

⁹¹ *National institutions for the promotion and protection of human rights*, GA Res 48/134, UNGAOR, 1994 UN Doc A/RES/48/134.

b. Concluding Observations

Based on these reports, in concluding observations, treaty bodies give the reporting State practical advice and encouragement on further steps to implement the rights contained in the treaty. In its concluding observations, a Committee may also acknowledge the positive steps taken by the State and identify areas of concern where more work is to be done in order to give full effect to the treaty's provisions.⁹²

c. General Comments and General Recommendations

Each Committee also publishes its interpretation of the human rights treaty provisions in the form of "General Comments" and "General Recommendations". The treaty bodies adopt these documents to elaborate the meaning of treaty obligations to State parties.⁹³ When CERD and CEDAW treaty bodies issue them to supervise the State parties about their obligations it is referred as "General Recommendations" but when ICCPR, ICESCR, and CRC treaty bodies issue them it is referred as "General Comments".

d. Individual Complaints

Treaty bodies also entitle individuals to complain of violations of their rights under the treaty.⁹⁴ These four treaty bodies can consider individual communications: The Human Rights Committee, The Committee on the Elimination of Racial Discrimination, The Committee on the Elimination of Discrimination against Women, and The Committee against Torture. The treaty bodies also

⁹² ICERD, *supra* note 48, article 9(2); ICCPR, *supra* note 35, article 40; ICESCR, *supra* note 36, article 21; CEDAW, *supra* note 51, article 21; and CRC, *supra* note 53, article 45.

⁹³ *Ibid* and see also, United Nations Human Rights Office of the High Commissioner, "Human Rights Treaty Bodies- General Comments" online:< <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>>.

⁹⁴ The relevant mandates are ICERD, *supra* note 48, article 14; the ICCPR-Optional Protocol; the CEDAW-Optional Protocol, article 1; and ICRMW, *supra* note 54, article 77.

take urgent action in appropriate cases to request the concerned State party to take interim measures pending the outcome of a communication.

e. State-to-State complaints

Treaty bodies can receive and consider communications in which one State party claims that another State party is not fulfilling its obligations under a treaty.⁹⁵

f. Inquiry

Under the inquiry procedure, a Committee may investigate a State where it has received reliable information indicating that the rights contained in the treaty are being systematically violated by a State party.⁹⁶

g. Follow-up

Follow-up to the concluding observations and recommendations of the treaty bodies is essential to improving the human rights situation on the ground in a country.⁹⁷ Treaty bodies have developed procedures for monitoring the implementation of their recommendations by States. All the treaty bodies issue general requests to States to provide information on follow up to concluding observations and recommendations as a part of the State's next report.

2.3.3 Other Special Procedures

The UN conceived the treaty bodies mechanisms as central to the international protection of human rights. The working of treaty bodies is also supported by other mechanisms, like special procedures, including Special Rapporteurs, Universal Periodic Review, and the Human Rights

⁹⁵ ICERD, *supra* note 48, articles 11-13; ICCPR, *supra* note 35, articles 41-43; CAT, *supra* note 52, article 21; ICPED, *supra* note 55, article 32; and, ICMW, *supra* note 54, article 76.

⁹⁶ ICESCR, *supra* note 36, article 11; CAT, *supra* note 52, article 20; CRC, *supra* note 53, article 13; CEDAW-Optional Protocol, articles 8–9; ICPED, *supra* note 55, article 33; and, the Optional Protocols to CRPD, articles 6-7.

⁹⁷ United Nations, *Follow-up to Concluding Observation*, UNGAOR, (2009) HRI/ICM/2009/6.

Treaties Division of the Office of the High Commissioner for Human Rights. The detailed description and mandates of special procedures are discussed below.

a. Special Rapporteurs

The Special Rapporteurs of the Human Rights Council constitute one of the important international human rights mechanisms established to monitor, examine, and submit report on the human rights situation in specific countries or territories in relation to major issues of human rights.⁹⁸

The individual mandate holders of the special procedure are known as “Special Rapporteurs”. Special Rapporteurs undertake country visits, conduct thematic studies, convene expert consultations, engage in advocacy, and raise public awareness. They also consider direct complaints from victims of human rights violations, appeal to governments on behalf of victims, and carry out other functions.⁹⁹

Most importantly, Special Rapporteurs have either thematic or country specific mandates. The thematic mandates include: violence against women, including its causes and consequences; trafficking in persons, especially women and children; and the Right to Health.¹⁰⁰ They provide reports about the global situation of a phenomenon. The country specific mandate, like the Special Rapporteur for Cambodia, provides reports on country-specific human rights situations and related information or the allegations of human rights violations in a country.¹⁰¹ To perform this function,

⁹⁸UN General Assembly, *Human Rights Council*, UNGAOR, 60th Sess, UN Doc. A/RES/60/251, (2006) at para. 6. See also *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms*, ESCOR Res. 1503 (XLVIII), U.N. ESCOR, 48th Sess., U.N. Doc. E/4832/ADD.1 (1970).

⁹⁹ United Nations Human Rights Office of the High Commissioner, “Special Procedure of the Human Rights Council” online: < <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>.

¹⁰⁰United Nations Human Rights Office of the High Commissioner, Thematic Mandates online:<http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM>.

¹⁰¹United Nations Human Rights Office of the High Commissioner, Country Mandates online:<http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM>.

the Special Rapporteurs visit countries whenever the U.N. receives reliable information of grave, serious, or systematic human rights violations by State parties.¹⁰² The Special Rapporteurs visit concerned countries to analyze human rights situations there. At the end of their visit, Special Rapporteurs report on their findings or, with the help of communications by State officials, make recommendations and present their reports to the Human Rights Council.¹⁰³

The role of Special Rapporteurs helps treaty bodies to assess the state of human rights at the domestic level of a State party. Treaty bodies and Special Rapporteurs are very complementary because, on a regular basis, they share human rights information and follow-up on their recommendations and concerns.

b. Universal Periodical Review

The Universal Periodical Review (UPR) is a unique process established by the General Assembly in 2006 as one of the procedures of the Human Rights Council to assess the human rights performance of all countries.¹⁰⁴ The UPR is mandated to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”.¹⁰⁵ It provides an equal opportunity for States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights.¹⁰⁶

¹⁰² *Ibid.*

¹⁰³ *Supra* note 99.

¹⁰⁴ *Supra* note 98 at para 5(e)

¹⁰⁵ *Ibid.*; see also, *Human Rights Council*, Institution building of the United Nations of Human Rights Council, UNGAOR, 5/1, UN Doc. A/RES/60/251, (2006) at paras 1-38.

¹⁰⁶ ICHR Guide, *supra* note 87 at 48.

The UPR also monitors, supports, and expands the promotion and protection of human rights at the domestic level. To achieve this aim, the UPR assess States' human rights records and addresses human rights violations wherever they occur. The UPR also provides technical assistance to States to enhance their capacity to deal effectively with human rights challenges.¹⁰⁷ The review by the UPR is based on several stages, including documentation on which the review is based; the review documents; and follow-up to the conclusion and general recommendations. This guides States to pay special attention to the respective issues in which human rights violations are most common.

The working of the UPR is complementary to the treaty bodies' reporting process. The review provides an opportunity for State parties to address major human rights concerns in their State reports, before submission to treaty bodies in their regular reports, including as to the implementation of general recommendations. The treaty bodies also remind State parties regarding the implementation of the recommendations guided by the UPR process.

c. Human Rights Treaties Division (HRTD)

The HRTD is one of the major divisions of the Office of the High Commissioner for Human Rights (OHCHR).¹⁰⁸ The OHCHR is mandated to provide support and guidance to the different human rights monitoring mechanisms in the U.N. system, including the treaty bodies that are mandated to monitor the compliance of State parties with their treaty obligations.¹⁰⁹ The treaty bodies receive support from the HRTD, which is primarily responsible for the implementation of Sub-Programme

¹⁰⁷ *Ibid* at para 3.

¹⁰⁸ United Nations Human Rights Office of the High Commissioner, "Who we are" online: <<http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>>.

¹⁰⁹ *High Commissioner for the Promotion and Protection of Human Rights*, GA Res 48/141, UNGAOR, 48th Sess, UN Doc A/48/141 (1994).

2 of the Secretary General's Strategic Framework dedicated to support the human rights treaty bodies.¹¹⁰ In addition to supporting the treaty bodies by facilitating their work, the HRTD is responsible for promoting the continued improvement and harmonization of the work of the treaty bodies.

2.4 Challenges of the UN Human Rights Treaty System

The basic U.N. enforcement mechanisms, namely, treaty bodies, Special Rapporteurs and the UPR, are designed to enhance the domestic-level protection of international human rights law. Since human rights treaties are increasingly accepted by States parties, international scholars are now focused on studying the effective working of the mechanisms to ensure that obligations undertaken by States parties are respected at the national level.¹¹¹ The effective working of the U.N. treaty monitoring system, in particular, is the subject of serious scholarly debate. Whereas the twentieth century was devoted to the drafting of human rights treaties, human rights scholars and advocates in the twenty-first century are focused on securing better compliance with their standards through the human rights treaty system.¹¹² This section focuses on scholarly commentary on the advantages and challenges to the effective working of the monitoring and enforcement mechanisms of the UN treaty system.

¹¹⁰OHCHR, *Report on United Nation Human Rights Treaties Division*, 2011, online http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegation/28_Human_Rights_Treaties_Division.pdf>.

¹¹¹ Anne F Bayefsky, *supra* note 31, Appendix 6, *International Law Association, Committee on International Human Rights Law and Practice, Report on the UN Human Rights Treaties: Facing the Implementation Crisis*, at 681.

¹¹² Helen Keller and Ulfstein Geir, *supra* note 47 at 1.

2.4.1 Cultural Relativism

The concept of “universalism” in international human rights law means that every right must be available to all human beings equally.¹¹³ In 1948, the Universal Declaration on Human Rights (UDHR) confirmed the universality of human rights by proclaiming equal entitlements of women and men to the rights contained in it. It also declared that no discrimination shall be allowed on the basis of “sex”.¹¹⁴ The Declaration was eventually adopted. Using the terms “all human beings” and “everyone”, it leaves no doubt that the UDHR was intended for everyone, men and women alike.¹¹⁵ The U.N.’s nine international human rights treaties also capture the idea of the universality of human rights. The U.N. treaties guarantee basic rights which underline the idea that human beings born in any part of the world are equal in dignity and rights.¹¹⁶ These rights are universal in nature because they apply irrespective of one’s origin, status, condition, or place where one lives.¹¹⁷

All States have ratified at least one U.N. human rights treaty, and more than eighty percent of States are party to four or more human rights treaties.¹¹⁸ As well, more than seventy five percent of States have ratified six human rights treaties.¹¹⁹ Anne. F. Bayefsky, however, notes that the

¹¹³ Anne F Bayefsky, *supra* note 31 at 1.

¹¹⁴ UDHR, *supra* note 16, article 1.

¹¹⁵ ICCPR, *supra* note 35 at preamble para.

¹¹⁶ ICERD, *supra* note 48 at 2.

¹¹⁷ *Ibid.*

¹¹⁸ Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*. 2001, online<<http://www.bayefsky.com/report/finalreport.pdf>. Accessed 01/08/2007> Pg. 2-4.

¹¹⁹ Chapter IV. Multilateral Treaties Deposited with the Secretary General. Only the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990, has failed to achieve this with a total of 36 State parties as at 27 April 2007.

ratification of treaties is not enough for achieving the universality of human rights. Human rights remain far from the universal promise and are abused on a daily basis.

One of the persistent challenges for achieving the universality of human rights is “cultural relativism”. Cultural relativism may be defined as the position where local cultural traditions, including religious, social, and political practices, determine the scope and validity of human rights enjoyed by individuals in a society. Jack Donnelly contrasts cultural relativism with the universal ideology of human rights, namely, the idea that human rights are common to all religions, faiths and moral codes, and cross national and cultural boundaries.¹²⁰ Social inequality, including gender and economic inequality, as well as patriarchal systems, undermine this principle and, in the name of culture and belief, make it difficult for women and other marginalized groups to enjoy their rights. Fernando R. Teason supports the idea that cultural relativism undermines the universality of human rights by making human rights incapable of cross-cultural application on the ground that human rights differ from one culture to another, with the justification that what is right for one society may not be right in another society.¹²¹ For example, if a culture accepts the practice of female genital mutilation (FGM), then no outside principle can overrule the cultural norm. This shows how cultural relativism has emerged as a roadblock against the universal application of human rights. Professor Z.E. Lee argues that cultural relativism provides an excuse for State parties to evade their international human rights obligations.¹²²

¹²⁰ Jack Donnelly, “Cultural Relativism and Universal Human Rights” (1984) 6:4 Hum Rts Q 400 at 405-410.

¹²¹ Fernando R Teason, “International Human Rights and Cultural Relativism” (1985) 25:4 Va. J. Int’l, L 869 at 887 [Fernando Teason]

¹²² Z E Lee, *Some Issues on the Universality-Cultural Relativity Debate on Human Rights: Challenges of Globalization for Human Rights in Asia – Roles of Catholic Human Rights Professionals*, (1997) online:<<http://icmica-asia.freehosting.net/pub/bangkok/zosimo.html>. accessed 06/01/2004>.

The challenge remains as to how the treaty mechanisms can ensure the universal enjoyment of human rights while allowing for cultural variations in their implementation at the national level. The goal of universalization is not that all human rights are implemented in the same manner in every context. Rather, the goal is to guarantee equal enjoyment of rights to all human beings.¹²³ In her *Report of Strengthening the United Nations Human Rights Treaty System*, Navneethem Pillay explained that the vision of the treaty system is grounded on the principle of universality of human rights, but it is States' primary responsibility to ensure there is a proper implementation of these principles in national contexts.¹²⁴ The universality of human rights, and their cross-cultural applicability, is one of the challenges of the U.N. treaty system.

2.4.2 State reporting

In the reporting procedures of the human rights treaty system, each State party is under an obligation to submit regular reports to the relevant treaty body on how the treaty rights are being implemented in the national context. State reporting is a fundamental requirement for the effective protection of human rights because it helps treaty bodies to scrutinize the state of human rights in a national jurisdiction. The treaty bodies also interact with government representatives during the review of a State's periodic reports on their implementation of the treaties. Indeed, the key purpose of the State reporting procedure is to examine the measures taken by the State party to give effect to the rights recognized in the treaties. Despite this, the treaty bodies have faced significant obstacles in the reporting process, as discussed below.

¹²³ Nana Daroka Sekyiamah, News Release "Government Must Respect, Protect and Fulfill Human Rights of All People, Regardless of Sexual Orientation, Gender Expression, and Gender Identity" (2015) online:<<https://www.awid.org/news-and-analysis/governments-must-respect-protect-and-fulfill-human-rights-all-peoples-regardless>>.

¹²⁴ UNHCHR Report, *supra* note 2 at 8.

(a) Overdue reports

The compliance of the State party with its obligations under the treaty system has many dimensions. One of the important dimensions is to submit the reports at regular intervals to the treaty bodies for review of their compliance with the treaties. To ensure this, the nine core international human rights treaties and two optional protocols have appropriate reporting periodicity. For example, the initial reports under ICERD, ICCPR, CEDAW, CAT and ICRMW are to be submitted within one year of the treaty entering into force for a party.¹²⁵ The initial reports under the ICESCR, CRC, CRPD and CPED are to be submitted within two years of the treaty entering into force, followed by periodical reports.¹²⁶ The periodic reports under ICERD are required within two years, and an average period of reporting for other human rights treaties is between four to five years. This means that if a State ratifies all nine core international human rights treaties and optional protocols with a reporting procedure, it is bound to submit approximately two reports annually.¹²⁷ The failure to submit State reports at regular intervals is becoming a major roadblock in the working of the U.N. treaty system.

Navneethem Pillay discussed this as one of the ironies of the system. Her *Report on Strengthening the United Nation Human Rights Treaty System* commented on the engagement of the State parties under the system. She noted that, although expeditious increase in ratification is a positive sign for the promotion and protection of human rights, this still makes it difficult for State parties to meet the demands of increased reporting and implementing obligations.¹²⁸ In 2010 and 2011, the treaty bodies received only 16% of State reports on time. Under some treaties, such

¹²⁵ *supra* note 89, and ICRMW, *supra* note 54, article 73.

¹²⁶ *Ibid*, CPED, *supra* note 55, article 29; and CRPD, *supra* note 56, article 35.

¹²⁷ UNHCHR Report, *supra* note 2 at 21.

¹²⁸ *Ibid* at 21 and 22.

as ICESCR, CAT and the ICCPR, around 20% of State parties have never submitted an initial report. For others, like ICRMW and CRPD the percentage is even higher.¹²⁹ The percentage of overdue reports signifies that one of the major challenges of the U.N. treaty system is that State parties who ratify which treaties fail to report on time and some fail to report at all.

Several scholars have highlighted the different reasons why parties fail to submit periodical reports on time. Lack of willingness is one of the major reasons.¹³⁰ States must be committed to willingly submit reports at regular intervals established under treaties. Many State parties have not been willing to fulfill their reporting duties, thereby limiting the treaty bodies as to how to scrutinize the actions and remedies they have adopted for the promotion and protection of human rights.¹³¹ The former High Commissioner, Louise Arbour, in her “Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body”, observed that the members States’ superficial engagement limits their willingness, and this makes it difficult for them to fulfill their compliance obligations.¹³² This is why the reporting regime is marked by a spectre of long overdue reports. This situation compromises the ability of the treaty bodies to analyze human rights conditions. It also limits their ability to provide effective guidance to ensure the promotion and enforcement of human rights in State parties.

(b) Quality of State Reports

In the *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, Philip Alston studied the compliance of State parties with their reporting

¹²⁹ *Ibid* at 22-23.

¹³⁰ Anne. F. Bayefsky, *supra* note 31 at 8.

¹³¹ *Ibid* at 9.

¹³²*Ibid*.

obligations within the treaty system.¹³³ He noted that the reporting procedures of treaty bodies have significant unevenness regarding progress in improving both the quality and effectiveness of monitoring, and in reforming State reporting procedures.¹³⁴ He further noted that the preparation of a good quality State report is an opportunity for States to explain all the legislative, judicial, administrative, and other measures they take to meet their reporting obligations under all treaties to which they are a party.¹³⁵ The report preparation process allows States to review their actions and the policy measures they take to fulfill their international commitments and to monitor the progress made in the enjoyment of human rights protected by the treaties.

Christen Broecker and Michael O' Flaherty, however, note that the poor quality of the State reports is a persistent challenge to the reporting system.¹³⁶ The variable quality of State reports has resulted in the failure of the reporting process to achieve its objective to review treaty compliance. In fact, treaty bodies often receive insufficient information by which to analyze the true position of human rights in a country. To get around such situations of incomplete information, the General Assembly has formulated guidelines regarding the form and content of reports to be submitted by State parties.¹³⁷ The purpose of the harmonized guidelines is to strengthen the capacity of State parties to report obligations in a timely and effective manner.¹³⁸ This also enables the treaty bodies

¹³³ Philip Alston, *supra* note 19 at para 14-36.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Christen Broecker and Michael O' Flaherty, "The Outcome of the General Assembly's Treaty Body Strengthening Process: An Important Milestone on a Longer Journey, June 2014, online:< http://www.universal-rights.org/wp-content/uploads/2015/02/URG_Policy_Brief_web_spread_hd.pdf> at 7.

¹³⁷ *Report of the Secretary General on Compilation of Guidelines on the Form and Content of Reports to State Parties to International Human Rights Treaties*, 3 June 2009, HRI/GEN/2/Rev.6. Chapter 1 [Harmonized Guidelines on Reporting 2006'].

¹³⁸ *Ibid* at para 3.

to receive a more complete picture of the implementation of the relevant treaties. Anne F. Bayefsky argued that many reports failed to follow the established guidelines.¹³⁹ For example, the guidelines direct States to elaborate upon both the de jure and de facto information on the implementation of treaties provisions, not merely to provide a description of legal instruments and other administrative policies adopted by a State party. A report should also indicate how effective the legal instruments are in actually working. Bayefsky also pointed out that many reports are only self-serving or descriptive in nature.¹⁴⁰ It has been observed on several occasions that States do not respond to requests for information that they have been asked to present in their reports.¹⁴¹ The reports only provide descriptive information to the treaty bodies on important matters, not the evaluative information that is required.

The failure of State parties to prepare quality reports disables the treaty bodies from identifying problems and shortcomings in their approach to assessing implementation of the treaties. This situation raises the major question as to how the treaty bodies can ensure the promotion and enforcement of human rights.

2.4.3 Quality of Concluding Observations and General Comments

The treaty bodies contribute to the development and understanding of international human rights standards through the process of writing concluding observations and general comments. The issuance of concluding observations is one of most important functions of the system, because it provides an opportunity for treaty bodies to deliver guidance and issue advice on the condition of human rights in a country. The quality of concluding observations, however, has also become a

¹³⁹ Anne F Bayefsky, *supra* note 31 at 10.

¹⁴⁰ *Ibid.*

¹⁴¹ Cosette D Creamer & Beth A Simmons, "Ratification, Reporting, and Rights: Quality of Participation in the Convention against Torture" (2015) 37 Hum Rts L Rev 579 at 584.

major challenge of the U.N. treaty system, raising the question to what extent concluding observations may provide sufficiently precise guidance to States for the implementation of treaties.¹⁴² Several scholars have assessed the quality of concluding observations and highlighted the need for improvement.

In 1997, the U.N. Independent Expert, Philip Alston, advised that the quality of concluding observations needed improvement in terms of ‘clarity, degree of detail, level of accuracy and specificity’.¹⁴³ The major issue is that the concluding observations or comments issued by the treaty bodies are formal and descriptive in nature.¹⁴⁴ Many times, the treaty bodies fail to address in their concluding observations the serious issues which require special attention for the protection and promotion of human rights. The United Nations High Commissioner for Human Rights (UNHCHR) in its 2009 report urged treaty bodies to provide more focused and targeted concluding observations of concrete and achievable recommendations.¹⁴⁵

Michael O’ Flaherty thinks the impact of concluding observations or comments depends on how well the treaty bodies draw guidance from State parties’ reports.¹⁴⁶ The treaty bodies, after examining State reports, submit a list of issues to a State party on the basis of its State report.¹⁴⁷ However, a problem arises when the treaty bodies fail to make recommendations on the issues,

¹⁴² Michael O’ Flaherty, “The Concluding Observations of Human Rights Treaty Bodies” (2006) 6:1 Hum Rts L Rev 27 [Michael O’ Flaherty].

¹⁴³ Philip Alston, *supra* note 19 at para 109.

¹⁴⁴ Suzanne Egan, *supra* note 11 at 224.

¹⁴⁵ UNHCHR Report, *supra* 2 at 57.

¹⁴⁶ Michael O’ Flaherty, *supra* note 142 at 37, 38 and 39

¹⁴⁷ *Ibid.*

and rather focus on extraneous matters.¹⁴⁸ This way, a Committee limits its ability to properly guide a party on how to promote and protect human rights in its jurisdiction.

Another issue is that concluding observations lack detail. The treaty bodies, rather than giving concrete recommendations in those observations, provide diplomatic views by praising or criticizing State parties' actions. In 2001, Anne F. Bayefsky said that, although the quality of concluding observations or comments results from the reporting process and have the capability to guide State members to implement treaty provisions adequately, the quality of the observations has been compromised.¹⁴⁹ The observations arise from the quality of constructive dialogue with State representative. Due to impediments during Committee sessions, treaty bodies are unable to provide clear and precise guidance to State parties.¹⁵⁰ As such, many times, treaty bodies only express their regret about a State party's compliance failures or weaknesses, and provide no detailed guidance but only diplomatic recommendations. The absence of constructive dialogue is a major contributor to the poor quality of concluding observations, which largely, are descriptive and formal in nature.

2.4.4 Limited Implementation of Recommendations

Implementation of the treaty bodies' recommendations is the process where State parties take measures to address the issues raised and discussed by treaty bodies in their concluding observations.¹⁵¹ According to the principle of subsidiarity in international human rights law, States

¹⁴⁸ *Ibid.*

¹⁴⁹ Anne F Bayefsky, *supra* note 31 at 12.

¹⁵⁰ *Ibid* at 16.

¹⁵¹ Human Rights Implementation Centre, "Follow-Up and Implementation of Decisions by Human Rights Treaty Bodies" (10 September 2009), 1 at 2, online:<<http://www.bristol.ac.uk/medialibrary/sites/law/migrated/documents/semrep2009.pdf>>.

have the primary responsibility to secure human rights in their national jurisdictions.¹⁵² The international human rights institutions only have supervisory power to review the cases where States fail to protect international human rights standards domestically.¹⁵³ This means that a genuine commitment from State parties is required to enforce treaty bodies' recommendations at the domestic level. In practice, the limited implementation of treaty bodies' recommendations is a major challenge in the U.N. treaty system.¹⁵⁴

The first major issue lies with the enforcement mechanisms of the U.N. treaty system. The enforcement mechanism of the treaty bodies largely depends on the willingness of State parties to enforce all the recommendations given by treaty bodies.¹⁵⁵ Sir Nigel Rodley and Professor Ruth Wedgwood identify that the treaty body system has established procedures for ensuring States' compliance but does not have the means to enforce its recommendations. It may be an effective way to put pressure on State parties to remind them of their international human rights obligations. But this still leaves the treaty bodies with bare hands in situations of limited enforcement.¹⁵⁶ The human right treaty bodies do not have the same power and enforcement mechanisms as national courts and authorities that can take action to enforce their recommendations.¹⁵⁷ National courts have powers to execute their decisions, but treaty bodies can only look into how a State has failed to comply with its obligations and make recommendations for future reform.¹⁵⁸ The failure of State

¹⁵² Samantha Besson, "Subsidiarity in International Human Rights Law-What is Subsidiary about Human Rights?" (2016) 61:1 Am J Juris 69-107 [Samantha Besson].

¹⁵³ *Ibid* at 70.

¹⁵⁴ Pradeep Shankar Wagle, *supra* note 25 at 87.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Supra* note 151 at 2.

¹⁵⁷ *Ibid* at 4.

¹⁵⁸ *Ibid*.

parties to fulfill their commitments to enforce treaty Committee recommendations is a major roadblock to progress in human rights protection around the globe.

The second major issue is the lack of financial resources. Due to this, implementation of the recommendations becomes difficult for State parties. Ultimately, this results in limited enforcement of treaty rights. On several occasions, treaty bodies direct State parties to adopt legislative, administrative, and other activities for the protection and promotion of human rights, but financial constraints disable State parties from being able to comply. Pradeep Shankar Wagle noted that there is a vast gap between the “law in books” and “law in action”.¹⁵⁹ He noted that, although the National Human Rights Commission was established to monitor the compliance of State parties in Nepal, the implementation of the recommendations of treaty bodies is still very poor.¹⁶⁰ Poor economic conditions and budgetary constraints make it difficult for Nepal to enforce treaty bodies’ recommendations.¹⁶¹

In view of the foregoing constraining factors, it is not clear how quickly human rights standards will become part of the general culture of individual countries and have legal effect, thus making limited implementation of recommendations a major challenge.¹⁶²

2.4.5 A limited role for NGOs in the System

Civil society or non-governmental organizations are crucial players in the international human rights system. They contribute valuable information and ideas for positive change, provide operational capacity in emergencies, facilitate communications, and increase the legitimacy and

¹⁵⁹ Pradeep Shankar Wagle, *supra* note 25 at 88.

¹⁶⁰ Samantha Besson *supra* note 152 at 89.

¹⁶¹ *Ibid.*

¹⁶² ICESCR, General Comment No. 3, *supra* note 43 at 3.

accountability of global programs.¹⁶³ In the reporting process, NGOs can help treaty bodies work effectively in a number of ways. NGOs can be invited to participate in national consultations before the drafting of State reports and be entitled to submit a report of their own to treaty bodies, based on their findings regarding national implementation of a treaty.¹⁶⁴ NGO reports, also known as shadow reports, contain suggested questions and recommendations that a treaty body can use in the examination of State reports.¹⁶⁵

The importance of NGO participation in the work of treaty bodies has been underlined repeatedly. Representatives in the sixth meeting of Persons Chairing the Human Rights Treaty Bodies pointed to the important role of NGOs in supplying documentation and other information on human rights developments.¹⁶⁶ Suzanne Egan supports this and comments that through NGO's participation in the reporting system, the quality of work under State reports has improved.¹⁶⁷ It is true that the role of NGOs in the reporting system has slowly emerged, but there are obstacles that impede their participation in the system. Amnesty International's former U.N. representative, Andrew Clapham, criticized the treaty bodies who completely isolate and disconnect themselves from the mainstream discussion and activity relating to human rights.¹⁶⁸ Doing so limits the participation of NGOs and undermines the practical role they play in the treaty body system. Furthermore, expert members of the treaty bodies and government representatives are the only

¹⁶³ James A Paul, "NGOs and the United Nations- Comments for the Report of the Secretary General Comments", (1999), *Global Policy Forums* (blog) online:<
<https://www.globalpolicy.org/component/content/article/176/31440.html#2>>.

¹⁶⁴ Anne F Bayefsky *supra* note 31 at 15.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Report of the Sixth Meeting of Persons Chairing the Human Rights Treaty Bodies*, 18-22 September 1995, A/50/505 (4 October 1995) at para. 23

¹⁶⁷ Suzanne Egan, *supra* note 11 at 224.

¹⁶⁸ Anne F Bayefsky, *supra* note 31 at 75.

players with speaking parts during formal meetings. Both are reluctant to give NGOs an opportunity to actively participate in meetings, thus giving NGOs no chance to discuss a government's answers during proceedings.¹⁶⁹ F.D. Gaer acknowledges that the U.N. human rights treaties, which transformed the respect for human rights into binding obligations upon ratifying States, do not provide an explicit role for NGOs and make no formal provision for participation in their work.¹⁷⁰

The success of the reporting system requires meaningful discussion between the treaty body members and State parties in relation to the implementation of human rights obligations. It is important for treaty bodies and State parties to treat NGOs as equal partners in the process because they provide alternative information about country compliance, as well as offering advice. NGOs can help the members of treaty bodies to select the issues they plan to discuss with government and this can lead to more effective monitoring. Furthermore, NGOs need to ensure that investing time and money in preparing briefs and participating in the work of treaty bodies will not be futile. At the same time, efforts must be made to coordinate their work, and collaborate with treaty bodies, to fully achieve the potential of the reporting system. The key challenge for an effective treaty system is to make the best use of available resources which may be strengthened through connection between the treaty body system and NGOs.¹⁷¹

¹⁶⁹ *Ibid.*

¹⁷⁰ F D Gaer "Implementing international human rights norms: UN human rights Committees and NGOs." (2003) 2:3 *Journal of Human Rights* 339.

¹⁷¹ *Ibid* at 342.

2.5 Summary

The U.N. treaty system was created to improve the conditions of human rights in State party jurisdictions. The system has taken measures to ensure its effective working by establishing the monitoring system. The treaty bodies have taken steps to identify the challenges that limit the ability and willingness of States to protect and enforce human rights in their national jurisdictions. The U.N. addresses human rights violations that require special attention to protect the interest of peoples. This chapter sought to highlight challenges that have limited the effective working of the treaty system. These challenges include cultural relativism, poor reporting by States, superficial concluding observations by the treaty bodies, and lack of financial resources to enable States to implement their obligations under the treaties.

The challenges of the system not only limit the working of the treaty bodies as to the protection and enforcement of human rights in general. They also limit the working of treaty bodies to protect and promote women's rights. Although treaty provisions guarantee the enjoyment of several rights to women all over the world, abuse of women's rights is very common around the world.

The next chapter discusses how treaty provisions and their monitoring mechanisms seek to guarantee women's rights. It highlights how the challenges of the human rights treaty system also limit their work to protect and enforce women's rights.

Chapter-3: Women's Rights under the U.N. Human Rights Treaty System- Protection and Enforcement Challenges

3.1 Introduction

Since its foundation, the United Nations (U.N.) has given special attention to women's rights. Article 1 of the *U.N. Charter*, the foundational treaty of the U.N., reaffirms "the equal rights of men and women", signifying an intention to promote respect for human rights without distinction as to sex.¹⁷² This commitment is also reflected in the 1948 *Universal Declaration of Human Rights* (UDHR), which affirms that "everyone is entitled to all the rights and freedoms set forth in this declaration without discrimination of any kind, such as ... sex."¹⁷³ The early U.N. human rights treaties, namely the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on Economic, Social and Cultural Rights* (ICESCR), also pay special attention to women's rights and prohibit gender-based discrimination.¹⁷⁴ Gender equality was thus a central tenet of the U.N. human rights system.¹⁷⁵

Despite these formal protections, however, the U.N. system has been strongly criticized as having failed to address discrimination against women in a comprehensive manner. Against this criticism, in 1979, the U.N. General Assembly adopted the *Convention on the Elimination of Discrimination against Women* (CEDAW), which specifically obligates State parties to take steps to eliminate gender discrimination and to achieve gender equality.¹⁷⁶

¹⁷² UN Charter, *supra* note 30, article 1.

¹⁷³ UDHR, *supra* note 16, article 2.

¹⁷⁴ Article 3 of both treaties requires State parties to ensure that men and women are equally enjoy all the rights set out therein. ICCPR, *supra* note 35; and, ICESCR, *supra* note 36.

¹⁷⁵ For the purpose of this thesis the terms "sex" and "gender" are used interchangeably to address women's rights.

¹⁷⁶ CEDAW, *supra* note 51, article 2.

Despite a dedicated treaty on the subject of women's rights, newer treaties such as the *Convention on the Rights of the Child (CRC)*, and the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* have continued to include specific prohibitions on sex-based discrimination.¹⁷⁷ *The Convention on the Rights of Persons with Disabilities* further recognizes multiple forms of discrimination against women.¹⁷⁸

Stronger treaty-based recognition of women's rights has not necessarily translated into strong enforcement of these rights within the U.N. system. Monitoring mechanisms, including U.N. treaty bodies and Special Procedures, mainly Special Rapporteurs, have issued General Recommendations and Reports respectively to guide State parties on the adoption of practical measures to protect and enforce women's rights. The mechanisms of the U.N. treaty system have applied their tools to ensure gender equality and the protection of the rights of women. Yet, effective protection and enforcement of women's rights remains an ongoing concern.

This chapter examines in depth the protection of women's rights in the U.N. treaty system. It discusses three women's rights issues of particular concern: domestic violence (section 3.2), sex trafficking (section 3.3), and reproductive rights (section 3.4), and discusses current challenges of enforcement in the U.N. treaty-based system (section 3.5).

3.1.1 Objective and Methodology of Literature Review

This chapter is based on two documentary reviews. The first review consists of a study of primary materials, including the rights provisions of relevant U.N. treaties, and interpretation of these provisions by the U.N. treaty bodies and Special Rapporteurs in respective General Recommendations and Reports.

¹⁷⁷ CRC, *supra* note 53, article 2 and; ICAMW, *supra* note 54, article 7.

¹⁷⁸ ICPED, *supra* note 55, article 6.

The second review turns to secondary literature on current challenges in the promotion and enforcement of women's rights through the U.N. human rights treaty system, with particular reference to the three women's rights issues under study.

3.2 Domestic Violence under International Human Rights Law

Violence against women is recognized as a form of discrimination against women and one of the most pervasive human rights violations worldwide.¹⁷⁹ Women face violence of various forms: rape, domestic violence, dowry related violence, and other harmful practices. A major form of violence experienced by women is domestic violence. This is defined by the *Committee on the Elimination of Discrimination against Women* (CEDAW Committee) as “any act or conduct which has potential to cause injury or hurt women, physically, mentally, emotionally, socially, and economically, within the four walls of a house, and caused by a family member, including a husband or intimate partner”.¹⁸⁰

Other treaty bodies such as the *Committee on Economic, Social and Cultural Rights* and the *Committee against Torture* have also defined domestic violence as a violation of women's rights. The *Committee on Economic, Social and Cultural Rights* defined domestic violence as a violation of the right to life and family.¹⁸¹ The continuing occurrence of violence done by a husband is considered a violation of a woman's economic, social, and cultural rights. This raises

¹⁷⁹ The Committee on Eliminations of All Forms of discriminations against Women, “*CEDAW General Recommendations No 19: Violence against Women*”, 11th Sess, U.N. Doc CEDAW/A/47/38, (1992) at para 1 1, online: <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf>. [CEDAW, General Recommendation No. 19].

¹⁸⁰ *Ibid* at para 23.

¹⁸¹ The Committee on the Economic, Social and Cultural Rights, “*The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights: General Comment No. 16: (Art. 3 of the Covenant)*”, 34th Sess, UN Doc. E/C.12/2005/4, (2005) online:< <http://www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf>> at para 27.

a State's obligations under the U.N. treaties, namely, the need to eliminate gender-based discrimination. Further, the *Committee against Torture* defined domestic violence as torture in the private sphere.¹⁸² Domestic violence against women is a violation of the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.¹⁸³ Domestic violence constitutes torture in the form of beating, hitting, rape, and curtailment of basic needs such as food, clothing, and medical assistance during sickness. In 2007, the World Health Organization reported that the percentage of women who had ever experienced physical or sexual violence or both from a husband or an intimate partner was between 29% and 62%.¹⁸⁴

The U.N. treaty mechanisms have addressed two particular substantive issues in relation to domestic violence: first, the characterization of domestic violence as a form of gender-based violence; and second, the identification of domestic violence as a State responsibility rather than a private matter.

3.2.1 Domestic Violence as a form of gender-based violence

Under international human rights law, the text of U.N. treaties did not address the issue of domestic violence against women until the late 1980s. For instance, the CEDAW, adopted in 1979, only

¹⁸² Radhika Coomaraswamy, *Report of the UN Special rapporteur on violence against Women, its causes and consequences*, 52nd Sess, UN Doc. E/CN.4/1996/53 (6 February 1996) online:<<http://www.unhchr.ch/Huridoca.nsf/TestFrame/c41d8f479a2e9757802566d6004c72ab?Opendocument>>. see also, *supra* note 178.

¹⁸³ Manfred Nowak, *Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 7th Sess, UN Doc. A/HRC/7/3 (15 January 2008).

¹⁸⁴ World Health Organization, “*Multi country study on Women's health and domestic violence against women*” (WHO: Geneva, 2007) online:<http://www.who.int/gender/violence/who_multicountry_study/Introduction-Chapter1-Chapter2.pdf>; see also, Ravneet Kaur & Suneela Garg, “Addressing Domestic Violence Against Women: An Unfinished Agenda” (2008) 33:2 Indian J Community Med 73 at 74 online:<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/#CIT2>>.

addressed violence against women under the right to equality and freedom from discrimination. Article 1 defines “discrimination against women” 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 and any other field.”¹⁸⁵ However, CEDAW does not contain a provision on domestic violence. This gap was filled by the CEDAW Committee through adoption of General Recommendation No. 19 in 1992 when it first addressed the issue of domestic violence.¹⁸⁶ In this recommendation, the Committee specifically stated that domestic violence against women is a serious form of discrimination that inhibits women’s ability to enjoy basic freedoms and rights.¹⁸⁷ The Committee said that domestic violence violates several rights, including: right to life; right not to be subject to torture, cruel and inhuman or degrading punishment; the right to liberty and security of person; the right to equality in the family; and the right to the highest standard of physical and mental health.¹⁸⁸

There are two major reasons why the CEDAW Committee recognized domestic violence as a form of gender-based violence. To understand these reasons, it is first important to define the term “gender-based violence”. The Committee understands the term to mean “*violence that is directed against a woman because she is a woman or that affects women disproportionately*”. This

¹⁸⁵ CEDAW, *supra* note 51, article 1.

¹⁸⁶ CEDAW, General Recommendation No. 19, *supra* note 179 at para 23.

¹⁸⁷ *Ibid* at paras 4.

¹⁸⁸ *Ibid* at para 7.

expression emphasized that violence against women is not something occurring to women randomly, but rather, is an issue affecting women because of their gender.¹⁸⁹

This interpretation acknowledges that domestic violence is an insidious form of gender-based violence against women because it does not involve isolated or randomly occurring incidents, but a pattern of behaviour used by husbands or intimate partners against women. It is derived from social power structures and traditional attitudes which cause men to consider women as subordinate and, therefore, should live under the control or influence of a husband or family member.¹⁹⁰ Domestic violence is prevalent in many societies because cultural prejudices and practices provide justification to gender-based violence as a form of protection or control of women.¹⁹¹

To recall the States' obligations under treaties regarding the matter of domestic violence, in 1996, the first Special Rapporteur on Violence against Women, Radhika Coomaraswamy, stated that the international human rights framework applies to discriminatory practices, including domestic violence, so as to protect women from gender-based violence.¹⁹² Even in 2012, the Special Rapporteur, Rashid Manjoo, while submitting her third report to the Human Rights Council on Violence against Women, pointed to the range of women's experience of violence in the domestic sphere in different countries to show that State parties fail to meet the requirements that international human rights treaties expect of them in curtailing this violation.¹⁹³ Rashid

¹⁸⁹ *Ibid* at para 6.

¹⁹⁰ *Ibid* at para 11.

¹⁹¹ *Ibid*.

¹⁹² UN Economic and Social Council, Special Rapporteur on Violence against Women, *Framework for Model Legislation on Domestic Violence*, UN Doc. E/CN.4/1996/53/ Add.2 (1996).

¹⁹³ Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes, and consequences*, UNGAOR, 66th Sess, UN Doc A/66/215 (2011) at 10 and 18.

Manjoo stated that in the United States of America, women of African-American descent experience intimate partner violence at rates 35 per cent higher than white women.¹⁹⁴ In Algeria and Kyrgyzstan, women between the ages of 25 and 44 and women with two or more children reportedly suffered high levels of domestic violence.¹⁹⁵ In short, women from all social strata and of all ages face the problem of domestic violence.¹⁹⁶ The special rapporteur pointed out that traditions and practices like dowry death, though recognized by some cultures, have been condemned by the U.N. treaty bodies as some of the major causes of domestic violence against women in families.

Second, the U.N. treaties and mechanisms have recognized domestic violence as gender-based violence because it results in the loss of opportunities in social, political, and economic spheres for women. For example, to harm economically, preparators control victims by controlling economic resources. It makes one partner financially dependent on the other. The control that preparators exercise over economic resources means the other partner/person must get permission before making any decisions about their use. The *Committee on Economic, Social and Cultural Rights*, in its General Comment No. 20 on non-discrimination in economic, social and cultural matters, noted that domestic violence as gender-based violence undermines the fulfillment of economic, social, and cultural rights for a significant proportion of the world's population, that is, the female population.¹⁹⁷ Non-discrimination and equality, two important elements of international

¹⁹⁴ *Ibid* at para 27.

¹⁹⁵ *Ibid* at para 28.

¹⁹⁶ *Ibid* at 3.

¹⁹⁷ The Committee on Economic, Social and Cultural Rights, “*Non-Discrimination in economic, social and cultural rights (art.2, para.2 of the ICESCR: General Comment No. 20)*”, 42nd Sess, UN Doc E/C.12/GC/20, (2009) [ECOSOC General Comment No. 20].

human rights law, underlie enjoyment of economic, social, and cultural rights for women.¹⁹⁸ As a social issue, domestic violence against women not only makes them economically and socially dependent on their husbands, but also curtails the enjoyment of their family rights in equality with men.

Overall, it is clear that domestic violence is gender-based violence. It inflicts physical, social, economic, and other harms upon women. It also results in the violation of their basic human rights and fundamental freedoms. The obligation of States in this situation is to guarantee protection to women against gender-based violence, in particular, domestic violence. This duty can be discharged through enforcement of women's rights as provided under the respective U.N. treaties.

3.2.2 Domestic Violence is not a Private Matter but one of State Responsibility

As observed in Chapter Two, a State party has the primary responsibility to take actions to protect and enforce human rights within its jurisdiction. The problem of domestic violence has long been considered a private matter that should be dealt at home and not in public. It was therefore a major advancement in international law when domestic violence was recognized as a violation of women's rights, and for State parties to assume responsibility for the acts of private actors.¹⁹⁹ In relation to domestic violence, States parties are obligated to protect, respect, fulfill, and promote women's rights.²⁰⁰ This includes the responsibility to prevent, investigate, punish, and provide compensation for injury arising from private acts.²⁰¹ The first Special Rapporteur, Radhika Coomaraswamy, after active investigation, concluded in her 1996 report that domestic violence is

¹⁹⁸ *Ibid* at para 27.

¹⁹⁹ CEDAW, General Recommendation No. 19, *supra* note 179 at paras 24(b) and (r).

²⁰⁰ *Ibid* at para 9.

²⁰¹ *Ibid* at para 24(t) and (v).

a human rights concern, rather than simply a domestic criminal justice concern.²⁰² Thus, if a State party does not act against the crimes committed against women that violate their fundamental rights, then they are as guilty as the preparators.²⁰³ In this manner State parties are responsible for the actions of private actors.

To pin down State responsibility for this, the standard of ‘due diligence’ was first introduced by the CEDAW Committee in its General Recommendation No. 19. It challenges the view that private action is beyond State responsibility in international law. The concept of due diligence requires State parties to prevent, investigate, punish, and provide compensation for harms caused by against private acts.²⁰⁴ It also requires State parties to respond to domestic violence as a human rights violation.

The *Committee on Economic, Social and Cultural Rights* and the CEDAW Committee have both offered interpretive comments on domestic violence against women in General Comment No. 20 and General Recommendation No. 28.²⁰⁵ These treaty bodies together ask State parties to have laws, institutions, and systems to address such violence against women, and to ensure that the designated institutions effectively carry out their mandates with full support from State authorities. Another Special Rapporteur on Violence Against Women, Yakin Erturk, issued the report entitled “The Due Diligence Standard as a Tool for the Elimination of Violence Against Women”, in which

²⁰² *Supra* note 10 at para 29.

²⁰³ Radhika Coomaraswamy, *Preliminary Report of the UN Special rapporteur on violence against Women, its causes and consequences*, 50th Sess, UN Doc. E/CN.4/1995/42 (22 November 1994) online:<<http://hrlibrary.umn.edu/commission/thematic51/42.htm>> at para 72.

²⁰⁴ CEDAW, General Recommendation No. 19, *supra* note 179 at paras 24(m) and (s).

²⁰⁵ ECOSOC General Comment No. 20, *supra* note 197 at para 1 and 2; and, The Committee on Eliminations of All Forms of discriminations against Women, “*The Core Obligations of State Parties under Article 2 of the CEDAW :General Recommendations No 28*”, 47th Sess U.N. Doc CEDAW/C/GC28, (2010) at para 13 [CEDAW, General Recommendation No. 28].

the primary focus was State responsibility.²⁰⁶ She reinforced the concept of due diligence to map out the parameters of responsibility for States in responding to domestic violence.²⁰⁷ In terms of prevention, she encouraged empowerment of women through education, legal literacy, and access to community resources that would encourage them to negotiate the terms of their existence in public and the private sphere.²⁰⁸ In regard to protective orders, she asked State parties to take appropriate legislative, policing, and judicial measures to secure women in all societies.²⁰⁹ The establishment of judicial and policing systems would help women to feel safer in their environments and more able to report any act of violence against them. The failure of a State party to take necessary measures to prevent any form of gender-based violence against women, or a failure to investigate, punish, and provide compensation for harms from private acts, would be considered tacit permission or encouragement of acts of gender-based violence, particularly domestic violence against women. These failures would be violations of human rights.

Other than the standard of due diligence, the CEDAW Committee highlighted the importance of adopting legislative measures to enable State parties to take actions to protect women from domestic violence. In its General Recommendations No. 35, the Committee re-emphasized the need for States to take measures to protect women from violence, including domestic violence.²¹⁰ It also requires that they assess existing religious and customary norms in

²⁰⁶ Yakin Ertürk, “*Report of Special Rapporteur on Violence Against Women, its Cause and Consequences, Integration of the Human Rights of Women, and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence against Women*”, 62nd Sess, UN Doc. E/CN.4/2006/61 (2006) at paras 6-7.

²⁰⁷ *Ibid* at para 82.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid* at paras 49-50.

²¹⁰ The Committee on Eliminations of All Forms of discriminations against Women, *General Recommendations No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc CEDAW/C/GC/35, (2017) at para 26 (a) [CEDAW, General Recommendation No. 35].

light of the legal standards and challenge those norms that constitute discrimination against women.²¹¹ For example, State parties must modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against women so they can protect women against domestic violence.²¹² This would help State parties in their reporting obligations to provide information about legislative measures they have adopted to show their serious commitments towards compliance under U.N. treaty system.

To conclude, the U.N. treaties and their mechanisms have provided guidance to State parties on what steps to take to protect women from domestic violence. Given that domestic violence is gender-based violence, if States do not take concrete actions to eliminate it, they cannot make the excuse that domestic violence is a private matter and, therefore, they carry no responsibility for its harms to women.

3.3 Sex Trafficking under International Human Rights Law

Trafficking in persons involves sexual and labor exploitation of victims.²¹³ Under international human rights law, the term “trafficking in persons” is defined in article 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons* as:

“[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced

²¹¹ *Ibid.*

²¹² *Ibid* at para 24(a).

²¹³ CEDAW, General Recommendation No. 19, *supra* note 179 at para 14.

labour or services, slavery, or practices like slavery, servitude, or the removal of organs.”²¹⁴

Several tactics are used to manipulate and trap victims by deceit, fraud, and false promises of a good job or education. As well, an offer of marriage can be turned into exploitation.²¹⁵ Once a woman becomes a victim of sex trafficking, it is difficult for her to escape, and this deepens her economic and social vulnerability. U.N. treaties recognize sexual trafficking of women as a violation of human rights. The CEDAW and the CRC are two major treaties that directly address sexual trafficking of women. The CEDAW under article 6, and the CRC under article 35, both guarantee protection for victims of sexual trafficking.

Article 6 of CEDAW requires “States parties to take all appropriate measures, including legislative measures, to suppress all forms of trafficking in women and exploitation of prostitution of women”.²¹⁶ It also requires that the measures must offer reasonable assistance, protection, and support to the victims of sexual trafficking.²¹⁷

The treaties place special attention on specific groups particularly women and children. The CRC has made specific provision for their assistance, protection, and support.²¹⁸ Article 39 of the CRC requires State parties to “take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect,

²¹⁴*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UNGAOR, 55th Sess, UN Doc A/RES/55/25 (2001), article 3.

²¹⁵CEDAW, General Recommendation No. 19, *supra* note 179 at paras 14, 15 and 16.

²¹⁶ CEDAW, *supra* note 51, article 6.

²¹⁷ *Ibid.*

²¹⁸ CRC, *supra* note 53, article 39.

exploitation, or abuse.”²¹⁹ It emphasizes their recovery and rehabilitation. Furthermore, State parties are obligated to protect them from further harm.

The treaties also require State parties to provide domestic legal remedies to victims of human rights violations occurring within national jurisdictions.²²⁰ Article 2(c) of the ICCPR states that any person whose rights or freedoms are violated shall have an effective remedy.²²¹ They are obliged to ensure that any person claiming remedies shall have his or her right determined by the competent judicial, administrative, and legislative authorities.²²² Such authorities must be able to enforce the remedies granted to the victims.²²³ ICERD article 6,²²⁴ CRC article 39,²²⁵ the UDHR and the ICCPR all emphasize this duty. However, the CEDAW and ICESCR do not explicitly provide the right to any remedy, but it is assumed that treaties which require national implementation of human rights provisions also include the obligation to provide effective remedies.²²⁶

Women and girls are identified as primary victims of trafficking worldwide, especially for the purposes of sexual exploitation. The international human rights treaty system has addressed sex trafficking in detail as a human rights violation. U.N. mechanisms have addressed two particular substantive issues in relation to sex trafficking: (a) the rights of victims to protection,

²¹⁹ *Ibid.*

²²⁰ UDHR, *supra* note 16, article 2.

²²¹ ICCPR, *supra* note 35, article 2 sub-clause 3 (a).

²²² *Ibid.*, article 2 sub-clause 3 (b).

²²³ *Ibid.*, article 2 sub-clause 3 (c).

²²⁴ ICERD, *supra* note 48, article 6.

²²⁵ CRC, *supra* note 53, article 39.

²²⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, (2006), UN Doc. A/RES/60/147, online:<<http://www.refworld.org/docid/4721cb942.html>> [UN Basic Principles on Right to Remedy and Reparation for Victims].

support, assistance, and remedies; and (b) human rights in the criminal justice system. Both issues are discussed below.

3.3.1 The rights of victims to protection, support, assistance, and remedies

Over the years, treaty bodies such as CEDAW Committee, *Human Rights Committee*, and the *Committee on Economic, Social and Cultural Rights* have paid special attention to the provision of assistance, protection, support, and remedies to victims of sexual trafficking.²²⁷ After identifying victims of sexual trafficking, the primary responsibility of the State party is to provide immediate protection and help to the victims to alleviate feelings of insecurity and social vulnerability. State parties are required, primarily, to move the victims out of the sexual exploitation place to a safe place and, secondly, to provide immediate medical assistance to them.²²⁸ This would prevent further or potential violence against them if they seek to initiate legal proceedings or seek to improve their standard of life.²²⁹

Another major component of assistance is to facilitate victims' involvement in criminal proceedings against those who victimize women through sexual trafficking.²³⁰ Not only must victims' participation in a proceeding be free; they must also be given all the information necessary to assure that their participation in the proceedings is meaningful. Support of victims during legal proceedings must include access to legal assistance and advice, as necessary to ensure fair judicial proceedings.²³¹

²²⁷ CEDAW, General Recommendation No. 28, *supra* note 205 at paras 31, 32, 34 36, and 37; ICCPR, *supra* note 35, article 3; ICESCR, *supra* note 36, article 3.

²²⁸ UN Basic Principles on Right to Remedy and Reparation for Victims, *supra* note 226.

²²⁹ ECOSOC, Special Rapporteur Report on the Due Diligence Standard, *supra* note 206 at paras 40 (a) and (b).

²³⁰ Joy Ngozi, *trafficking in persons, especially women and children*, UNGAOR, 69th Sess, UN Doc. A/69/33797 (2014) at paras 28.

²³¹ *Ibid* at paras 28-31.

To ensure protection, support, and assistance to victims of sex trafficking, the role of NGOs is very well recognized in the international human rights system. NGOs are an important source of information by reason of their research to understand the root causes of sexual trafficking against women.²³² They play important roles in identifying the types of assistance, such as medical and legal, and the kinds of remedies that a State can provide to victims in fulfillment of its obligations in this area under the U.N. treaty system. For example, regarding women from rural areas, the Committee in its General Recommendation No. 34 recognizes that women living in those areas also face risk of sexual trafficking.²³³ They are more vulnerable to sex trafficking because they live in remote areas.²³⁴ The lack of information and awareness not only makes them likely to continue to suffer, but also makes them unable to receive legal and medical assistance from the State.²³⁵ NGOs can play key roles in creating awareness about the root causes of sexual trafficking, and educating victims on their rights and the remedies available to them. The Committee urged State parties to provide gender-responsive training on prevention measures, and to provide protection and assistance to these women for their dealings with the police and other agencies.²³⁶ The U.N. treaty bodies and special rapporteurs have emphasized that different kinds of remedies must be available to victims of sex trafficking: restitution, compensation, rehabilitation, recovery, satisfaction and guarantees of non-repetition of the violation. They have urged State parties to make these remedies available and accessible to victims. In 2014, the Special Rapporteur, Joy

²³² CEDAW, General Recommendation No. 28, *supra* note 205 at para 36.

²³³ The Committee on Eliminations of All Forms of discriminations against Women, *General Recommendations No. 34 on the rights of rural women*, UN Doc CEDAW/C/GC/34, (2016) at para 26 [CEDAW, General Recommendation No. 34].

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid* at para 27.

Ngozi Ezeilo, submitted her “Report on trafficking in persons, especially women and children” which assessed 10 years of trafficking activities, especially regarding women and children. She explained that these remedies help to restore the victims of sexual trafficking to their positions before they suffered the violation.²³⁷ The application of the appropriate remedies ensures the non-repetition of the sexual trafficking offence against the victim and prevents future violations of other rights. State parties are not the direct source of the sexual-related harms to victims, but they cannot isolate themselves from their legal responsibility to guarantee protection to victims of sexual trafficking.

Therefore, treaty bodies through their general recommendations and special rapporteurs in their reports have not only explained the different components of remedies in detail, more importantly they have guided State parties to make sure that victims of sexual trafficking have access to right to assistance, protection, and support.

3.3.2 Human Rights in the criminal justice system

Under international human rights law, State parties are required to ensure criminal justice for victims and to take steps to end the crime of sexual trafficking of women. Article 6 of CEDAW recognizes the obligation of State parties to combat trafficking of women as a matter of criminal justice.²³⁸ It requires States to take appropriate measures, including legislative ones, to address all forms of trafficking in women, including the adoption of new legislation or amendment of existing legislation. Such legislation must empower State agencies and institutions to prosecute, investigate, and punish sexual trafficking of women.²³⁹ In sum, criminalization includes

²³⁷ *Ibid* at paras 32-35.

²³⁸ CEDAW, *supra* note 51, article 6.

²³⁹ CEDAW, General Recommendation No. 34, *supra* note 233 at para 27.

legislatively declaring that the trafficking of people is a crime, institutionalizing procedures to investigate and prosecute it with due diligence, and imposing appropriate penalties on traffickers.²⁴⁰

The special rapporteur on trafficking in persons, especially for women and children, Joy Ngozi Ezeilo, recognized punishing the trafficker as an essential part of a State's obligation under a criminal justice system to curb trafficking.²⁴¹ State parties must adopt punitive measures to curb sexual trafficking. Judicial and administrative sanction against offenders should provide satisfaction to the victim that the trafficker will be punished by the State and that violations of her rights are addressed effectively.²⁴² Weak penal provisions not only result in the failure of the State to punish the trafficker, but also undermine criminal justice for trafficking victims.

To ensure criminal justice for victims, the U.N. treaty bodies have also emphasized that it is important for State parties to institutionalize procedures to diligently investigate and prosecute trafficking.²⁴³ A State that does not criminalize the offence and fails to protect victims by, among other things failing to prosecute traffickers, will be considered as having failed to perform its responsibility under the U.N. treaty system. For example, the *Committee on Economic, Social and Cultural Rights* pointed out that criminal justice officials must be given specialized training for this purpose.²⁴⁴ More generally, the State must provide human rights education and training programmes for public officials and carry out relevant training for judges and candidates for

²⁴⁰ *Ibid.*

²⁴¹ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/20/18 (2012) at paras 16-22.

²⁴² *Ibid.*

²⁴³ ECOSOC, Special Rapporteur Report on the Due Diligence Standard, *supra* note 206 at para 25(b).

²⁴⁴ ECOSOC General Comment No. 20, *supra* note 197 at para 38.

judicial appointment.²⁴⁵ This will help to ensure that victims are given proper access to justice, and that they are satisfied afterwards that violations of their rights are addressed adequately.

Overall, it is clear that the Special Rapporteur and the treaty bodies leave no doubt that criminalization and prosecution of human trafficking, especially of women, is no longer an option for any party to any of the U.N. treaties. They also emphasize unequivocally that sex trafficking is a serious issue that requires State parties to provide assistance and protection to victims.

3.4 Reproductive Rights under International Human Rights Law

The right to reproductive health is protected as part of the rights to life, health, and prohibition of discrimination under international human rights law.²⁴⁶ While the U.N. treaties, other than CEDAW, do not explicitly address reproductive rights, these rights are addressed through other fundamental rights. Article 6 of the ICCPR states that “every human being has the right to life” and no one shall be deprived of it.²⁴⁷ The ICESCR, under article 12(1), recognizes that “everyone has the right to enjoy the highest standard of physical and mental health.”²⁴⁸ State parties to these conventions are obliged to fulfill these obligations in relation to women’s reproductive health.²⁴⁹ As mentioned above, CEDAW is the only U.N. treaty to explicitly address reproductive rights under articles 12, 14 and 16. Article 12 urges “State parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure equal access

²⁴⁵ *Ibid.*

²⁴⁶ The Committee on Economic, Social and Cultural Rights, “*Article 18 (Freedom of Thought, Conscience or Religion): General Comment No. 22*”, 48th Sess, UN Doc. E/C.12/GC/22, (2016) at 1 [ECOSOC General Comment No. 22].

²⁴⁷ ICCPR, *supra* note 35, article 6.

²⁴⁸ ICESCR, *supra* note 36, article 12(1).

²⁴⁹ ECOSOC General Comment No. 20, *supra* note 197 at para 33; and, ECOSOC General Comment No. 22, *supra* note 246 at para 1.

to health care services, including those related to family planning”.²⁵⁰ Article 12 further calls on State parties to ensure appropriate services for women relating to pregnancy and the post-natal period. Where necessary, the services must be free. As well, adequate nutrition during pregnancy and lactation must be assured to women.²⁵¹ Under article 14, CEDAW gives special attention to the reproductive rights of rural women. Article 14(b) requires “State parties to take all appropriate measures to provide access to adequate health care facilities, including information, counselling, and services in family planning for women in rural areas”.²⁵² Lastly, article 16 recognizes the right of women to decide “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.²⁵³ Overall, these rights are intended to help women achieve a high standard of living and a healthy life.

Despite formal recognition, the violation of women’s reproductive rights is common across the globe.²⁵⁴ Reproductive rights are not only a health issue, but also a major human rights concern.²⁵⁵ The reproductive rights of women are at high risk because of cultural practices, such as female genital mutilation, early marriages and forced abortions.²⁵⁶ The other practices that violate the reproductive rights of women include forced virginity examinations, female sterilization, early age pregnancies, and insufficient time between pregnancies leading to high rates

²⁵⁰ CEDAW, *supra* note 51, article 12(1).

²⁵¹ *Ibid*, article 12 (2).

²⁵² *Ibid*, article 14 (b).

²⁵³ *Ibid*, article 16.

²⁵⁴ CEDAW, General Recommendation No. 19, *supra* note 179 at para 20; and, ECOSOC, General Comment No. 22, *supra* note 246 at para 2.

²⁵⁵ ECOSOC, General Comment No. 22, *supra* note 246 at paras 2-3.

²⁵⁶ *Ibid*.

of maternal mortality.²⁵⁷ The denial of reproductive health rights to women has brought immense negative impacts on their health.

The U.N. treaties have made significant efforts to protect the reproductive rights of women. The next two sections explain how the U.N. treaty mechanisms have addressed the violations of these rights in two ways: (a) Equal accessibility in health care services; and (b) State responsibility to protect, respect, and fulfill or ensure enforcement of women's reproductive rights.

3.4.1 Availability, Accessibility, and Affordability of health care services

The UN enforcement mechanisms, including treaty bodies and other special procedures, have made pronouncements on matters relating to reproductive rights and have adopted several measures for the protection and promotion of the reproductive rights of women. Under General Recommendation Nos. 19, 24, 28 and 34, the CEDAW Committee pointed out that State parties are obliged to provide available and accessible health care services facilities throughout women's lives in an affordable manner. This is one of the important features recognized by treaty bodies for the protection of women's reproductive rights.

The uneven distribution of health care services is a major cause of violation of reproductive rights in the form of maternal mortality, as the women who need the greatest services to ensure reproductive health care cannot access them.²⁵⁸ In the case of rural areas, the availability and accessibility of health care services for the protection and promotion of women's reproductive health is extremely limited.²⁵⁹ The primary reasons for this include lack of infrastructure and trained personnel, and lack of information on modern methods of contraception in the delivery of

²⁵⁷*Ibid.*

²⁵⁸*Ibid* at paras 7-8.

²⁵⁹ CEDAW, General Recommendation No. 34, *supra* note 233 at paras 37 and 38.

rural health care services.²⁶⁰ These basic services are mandatory for safe motherhood, which is an integral part of reproductive rights. However, because of the uneven distribution of these basic health care services during pre-natal and post-natal periods, some women are not given adequate care, a failure that results in maternal deaths. Therefore, the emphasis is on reproductive health care facilities being within reach for all, and not denied to persons living in remote areas.²⁶¹ Indeed, in 2016, the CEDAW Committee specifically focused on accessibility of services for women living in rural areas.²⁶² The treaty bodies and Special Rapporteurs emphasized that State parties must provide adequate numbers of functioning health care facilities, services, goods, and that programmes must be available in public and private facilities and within reasonable geographical reach to these women.²⁶³

Another important issue to which treaty bodies and special rapporteurs paid attention is the limited allocation of financial resources to reproductive health care services by some State parties. Many women cannot afford the services even at reasonable cost because they lack the means for this. Therefore, State parties have a duty to allocate adequate budget to support new and existing health care plans or policies, with a focus to achieve equal distribution of reproductive health care services in urban as well as rural areas. The *Committee on Economic, Social, and Cultural Rights* urges that States bear the responsibility to provide financial and other necessary support, like health insurance coverage and access to women's reproductive health services.

²⁶⁰ *Ibid* at para 37.

²⁶¹ ECOSOC General Comment No. 22, *supra* note 246 at para 16.

²⁶² CEDAW, General Recommendation No. 34, *supra* note 233 at paras 37-39; and, ECOSOC General Comment No. 22, *supra* note 246 at para 11-21.

²⁶³ ECOSOC General Comment No. 22, *supra* note 246 at para 17; See also, Anand Grover, *Special Rapporteur Reports on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 66th Sess, UN Doc. A/66/254, (2011) at para 21.

The Committee asks State parties to (a) place a gender perspective on policies and programmes affecting women's health, involving women in the planning, implementation and monitoring of such policies and programmes and in the provision of health services to women; (b) ensure the removal of all barriers to women's access to health services, education and information, including in the area of reproductive health; and (c) prioritize reduction and preservation of maternal mortality rates through safe motherhood services and prenatal assistance.²⁶⁴ The goal is that when proper attention is given to these issues, the access to health care services that it facilitates will lead to a good quality of life for women. Otherwise, the denial of legally available health services to them amounts to torture or ill-treatment and the violation of their reproductive rights.²⁶⁵

Complimentary to assurance of access to reproductive health care services to women is the need for the States to respect, protect, and fulfill those rights for women. The next subsection looks at this matter.

3.4.2 States' Responsibility to respect, protect and fulfil or ensure enforcement of women's reproductive rights

The U.N. treaty bodies have noted that protection and enforcement of reproductive rights is a major concern. Many State parties have not been able to deal well with the several legal, practical, social, and other barriers which have restricted women's access to reproductive care services, goods, facilities, and information.²⁶⁶ As noted above, reproductive rights are an integral part of health, the elements of which include access to the available range of reproductive health information, goods,

²⁶⁴ ECOSOC General Comment No. 22, *supra* note 246 at para 49.

²⁶⁵ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment*, UNGAOR, 22nd Sess, UN Doc. A/HRC/22/53 (2013) at para 45-50.

²⁶⁶ ECOSOC General Comment No. 22, *supra* note 246 at 2.

facilities and services to enable women to make free, informed and responsible decisions about their reproductive behaviour. However, for women to enjoy their reproductive rights, State parties bear a responsibility to respect, protect, and fulfill those reproductive rights.²⁶⁷ Over the years, treaty bodies have assisted State parties in their national efforts to implement relevant treaties on this subject.

Firstly, the U.N. treaty bodies and special rapporteurs have emphasized the need to respect, protect and fulfil women's reproductive rights. The CEDAW Committee and the *Committee on Economic, Social and Cultural Rights*, in their General Comments Nos. 24 and 22 respectively, explain that the obligation to *respect* requires State parties to refrain from interfering with the exercise by individuals of the right to reproductive health.²⁶⁸ States must not deny or limit any woman's access to reproductive health services and information.²⁶⁹ They must also reform laws that impede exercising and enjoying rights to right to reproductive health, such as passing laws that criminalize abortion.²⁷⁰

The obligation to *protect* women's reproductive rights requires State parties to take measures to prevent third parties from interfering with and curtailing the enjoyment of the right to reproductive health.²⁷¹ It means State parties must ensure that women have full access to

²⁶⁷ The Committee on the Elimination of Discrimination against Women, "*Article 12 of the Convention (Women and Health): General Comment No. 24*", 20th Sess, UN Doc. A/54/38/ Rev.1, (1999) at paras 2,7 and 11 [CEDAW, General Recommendation No. 24].

²⁶⁸ *Ibid* at para 17; and ECOSOC General Comment No. 22, *supra* note 246 at para 40.

²⁶⁹ *Ibid*.

²⁷⁰ ECOSOC General Comment No. 22, *supra* note 246 at para 41.

²⁷¹ CEDAW, General Recommendation No. 24, *supra* note 267 at paras 15-16; and ECOSOC General Comment No. 22 *supra* note 246 at paras 42-45.

appropriate information on reproductive health, including family planning and the dangers of early pregnancy, regardless of their marital status and their parents' or guardians' consent.²⁷²

The obligation to *fulfill* requires State parties to take appropriate legislative, administrative, judicial, and budgetary measures to the maximum extent of their resources to ensure the full realization of women's reproductive rights.²⁷³ This means States should ensure access to reproductive health care services such as maternal health care, safe abortion care, without discrimination against individuals who belong to marginalized or disadvantaged groups. This obligation also requires States to take appropriate measures to eradicate practical barriers in this regard.

Apart from the obligations to protect, respect, and fulfill, the CEDAW Committee and the *Committee on Economic, Social and Cultural Rights* have also shed light on the reporting obligation of State parties under the U.N. treaty system regarding the protection of women's reproductive rights.²⁷⁴ The concern of these two bodies is for States to conscientiously provide information on measures they adopt to protect and promote reproductive health rights of women in their jurisdictions. Such reports must include information on measures taken to eliminate barriers that women face in access to reproductive health care service; measures taken to ensure access to quality reproductive health care services; and measures taken to ensure timely access to the range of services that are related to family planning.²⁷⁵ The information is needed to enable treaty bodies to monitor State compliance with duties in respect of the reproductive rights of women. Compliance is seen as a step to achieve gender equality both in law and in practice.

²⁷² ECOSOC General Comment No. 22, *supra* note 246 at para 44.

²⁷³ *Ibid* at paras 45-48.

²⁷⁴ CEDAW, General Recommendation No. 24, *supra* note 267 at para 21.

²⁷⁵ *Ibid* at paras 21-24.

Generally, the U.N. treaty system has sought to protect women in the three areas discussed above. It asks the States to diligently fulfill their duties to protect women. However, as observed in Chapter Two, the U.N. treaty system faces challenges that impede its efforts to protect and enforce human rights. These challenges have compromised its work in regard to the protection of women's rights. The challenges are discussed in detail below.

3.5 Challenges of the UN Human Rights Treaty System

In the sphere of women's rights, a wide gulf exists between theory and practice.²⁷⁶ The U.N., through its treaty system, has made several efforts to protect and prevent violations of women's rights.²⁷⁷ In practice, the efforts have been described as "futile."²⁷⁸ This section draws on the secondary literature that discusses challenges that prevent the UN treaty system from working effectively to protect and promote women's rights with particular reference to the three women's rights issues set out in preceding sections. The challenges discussed here include: cultural relativism; the problems of State reporting; the quality of Committee observations and comments; inadequate State implementation of recommendations; and the limited role of NGOs in treaty implementation.

3.5.1 Cultural Relativism

As explained in Chapter Two, cultural relativism is a major challenge to the working of the U.N. treaty system for the protection and enforcement of human rights generally. The same challenge has emerged as a major roadblock in regard to the protection and enforcement of women's rights.

²⁷⁶ Ahmed Naseen Khan, "Women's Security and Legal Safeguards in India" (2013) 2:4 Journal of Business Management and Social Sciences Research 25.

²⁷⁷ *Ibid.*

²⁷⁸ Rebecca J Cook, "*Human Rights of Women: National and International Perspectives*" (Philadelphia: University of Pennsylvania Press, 1994 at 4 [Rebecca Cook]).

Since the *World Conference of Vienna*, it has been recognized that “women’s rights are human rights and human rights are women’s rights”.²⁷⁹ The principle of universality applies to women’s rights, like to any other rights, and makes women equally entitled to enjoy all rights. Despite this, the principle is questioned in cases where women face violation of their rights in the name of culture. There are different cultural practices, within family and society, that are harmful towards women, including domestic violence.²⁸⁰

Although cultural relativism holds that no culture is superior to another in terms of morality, ethics, and law, it is considered that the validity of cultural equality depends on the cultural environment.²⁸¹ Consequently, cultural relativism holds that all beliefs and practices are relative to an individual within the society of a particular culture. Regarding women’s rights, Maryam Namazie stated that “cultural relativism is a racist phenomenon which values and respects all cultural and religious practices, irrespective of their consequences for women”.²⁸² Cultural relativism gives each culture full liberty to enjoy what is believed to be relevant and purported to be right to its society. It does not only ignore the consequences of cultural practices towards women, but also causes negative impacts on women’s life. Further, cultural relativism curtails the social, economic, cultural, and political development of women.

As discussed above, domestic violence is one of the major forms of discrimination against women and violates women’s rights in all spheres of life. To address this, the U.N. human rights

²⁷⁹ Margaret E Galey, “International Enforcement of Women’s Rights” (1984) 6 Hum. Rts. Q. 463 at 463.

²⁸⁰ Susan W Tiefenbrun, *Women’s International and Comparative Human Rights* (North Carolina: Carolina Press, 2012) at 95.

²⁸¹ Sandra Danial, “Cultural Relativism vs. Universalism: Female Genital Mutilation, Pragmatic Remedies” (2013) 2:1 The Journal of Historic Studies at 2.

²⁸² Maryam Namazie, “Racism and Cultural Relativism, and Women's Rights” (14 August 2001), *Maryam Namazie* (blog) at 2. online:< <http://maryamnamazie.com/racism-cultural-relativism-womens-rights/>>.

treaty system urges State parties to take the “obligation of due diligence” seriously to prevent, investigate, punish, and provide compensation for harms resulting from acts of domestic violence.²⁸³ However, culture plays an influential role in society to determine what is right and wrong for a woman.²⁸⁴ Culture, traditions, and patriarchal beliefs have major influences in individual behaviour that cause domestic violence.²⁸⁵ Domestic violence is in large part a consequence of patriarchy and a systematic attempt to maintain male dominance in the home and in a society where a wife is expected to be tolerant, gentle, to do housework, raise children and, if she fails to perform her marital and household duties, she is looked down upon by her family and even society.²⁸⁶ This imbalance of gender roles between men and women is a consequence of gender inequality that is maintained in the name of culture. Ultimately, it violates women’s rights. The influence of culture hinders the efforts of States to work effectively against domestic violence and to consider it phenomenon beyond the actions of private actors.

Like its influence for justifying domestic violence, cultural relativism also has a significant impact in the rise of sexual trafficking of women. The U.N. treaties bodies and special rapporteurs have not quite succeeded in providing assistance, support, and remedies to the victims, or in criminalizing the offence of sex trafficking of women. This is partly because cultural and religious

²⁸³ ECOSOC, Special Rapporteur Report on the Due Diligence Standard, *supra* note 206 at para 24(b).

²⁸⁴ Hillary Charlesworth, “What are ‘Women’s International Human Rights’?” Chapter 3 in Rebecca Cook, *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1994) at 58.

²⁸⁵ Sudha Chaudhary, “Domestic Violence in India” (2013) 1:2 *Journal of Indian Research* 146 at 147.

²⁸⁶ Passanan Assavarak, “Patriarchy: behind the silent voice of domestic violence” (2007) *Mainstreaming Human Security*

online:<https://scholar.google.ca/scholar?hl=en&as_sdt=0%2C5&q=Patriarchy%3A+behind+the+silent+voice+of+domestic+violence&btnG=>; Sheikh Saaliq, “Every Third Woman in India Suffers Sexual, Physical Violence at Home”, *News 18* (8 February 2018), online:< <http://www.news18.com/news/india/the-elephant-in-the-room-every-third-woman-in-india-faces-domestic-violence-1654193.html>>.

practices and patriarchal beliefs are a roadblock against these efforts.²⁸⁷ These harmful cultural beliefs have been a root cause of sexual trafficking.²⁸⁸ For example, in Africa, young girls and women are trapped into sexual trafficking because of the abuse of certain cultural practices²⁸⁹ due to which State parties, despite the development of legislation, are unable to provide assistance, support and remedies, and to punish preparators because the cultural and religious practices which protect them are sanctioned by family and society.²⁹⁰ Consequently, the guidance provided by treaty bodies becomes futile to protect women from sexual trafficking.

Therefore, despite the recognition of women's rights under treaties, their violation in the name of cultural beliefs is still prevalent. Overall, discriminatory cultural practices against women have caused States to fail to protect women's rights. These practices also limit the effective working of the U.N. treaty bodies in their efforts to protect and promote women's rights universally.

3.5.2 State reporting

The reporting obligation asks States to provide information on implementation of women's rights and to address the steps taken for their promotion and protection.²⁹¹

²⁸⁷ David R. Hodge & Cynthia A Lietz, "The International Sexual Trafficking of Women and Children" (2007) 22:2 *Journal of Women and Social Work* 163 at 163.

²⁸⁸ Norah Hashim Msuya, "Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children" (2017) 2:1 *A Journal on Sexual Exploitation and Violence* at 1 online:<<http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1007&context=dignity>>.

²⁸⁹ *Ibid* at 4.

²⁹⁰ Mary De Chesney, "Cultural Aspects of Treating Survivors of Trafficking" (2013) 72:12 *Hawaii J Med Public Health* 1, online:<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3727606/>>.

²⁹¹ *A Handbook for Civil Society*, "Working with the United Nations Human Rights Programme" New York, 2008 Online<<http://www.ohchr.org/civilsocietyhandbook/>>.

(a) Overdue reports

As observed in Chapter Two, Navneethem Pillay notes that overdue State reports is one of the major challenges to the work of the treaty bodies.²⁹² Hein Shoo pointed out that this challenge results in State parties' failures regarding the protection of women's rights.²⁹³ CEDAW is the most comprehensive treaty for the protection and enforcement of women's rights. Its reporting obligations require State parties to submit periodical reports. They include the initial periodical report, which must be submitted in one year, and average periodical reports every four years. These reports must provide information on measures that States adopt to improve the conditions of women's rights and to facilitate achieving gender equality.²⁹⁴ However, these reports to the CEDAW Committee are usually long overdue, ensuring that the Committee is unable to monitor the compliance of State parties with their reporting obligations. Suzanne Egan pointed out the issue of escaping surveillance by State parties.²⁹⁵ The failure to submit reports and a long delay in providing reports is one way for State parties to avoid scrutinization of their efforts taken to protect and enforce women's rights. This problem limits treaty bodies' ability to scrutinize women's rights observance in national jurisdictions.

With respect to reproductive rights, the U.N. treaty bodies provide general guidance through their General Recommendations and Comments to all State parties to aid their protection and enforcement activities to fulfill women's reproductive rights expectations. To analyze the true

²⁹² UNHCHR Report, *supra* note 2 at 8.

²⁹³ Heisoo Shin, "CEDAW and Women's Human Rights: Achievements and Obstacles" (Paper delivered at The Castan Center for Human Rights Law's Annual Conference, 3 December 2004) at 1-4, online:<https://www.monash.edu/_data/assets/pdf_file/0010/138664/heisoo-shin-paper.pdf> [Heisoo Shin].

²⁹⁴ Andrew C Byrnes, "The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14:1 Yale J. Int'l L 1.

²⁹⁵ Suzanne Egan, *supra* note 11 at 224-227.

position and obstacles that State parties face within their national jurisdiction in undertaking compliance duties, the treaty bodies require State parties to submit reports in a timely manner. The violation of women's reproductive rights is an emerging issue in developing and under-developing countries, especially in their rural areas where rate of maternal mortality is very high. Because the parties delay submissions, the treaty bodies are generally unable to make appropriate recommendations to help the States to provide proper attention to this issue.²⁹⁶ Furthermore, this long delay in providing reports in reproductive rights also prevents the treaty bodies in assessing the true condition of women's reproductive rights in national jurisdictions. Overall, the record of regularity in report submission by States to treaty bodies is very poor, and this scuttles compliance monitoring of State conduct with respect to protecting reproductive rights for long periods.²⁹⁷

With respect to domestic violence, the submission of States reports to treaty bodies is an opportunity to highlight the gap between ratification of and compliance with the rights set out in the treaty for the protection and enforcement of women's rights.²⁹⁸ State parties' engagement is more important in domestic violence as many States have a tendency to avoid their responsibility by making the excuse that "domestic violence is a private matter". The failure of submission or long delay in reports not only undermines treaty bodies to read State reports as they themselves cannot visit each State party but keeps women more vulnerable to domestic violence. In Ireland's reporting process it was observed that there was a substantial delay of nine years in the submission

²⁹⁶ Isfahan Merali, "Advancing women's reproductive and sexual health rights: using the International Human Rights System" (2000) 10:5 Development in Practice 609.

²⁹⁷ *Ibid* at 616.

²⁹⁸ Jeni Klugman, "Gender Based Violence and the Law" (2017) Georgetown Institute for Women, Peace and Security, Georgetown University Working paper, online:<<https://openknowledge.worldbank.org/bitstream/handle/10986/26198/112914-WP-PUBLIC-WDR17BPGenderbasedviolenceandthelaw.pdf?sequence=1>>.

of its combined sixth and seventh report to CEDAW.²⁹⁹ Significant delay of nine years not only compromised the objective of the reporting system but also limited the CEDAW Committee's ability to address the major issue of affordability of legal assistance for victims of domestic violence provided by State authorities.³⁰⁰ This superficial engagement of State parties with the U.N. reporting system has highlighted their failure towards fulfillment of reporting compliance in the issue of domestic violence.

To conclude, overdue reports limit the compliance and monitoring work of the U.N. treaty bodies regarding the true condition of women's rights within national jurisdictions. This continues to be a major challenge to the effectiveness of the system.

(b) Quality of State Reports

Phillip Alston points out that the quality of State reporting helps treaty bodies to monitor the compliance of State parties.³⁰¹ Poor quality of State reporting, therefore, is another major challenge of the U.N. treaty system in protecting human rights. Frauke Lisa Seidensticker highlights the need for State parties to provide evaluative information regarding constitutional and legal provisions that are adopted to promote and protect women's rights.³⁰² Such information must be supplemented by the measures State parties take for women's rights protection, their practical

²⁹⁹ Free Legal Advice Centres, "Submission in advance of the examination of Ireland's combined sixth and seventh reports under the UN Convention on the Elimination of all forms of Discrimination against Women" (2016) FLAC Working Paper at 1 online:<

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IRL/INT_CEDAW_CSS_IRL_26097_E.pdf>.

³⁰⁰ *Ibid* at 4.

³⁰¹ Philip Alston, *supra* note 19 at para 14-36.

³⁰² Frauke Lisa Seidensticker, "Examination of State Reporting by Human Rights Treaty Bodies: An Example of Follow-Up at the National Level by National Human Rights Institutions" German Institute for Human Rights (2005) online:<http://www.institutfuermenschenrechte.de/uploads/tx_commerce/examination_of_state_reporting_by_human_rights_treaty_bodies_an_example_of_follow_up_at_the_national_level_by_nhris.pdf>.

realization, and the factors and difficulties that restrain protection and development of women rights at domestic level.³⁰³ As the *Human Rights Committee* of the ICCPR put it, this is so “the Committee may ascertain the measures that have been taken to give effect to the obligations, the progress made, the difficulties encountered and the steps taken to overcome them.”³⁰⁴ Thus, the U.N. treaty bodies expect State parties to provide detailed information on the measures they take to protect women from crimes, like sexual trafficking, that violate their right to life and liberty.³⁰⁵

With respect to sexual trafficking involving women, the poor quality of State reporting has led to a lack of attention towards the two basic requirements that must be reflected in the reports: firstly, to provide immediate assistance, protection, and remedies to the victims of sex trafficking to prevent further harm; and secondly, to criminalize sex trafficking by adopting appropriate measures including legislative ones.³⁰⁶ A good quality State report must provide evaluative information on these matters. It must also provide information on administrative plans and policies, and judicial measures regarding restitution and rehabilitation of the victims of sexual trafficking. Most States do not provide such evaluative information. They give descriptive information to the treaty bodies regarding their compliance.³⁰⁷ For instance, they give general information about legislation and plans or policies regarding control of sex trafficking, but they do not provide much

³⁰³ *Ibid* at 7.

³⁰⁴ UN Human Rights Committee, General Comment No. 28, UN Doc CCPR/C/21/Rev. 1/Add.10, (2000) at para 3 [HRC, General Comment No. 28].

online:<http://tbinternet.chchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fRev.1%2fAdd.10Lang=en>.

³⁰⁵ *Ibid* at para 10

³⁰⁶ CEDAW, General Recommendation No. 28, *supra* note 205 at paras 31, 32, 34 36; UN GA trafficking in persons, especially women and children, *supra* note 230 at para 28.

³⁰⁷ Anne F. Bayefsky, *supra* note 31 at 4.

information about investigation of reported cases.³⁰⁸ This ultimately results in the limited working of the U.N. treaty system to scrutinize the actions taken by a State party in its jurisdiction, in particular to provide assistance, support or protection to victims of sexual trafficking.

The poor quality of State reporting also impacts the ability of the treaty bodies to protect women from domestic violence. Regarding domestic violence, treaty bodies expect to receive evaluative information on actions State parties have taken by introduction of new laws or modification in existing laws, or abolishment of customs and practices. The poor quality of State reporting makes it difficult for the treaty bodies to properly evaluate the measures taken by State parties to protect women against domestic violence, as it is regarding reproductive rights.³⁰⁹ The composite failure is evidence of the poor state of women's rights protection and enforcement in national jurisdictions around the world.

3.5.3 Quality of Concluding Observations and General Comments

As mentioned in Chapter Two, concluding observations and general comments guide State parties to facilitate promotion of human rights at the domestic level.³¹⁰ When treaty bodies publish concluding observations and general comments, they expect State parties to apply them towards protecting women's rights.³¹¹ Anne F Bayefsky pointed out that it is States' reports, and dialogues held in the Committee meetings based on the list of issues that States parties identify in their reports, that inform what observations and recommendations the treaty bodies make.³¹² The treaty

³⁰⁸U.N. Human Right Committee, *violations of women's human rights in Guatemala*, 100th Sess, at 4, online:<http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MADRE_Guatemala100.pdf> [HRC, Guatemala Report].

³⁰⁹ Heisoo Shin, *supra* note 293 at 2.

³¹⁰ Michael O' Flaherty, *supra* note 142.

³¹¹ Machiko Kantetake, "UN Human Rights Treaty Monitoring Bodies before Domestic Courts" (2018) 67 ICLQ 201 at 201.

³¹² Anne F Bayefsky, *supra* note 31 at 6.

bodies use their concluding observations to supervise the actions, plans and policies that States later adopt for the development of women's rights.³¹³ However, since the quality of State reports is not up to the standard required, guidance from the treaty bodies does not usually address specific women's rights issues. Such guidance is reduced to provide general normative observations regarding parties' treaty duties. Thus, it is the case that treaty bodies have failed to provide guidance on criminalization of sex trafficking and victims' rights to immediate assistance, protection and remedy in their concluding observations.³¹⁴ The treaty bodies do cover many substantive areas relevant to women's rights, such as right to public life, rights to education, and right to marriage, but these constitute only about ten-percent of issues relating to women's rights.³¹⁵ Many times, treaty bodies not only forget to address specific issues but also fail to even address the issue of sexual trafficking against women. As noted above, sexual trafficking is a serious women's right issue which treaty bodies cannot afford to not discuss in their concluding observations, as this undermines the objective of issuance of concluding observations.

When it comes to reproductive rights, the quality of concluding observations is not different. In General Recommendations and Comments, treaty bodies provide elaborative guidance to State parties relating to reproductive rights of women and cover substantive issues relating to reproductive rights to address how State parties should take action to fulfill their legal obligations to respect, protect and fulfill women's reproductive rights.³¹⁶ However, the treaty bodies while issuing concluding observations to State parties give partial coverage to issues such

³¹³ HRC, Guatemala Report, *supra* note 308 at 204.

³¹⁴ Human Rights Council, *Report of intergovernmental process on strengthening the Human Rights Treaty Body System*, UN Doc. HRI/MC/1998/6 at 4.

³¹⁵ *Ibid.*

³¹⁶ CEDAW, General Recommendation No. 34, *supra* note 233 at paras 37-38.

as maternal mortality. For instance, where treaty bodies could pay attention to providing guidance with respect to availability, accessibility of reproductive health care services in an affordable manner, or mistreatment of women during child-birth, treaty bodies pay attention to offering diplomatic praise to States for their actions, rather than clear, precise, and concrete guidance relating to the implementation of the substantive provisions of the relevant treaty.³¹⁷

Overall, poor quality of concluding observations has emerged as an important challenge that has impeded the effective working of the UN treaty system for the protection and enforcement of women's rights.

3.5.4 Limited Implementation of Recommendations

The enforcement of women's rights suffers from the same problems encountered in the effort to enforce general international human rights law.³¹⁸ As well, because women are often treated as "second class" citizens in many countries, government efforts to promote their rights have been slow, or in some cases, non-existent.³¹⁹ Indeed, the efforts of the U.N. treaty system to promote international human rights law are not sufficiently complemented by effective government enforcement efforts to redress the disadvantages and injustices experienced by women.³²⁰

Essentially, this undermines the immediate need for the treaty bodies to lead in providing effective remedies for women subjected to human rights violations.³²¹ As I discussed in Chapter Two, the success or failure of the system depends on ensuring that human rights standards become part of national culture. Since the treaty bodies do not have the means to enforce their

³¹⁷ Sussane Zwingel, *Translating International Women's Rights: The CEDAW Convention in Context* (Miami: Macmillan Publishers, 2014) at 94-95.

³¹⁸ Rebecca Cook, *supra* note 278 at 1-2.

³¹⁹ *Ibid* at 3.

³²⁰ *Ibid*.

³²¹ Margaret Galey, *supra* note 279 at 464-465.

recommendations within national jurisdictions, it requires commitment from State parties to take action to implement women's rights. To this end, Mahwish Tazeem reiterates that State parties must work to change social attitudes in the public and private spheres to eliminate gender stereotypes and to promote gender equality.³²²

Addressing domestic violence against women, the treaty bodies want State parties to protect women from violence by husbands or intimate partners.³²³ The way to achieve this is for State parties to have laws, institutions, and a system to address such violence against women. The State must ensure that the legal mandates are carried out by institutions and agencies that are fully supported by State authorities. For instance, national courts and authorities must take action to implement the guidance provided by the treaty bodies through General Recommendations and Comments to deal with domestic violence.

As discussed in Chapter Two, the treaty bodies only have supervisory power and only State parties can directly implement the recommendations provided by them.³²⁴ But an important difficulty is the tendency of State authorities to prioritize the preservation of the family over the rights of the woman. This attitude belittles the dangers of domestic violence against women, even to the point that many States regard it as a private matter.³²⁵ In the case of domestic violence, it is

³²² Mahwish Tazeem, "Universal Human Rights of Women in Local Context: Challenges of Implementing the United Nation Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in Pakistan" (2015) at 101 online:< http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1518389166513~506>.

³²³ CEDAW, General Recommendation No. 19, *supra* note 179 at para 24; CEDAW, General Recommendation No. 24, *supra* note 267 at para 2.

³²⁴ Anne F Bayefsky, *supra* note 31 at 5.

³²⁵ Indira Jaising et al. *Domestic Violence legislation and its implementation: an analysis for ASEAN countries based on international standards and good practices* (Bangkok: UNIFEM, 2009) online:< <http://www.mekongmigration.org/labourlaw/images/resources/Domestic%20violence%20legislation%20ASEAN.pdf>>.

important that the recommendations are properly implemented, otherwise the work done by treaty bodies in this regard will be futile.

With respect to reproductive rights, the U.N. treaty bodies' guidance emphasizes that States must make available affordable health care services and goods for the protection of women's reproductive rights. This requires that the States must have an adequate budget for health plans and policies within their jurisdictions. Anne F. Bayefsky and Susan W. Tiefenbrun highlight that a major reason for the limited enforcement of recommendations is lack of financial support.³²⁶ This has also been echoed by other scholars where they have pointed out there is a lack of financial support when it comes to the enforcement of recommendations.³²⁷ It is quite true that developing States, in particular, have limited financial resources and infrastructure at the national and sub-national levels to meet this need.³²⁸ This is why access to proper health care services and goods are still a distant goal for women in rural areas where violations of reproductive rights are even more prevalent.

In conclusion, it can be safely said that all the prescriptive rules of the U.N. treaties and their interpretation given by the treaty bodies, including through guiding recommendations in concluding observations, have little effect if States do not implement the law within their jurisdictions. In this context, the fact that NGOs also play only a limited role in the working of the treaty system regarding the protection of women's rights does not offer any greater hope. This latter issue is discussed next.

³²⁶ Anne F Bayefsky, *supra* note 31 at 5; Susan W Tiefenbrun *supra* note 276.

³²⁷ Margret Galey, *supra* note 279 at 101.

³²⁸ *Ibid.*

3.5.5 A Limited Role for NGOs in the System

In international human rights law, NGOs have become an important part of global civil society. Timothy and Freeman observe that women's rights have come a long way since the adoption of the Declaration on the Elimination of Discrimination against Women.³²⁹ The participation of NGOs in reporting procedures not only highlights the true state of human rights in States but also helps to clarify the challenges women face in different parts of world. The major concern is that women's rights are dwindling in importance and NGOs have not been impactful in improving the outlook. In Chapter Two, I discussed several challenges that NGOs face in the effort to meaningfully participate in the functioning of the human rights treaty system. Here I address how the work and role of NGOs have been compromised in regard to assuring the protection and enjoyment of women's rights.

The World Conference on Human Rights, 1993, was a concrete step to correct historic discriminatory practices against women.³³⁰ Since that conference, various NGOs for the protection of women's rights have formed and have been playing important roles to develop gender-sensitive human rights discussion in the treaty bodies. J. Barnett and Mahwish Tazeem noted that within CEDAW, NGOs provide background information, statistical data, and input for the preparation of general recommendations.³³¹ They also offer recommendations and suggestions for proper implementation of CEDAW in various countries. The Committee, during discussions with State representatives, invite NGOs to participate on women's rights issues.

³²⁹ Timothy, K. & Freeman, The Beijing +5 and women human rights: The CEDAW convention and the Beijing Platform for Action: Reinforcing the promise of the rights framework. *The International Women Rights Actions Watch Web-site*, online:<<http://www1.umn.edu/humanrts/iwraw/Freeman-Timothy.html>>.

³³⁰ J Barnett, "Feminists shaping news: A frame analysis of news releases from national governmental organizations for women" (2005) 17 journal of Public Relations Research 341 at 345.

³³¹ Margret Galey, *supra* note 279 at 106.

Regarding sexual trafficking, NGOs play a vital role in highlighting major issues that States do not address in their reports. The difficulty is that the treaty bodies isolate NGOs and allow only State representatives to dialogue with experts of the treaty bodies. As well, these organizations have difficulty collecting accurate data in relation to women's rights.³³² Cecilia Flores Oebanda highlights that without accurate data, the protection of women from sexual trafficking is made less urgent.³³³ Accurate data would help the treaty bodies to determine the root causes of sexual trafficking, and to discuss these with State parties. Accurate data would also help the NGOs to prepare more detailed shadow reports for treaty bodies to highlight the issues that need urgent attention from treaty bodies.³³⁴ This shows that NGOs have a limited role in the discussion with treaty bodies and States representatives.³³⁵ Katerina Tsetsura draws attention to the need for financial support for an NGO to investigate women's rights matters, and to prepare alternative reports for the use of the treaty bodies.³³⁶ State governments do not provide such funding for NGOs, especially in regard to programmes and projects developed for achieving gender equality.³³⁷ Ukrainian NGOs exemplify this problem. They reported that government grants were available, but the procedures to obtain them were very confusing.³³⁸ More generally, it appears that governments do not give proper resources to enable the work of women's rights NGOs.

³³² Katerina Tsetsura, "Challenges in framing women rights as human rights at the domestic level: A case study of NGOs in the post-Soviet" (2013) 39 *Public Relations Review* 406 [Katerina Tsetsura].

³³³ Cecilia Flores Oebanda, "Three major challenges in the fight against human trafficking" *Global Views* (4 August 2014), online:< <https://www.devex.com/news/3-major-challenges-in-the-fight-against-human-trafficking-84047>>.

³³⁴ Anne F Bayefsky, *supra* note 31 at 11.

³³⁵ Heisoo Shin, *supra* note 293 at 16.

³³⁶ Katerina Tsetsura, *supra* note 332 at 412.

³³⁷ *Ibid* at 410.

³³⁸ *Ibid*

Consequently, the limited role of NGOs not only limit them in providing help to State parties to ensure the protection of women's rights at domestic level. To conclude, these challenges have caused a major hindrance in the effective working of U.N. treaty bodies to monitor the true positions of women in State parties.

3.6 Summary

The U.N. treaty system and its enforcement mechanisms have paid attention to the protection and enforcement of women's rights as a matter of treaty provisions. This chapter has addressed three major women's rights issues, namely, domestic violence, sexual trafficking, and reproductive rights. In these areas, violations of women's rights are very common. The work of treaty bodies and Special Rapporteurs has provided guidance to States parties to help them to fulfill their international obligations to respect, protect and promote women's rights. This chapter showed that the challenges of the U.N. treaty system discussed above impede the working of the system to protect and enforce women's rights. These challenges include cultural relativism, overdue State reports, poor quality of State reports, limited implementation of recommendations, and the limited role of NGOs in advancing the implementation and upholding of women's rights. These challenges limit not only the efforts of the treaty bodies to achieve gender equality. They also limit State parties' ability to protect and promote women's rights in national jurisdictions.

The next chapter takes up the case of women's rights in India with respect to the same three issues discussed generally in this chapter: domestic violence, sexual trafficking, and reproductive rights. The discussion assesses the protection and enforcement of women's rights in India under the U.N. treaty system. The chapter explains that the challenges discussed in this chapter have impeded the U.N. treaty system from serving as a meaningful forum to protect and promote women's rights in India.

Chapter-4: Three Case Studies on Women's Rights in India and the Effective Working of the U.N. Treaty System

4.1 Introduction

After understanding the working and challenges of the U.N. treaty system in Chapter Two, Chapter Three discussed three women's rights issues: domestic violence, sexual trafficking, and reproductive rights, and further reviewed the current challenges in the promotion and enforcement of women's rights through the U.N. treaty system. Chapter Four assesses the protection and enforcement of women's rights in India within the U.N. treaty system, by focusing on these three specific women's rights issues.

This chapter begins by discussing India's participation in the U.N. human rights treaty system, including the different U.N. treaties that India has ratified and, therefore, the human rights of women that the state of India has committed to promote, protect, and enforce. The chapter is organized as three case studies on women's rights focused on the issues of domestic violence, sexual trafficking, and reproductive rights. Through these case studies, the chapter explores the challenges that have impeded the U.N. treaty system from serving as a meaningful mechanism for the protection and promotion of women's rights in India.

4.1.1 Objective and Methodology

The case studies involve a review of primary U.N. human rights treaty materials including: State reports, lists of issues, summary records, and concluding observations, all with respect to India between 2005-2016; and general comments and recommendations relevant to treaty provisions that address domestic violence, sexual trafficking, and reproductive rights under the U.N. treaty system. I collected these primary materials through the Official website of the U.N. Office of the High Commissioner of Human Rights by using the following search terms: "India's State reports",

“concluding observations”, “State parties compliance”, “violence against women”, “health rights” and “reproductive health rights” under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Rights of the Child* (CRC) and the *Convention on Elimination of All Forms of Discrimination against Women* (CEDAW). I used these primary materials to review how U.N. treaty bodies have addressed three women’s rights issues: domestic violence, sexual trafficking, and reproductive rights, thereby assessing the challenges that have compromised the U.N. treaty system to protect and enforce women’s rights in India.

The discussion also draws on secondary materials that I collected through the Index to Legal periodicals, Google Scholar and World Cat using the following search terms: “women rights”, “domestic violence”, “dowry deaths”, “sex trafficking”, “cultural relativism”, “devadasi system”, “maternal mortality” “India’s reporting obligation”, “role of NGOs”, and “domestic enforcement”. The purpose of using secondary materials is to support and analyze the points raised through the primary materials for the protection and enforcement of three specific women’s rights issues in India.

4.2 India and the UN Treaty System

India, one of the oldest civilizations in the world, has always given importance to the promotion and protection of human rights.³³⁹ Since independence, India has consistently supported the purpose and principles of the U.N. to promote and protect human rights, and has made significant contributions to its goal of international cooperation by committing to implement human rights in

³³⁹ Nidhi Madan, “History and Developments of Human Rights in India” (2017) 22:16 IOSR-JHSS 1 at 2.

the country.³⁴⁰ India took an active part in drafting the *Universal Declaration of Human Rights* (UDHR), and used this experience to inform the drafting of its own Constitution, both being informed by the fundamental concept of human rights.³⁴¹ This shows that India has viewed the U.N. as a forum that guarantees international peace and security by promoting human rights. India supported the development of the U.N. system by ratifying several U.N. treaties to enforce human rights in the country. Relevant ratifications include:

- International Convention on the Elimination of Racial Discrimination (ICERD) on 3 December 1968,³⁴²
- International Covenant on Civil and Political Rights (ICCPR) on 10 April 1979,³⁴³
- International Covenant on Economic, Social, and Cultural Rights (ICESCR) on 10 April 1979,³⁴⁴
- Convention on the Elimination of Discrimination against Women (CEDAW) on 9 July 1993,³⁴⁵
- the Convention on the Rights of the Child (CRC) on 11 December 1992.³⁴⁶

³⁴⁰ Prakash Shah, “International Human Rights: A Perspective from India” (1997) 21:1 *Fordham International Law Journal* 24 at 33.

³⁴¹ Ramkanata Satapathy, “Development of Concept of “Human Rights” in India: An Analysis” (2015) 3:5 *AJMS* 60 at 61 [Ramkanata Satapathy].

³⁴² United Nations Human Rights Office of the High Commissioner, “*View the ratification status by country or by treaty: Ratification Status for India*”
online:<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN>.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

Through ratification of international human rights treaties, India has accepted obligations to adopt measures compatible with its treaty obligations and duties to promote, protect and enforce human rights. In addition, India has an obligation to submit periodical reports to the relevant treaty bodies providing information on measures that it has adopted to give effect to the provisions of the treaties.³⁴⁷

Treaty bodies have always paid special attention to women's rights in India and urged the state to address these rights in its periodic reports. The next part of this chapter seeks to analyze why the treaty system has taken such a specialized interest in women's rights in India. It then discusses the three specific case studies to assess the protection and enforcement of women's human rights in India under the U.N. treaty system.

4.3 Three Case Studies on Women's Rights in India

While the U.N. treaty system seeks to protect and enforce women's rights, as a member, India has not been able to effectively protect the nation's women.³⁴⁸ To assess the condition of women's rights directly, the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, conducted an official visit to India from 22 April to 1 May 2013.³⁴⁹ She noted that in the sphere of women's rights in India, there is a wide discrepancy between theory and practice.³⁵⁰ Women face violence in several forms including domestic violence, dowry deaths,

³⁴⁷ICERD, *supra* note 48, article 9(1); ICCPR, *supra* note 35, article 40; ICESCR, *supra* note 36, article 16; CEDAW, *supra* note 51, article 19; and, CRC, *supra* note 53, article 44.

³⁴⁸Amnesty International, *The State of the World's Human Right: Data on India*, ((2018) at 193 online:<file:///C:/Users/deepa/Downloads/POL1067002018ENGLISH.PDF >. See also, Sutapa Saryal, "Women's Rights in India: Problems and Prospects" (2014) 3:7 Int. Res. J. Social Sci. 49 at 49.

³⁴⁹Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to India*, UNGAOR, 26th Sess, UN Doc. A/HRC/26/38/Add.1 (2014) 1 at 3.

³⁵⁰*Ibid* at 4-12.

honour crimes, rape, sexual trafficking, and maternal mortality.³⁵¹ Women are not only denied justice, social, political, and economic rights, they are also considered the weaker section of society.³⁵² Even in 2011, the India Today Newspaper conducted a poll among 213 gender experts who ranked countries on their overall perception of danger.³⁵³ According to these experts, they ranked India as the fourth most dangerous place for women, due to common occurrences of offences like female feticide, infanticide, and domestic violence including dowry-related bride-burning.³⁵⁴ In 2016 the National Crime Records Bureau (NCRB) of the Ministry of External Affairs presented data³⁵⁵ showing that crime against women had increased across the country by 2.6% over previous years.³⁵⁶ This shows that women's rights in India are not respected, protected, and enforced to the full extent guaranteed in the U.N. human rights treaties.

The major reasons for the prevalence of the human rights of women in India being neglected or violated are the persistence of harmful practices, gender-stereotype practices, and social and cultural norms.³⁵⁷ Indian society is male dominated, as men are generally considered superior to women.³⁵⁸ The persistence of patriarchal norms and gender hierarchies exposes women

³⁵¹ *Ibid.*

³⁵² Rashee Jain, *supra* note 42 at 42.

³⁵³ K Chowdhury, "India is fourth most dangerous place in the world for women: Poll" *India Today* (16 June 2011), online:<<http://indiatoday.intoday.in/story/india-is-fourth-most-dangerous-place-in-the-world-for-womenpoll/1/141639.html>>.

³⁵⁴ *Ibid.*

³⁵⁵ National Crime Records Bureau, "Crimes in India: Statistics" (New Delhi: Ministry of External Affairs, 2016) at 52 online:< <https://www.latestlaws.com/wp-content/uploads/2017/12/NCRB-Reporton-Crime-in-India-2016-Complete-PDF.pdf>> [NCRB Data 2016].

³⁵⁶ *Ibid.* see also, "NCRB Report reveals that 48.13 Lakh Crimes committed in India in 2016, an increase of 2.6%" (1 December 2017), *Latest Laws.Com* (blog) online:< <https://www.latestlaws.com/ncrb-report-reveals-48-13-lakh-crimes-committed-india-2016-increase-2-6/>>.

³⁵⁷ NCRB Data 2016, *supra* note 355 at para 76.

³⁵⁸ Rasida Begum, "Violation of Women Rights in India" (2014) 1:3 *IJHSS* 216 at 217.

to face violence from the “womb to the tomb”. Too often these norms find expression in violence against women, including, rape, domestic violence, dowry related deaths, and honor killings.³⁵⁹ In 2005, the Indian Government, in its report to the CEDAW Committee, pointed out that traditional culture, religion and patriarchal systems play critical roles in women’s life.³⁶⁰ While in dialogue with the CEDAW Committee in 2007, Ms. Singh, a Government representative, said that India was taking concrete steps to bridge the gap between de jure and de facto protection of women’s rights, but that cultural practices and patriarchal beliefs that men are superior to women are major obstacles to achieving gender equality.³⁶¹ As part of the patriarchal system, women, from early childhood, are taught to be submissive, tolerant, and self-sacrificing and to obey male family members.³⁶² Due to this, women in India very often face discrimination and their rights are regularly violated in one way or another.³⁶³

The sub-sections below turn to case studies on the three specific women’s rights issues identified above domestic violence, sexual trafficking, and reproductive rights, to assess the protection and enforcement of women’s human rights in India under the U.N. treaty system.

4.3.1 Domestic Violence in India: Overview

As explained in detail in Chapter Three, domestic violence is a kind of violence that occurs within the home. It has been documented to impose devastating physical, social, emotional, and financial

³⁵⁹ National Crime Records Bureau, “Crimes in India: Statistics” (New Delhi: Ministry of External Affairs, 2015) at 175 online:< <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/CrimeInIndia2015.pdf>> [NCRB data 2015].

³⁶⁰ The Committee on the Elimination of All Forms of Discrimination against Women, “*Combined Second and Third Periodic Report of State Parties India*”, UN Doc. CEDAW/C/IND/2-3, (2005) 1 at para 339 [CEDAW, India’s State Report 2005].

³⁶¹ The Committee on Elimination of All Forms of Discrimination against Women, “*Summary record of 7661st meeting, 37th Sess*”, UN Doc. CEDAW/C/SR.761(A) at 5 [CEDAW, India’s Summary Record 761(A)].

³⁶² *Ibid.*

³⁶³ *Ibid.*

effects on women.³⁶⁴ The incidence of domestic violence against women is not a new phenomenon in India.³⁶⁵ Behind the doors of the home, women in India have been tortured, slapped, beaten, and killed by intimate partners, family members, and in-laws. These incidents are happening to women in rural areas, towns, cities, and in metropolitan areas.³⁶⁶ It is prevalent among all social classes and a historical cultural pattern to pass on from one generation to another.³⁶⁷ There are many reasons for the prevalence of domestic violence against Indian women. They include social factors, economic pressure, and psychological factors that keep women in violent situations and do not allow them to raise their voices against it.³⁶⁸ Indeed, domestic violence against women is a major social problem in India.³⁶⁹

As observed in Chapter Three, the CEDAW Committee in its General Recommendation Nos. 19 and 28 stated that domestic violence is a form of gender-based discrimination that prevents women's enjoyment of their fundamental rights.³⁷⁰ The Committee provided guidance to State parties to help them take legislative, judicial and administrative measures to protect women from domestic violence. The failure of States to guarantee protection to women from domestic violence

³⁶⁴ Sudha Chaudhary, *supra* note 285 at 147.

³⁶⁵ World Report on Violence, *Violence by Intimate Partners*, (chapter-4) at 90
online:<http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap4.pdf>.

³⁶⁶ Sudha Chaudhary, *supra* note 285 at 149.

³⁶⁷ Ministry of Health and Family Welfare of India, "National Family Health Survey (NFHS-4)" (2017) at 561 online:
<<http://rchiips.org/nfhs/NFHS-4Reports/India.pdf>>.

³⁶⁸ *Ibid.*

³⁶⁹ Dhawesh Pahuja, "Domestic Violence against Women in India", (2011) online:<
<https://www.legalindia.com/domestic-violence-against-women-in-india/>>. See also, Bobbie Khanna, "CEDAW and the impact on violence against women in India", (2013) *UW Bothell Policy Journal* at 31 [Bobbie Khanna].

³⁷⁰ CEDAW, General Recommendation No. 19, *supra* note 179 at para 9 and; General Recommendations No 28, *supra* note 205 at para 13.

would be considered a violation of articles 6 and 9 of ICCPR, articles 12 and 14 of ICESCR, and articles 2(c), (d), (f), 5(a) and 6 of CEDAW.

India, being a party to CEDAW, has obligations to take appropriate measures to promote and protect women's rights. India has addressed domestic violence under the U.N. reporting system on several occasions, providing information on legislative measures it has taken to protect women from domestic violence. In 2005, India, in its combined second and third periodic report to CEDAW, pointed out that it is committed to enact a law on domestic violence to protect women from being victims, and to prevent the occurrence of domestic violence in society.³⁷¹ The national government introduced the bill, *Protection from Domestic Violence Bill, 2002*, which addressed the hidden form of violence against women in the domestic sphere.³⁷² It was the first instance where India took legislative action to address domestic violence against women.

In 2007 before the *Committee on Economic, Social and Cultural Rights*, India talked about the progress of passing this bill into the Domestic Violence Act, 2005.³⁷³ The term “domestic violence” in the Act has been made wide enough to encompass all forms of physical, sexual, verbal, emotional and economic abuse that can harm, cause injury to, or endanger the health, safety, life, limb, or well-being either mental or physical of the aggrieved person.³⁷⁴ The definition of an “aggrieved person” is equally wide, covering not only spouses but also sexual partners. The

³⁷¹ CEDAW, India's State Report 2005, *supra* note 360 at para 346.

³⁷² *Ibid.*

³⁷³ The Committee on Economic and Social, and Cultural Rights, *Combined second, third, fourth, and fifth Periodic Report of State Parties India*, UN Doc. E/C.12/IND/5 (2006) at paras 232 and 233 [ECOSOC, India's State Report, 2006].

³⁷⁴ *Ibid* at para 233.

daughter, mother, sister, child (male or female), widowed relative, and indeed any woman residing in the household who is related in some way to the respondent, is also covered by the Act.³⁷⁵

Although India has provided information about the legislative measures it took to guarantee protection to women from domestic violence, the situation of women as victims of such violence has not significantly changed. A 2016 report of the National Crime Records Bureau records a total of 12,218 cases of domestic violence against women registered in 19 metro cities in the country. Most cases are reported from: Delhi-3615; Mumbai-1311; and Jaipur-1008.³⁷⁶ This shows that even after 11 years of domestic violence law, women are still suffering from domestic violence.³⁷⁷ The reports filed by India under its reporting obligations from 2005-2016 help us to identify factors that have limited the effectiveness of the above legislative measure to address domestic violence. The factors are, mainly, cultural relativism and quality of State reports. I consider these issues next.

a. Cultural Relativism

Cultural relativism is one of the persistent challenges to the effective working of the U.N. treaty system to protect Indian women from domestic violence. In Indian societies, culture plays an important role in influencing the behavior of family members, including the use of violence against

³⁷⁵ Domestic Violence Act, 2005.

³⁷⁶ NCRB Data 2016, *supra* note 350. see also: Hemant Singh, “Crime in India-2016 Report: 14 facts at a Glance” (5 December 2017), *Jagran Josh* (blog), online:< <https://www.jagranjosh.com/general-knowledge/crime-in-india-2016-report-fourteen-facts-at-a-glance-1512458943-1>>.

³⁷⁷ Human Rights Now, “The Indian Government must immediately conduct sweeping reforms to end all forms of violence against women” (2012) online: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_14962_E.pdf>.

women at home.³⁷⁸ The predominance of oppressive cultural practices or norms over women's rights in India is very strong.³⁷⁹ Cultural practices, traditions, and beliefs are critical factors in determining what is right and wrong for women in Indian societies.³⁸⁰ These factors not only justify domestic violence against women but also weaken State actions to eliminate practices that enjoy social sanction. This provides opportunity to continue stereotypes and discriminatory practices against women.³⁸¹ India stated the following in 2005 in its second and third report before the CEDAW Committee:

The practice of dowry as customary practice continues despite the law, as it continues to enjoy social sanction. The greed for materialistic gains and overemphasis on marriage for women are making them more vulnerable to dowry harassment.³⁸²

Discriminatory practices, such as dowry payment by women, make them more vulnerable to domestic violence.³⁸³

The CEDAW Committee and the *Committee on the Economic, Social and Cultural Rights* have therefore raised “lack of progress achieved by the State party in eliminating traditional practices and provisions of personal status laws that are harmful and discriminatory to women and girls, including Sati, devdasi, child-marriages, dowry deaths and honor killings, in spite of the legal

³⁷⁸ Emma Livne, “Violence against Women in India: Origins, Perpetuation and Reform” (2015) Carnegie Mellon University Working Paper online:< <https://www.cmu.edu/dietrich/globalstudies/images/docs/livne-gs-capstone-paper.pdf>> at 10 and 11[Emma Livne].

³⁷⁹CEDAW, India's State Report 2005, *supra* note 360 at para 86, 129, 133 and 135.

³⁸⁰ The Committee on Elimination of All Forms of Discrimination against Women, *Concluding Observations of the Committee on Elimination of All Forms of Discrimination against Women: India*, 37th Sess, UN Doc. CEDAW/C/IND/CO/3, (2007) at paras 11, 20 and 21[CEDAW Committee Concluding Comment, 2007]; ICESCR, Concluding Observation, 2008, *supra* note 378 at para 26.

³⁸¹ Radha Sharma et al. “The Problem of Rape in India: A Multi-Dimensional Analysis” (2014) 7:3 International Journal of Managing Projects in Business 362-379.

³⁸² CEDAW, India's State Report 2005, *supra* note 360 at para 345.

³⁸³ Emma Livne, *supra* note 378 at 11.

prohibitions such as the Domestic Violence Act 2005, the Dowry Prohibition Act 1961, and the Prohibition of Child Marriage Act 2006”.³⁸⁴ The treaty bodies have thus urged India to extend beyond formal legal measures to modify cultural patterns of conduct and to eliminate prejudices and practices based on inferior social roles for women.³⁸⁵

The Indian government is claiming an inability to curtail the power of social sanction attached to the custom of the dowry. As a result, women’s rights continue to be violated in the name of cultural belief. Especially in rural areas, there is a belief that women are physically and emotionally weaker and must be subordinate to men.³⁸⁶ This orthodox belief fosters cultural practices that cause women to face domestic violence.³⁸⁷ They can face such violence in regard to the demand for dowry, or in cases where they argue with their partner and refuse to have sex with him; or where they fail to do their household work.³⁸⁸ Dowry is a deep rooted customary practice in communities. It began as a custom of giving gifts in the name of love and affection at the time of marriage.³⁸⁹ Eventually, the greed of the groom’s family for dowry can lead to violence against

³⁸⁴ The Committee on Economic and Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 40th Sess, UN Doc. E/C.12/IND/CO/5, (2008) at 25 [ICESCR, Concluding Observation, 2008].

³⁸⁵ CEDAW Committee Concluding Comment, 2007, *supra* note 380 at para 65; and, the Committee on the Elimination of All Forms of Discrimination against Women, *concluding observations of the combined fourth and fifth periodic reports of India*, UN Doc. CEDAW/C/IND/ CO/4-5, (2014) at para 21 [CEDAW Committee Concluding Observation, 2014].

³⁸⁶ Ankur Kumar, *Domestic Violence in India: Causes, Consequences, and Remedies*, (2010) online:<<https://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2/>>. at 1.

³⁸⁷ Madhu Purnima Kishwar, “Strategies for Combating the Culture of Dowry and Domestic Violence in India” (2005) UN Division for the Advancement of Women Working Paper online:<<http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/kishwar.dowry.pdf>>.

³⁸⁸ *Ibid* at 8-11.

³⁸⁹ Pragadesh Parmar, “Dowry Death and Law: Indian Scenario” (2014) 1:2 IAIM 44.

women.³⁹⁰ These traditions and cultural practices play critical roles in determining the validity of human rights for women, and make it difficult for the U.N. treaty bodies to bring about desired changes.

Treaty bodies have also asked India to review and reform personal laws to ensure de jure gender equality and compliance with the U.N. treaties. As explained in Chapter Three, it is understood that domestic violence is a gender-based violence where State parties are obliged to take appropriate measures to protect women.³⁹¹ The social belief in Indian societies is that married women must not speak against their husbands for fear of the consequences of having to leave their husbands' homes. A woman who leaves the marital home faces social stigmatization that makes her life more stressful and challenging.³⁹² Due to this, even legislative reforms have not been able to bring significant changes in the position of women.³⁹³ In particular, such changes have not fully succeeded to protect them from domestic violence.

Culture and traditional practices have also compromised the effective working of treaty bodies. This is because they are used by State parties to make excuses to evade their international obligations to protect and enforce women's rights in their jurisdictions. For example, the CEDAW Committee and the *Committee on the Economic, Social and Cultural Rights*, under General Recommendation Nos. 19, 28 and 34 of CEDAW, and General Comment No. 20 of ICESCR, oblige State parties to take appropriate steps to eliminate violence against women at home, and to act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against

³⁹⁰ S C Tripathi & Vibha Arora, *Law Relating to Women and Children*, (Delhi: Central Law Publications, 2012) at 327 [Tripathi & Vibha Arora].

³⁹¹ CEDAW, General Recommendation No. 19, *supra* note 179 at para 24.

³⁹² Ramkanata Satapathy, *supra* note 341 at 62.

³⁹³ *Ibid* at 41.

them by private actors.³⁹⁴ However, the State parties argue that the acts of private actors are influenced by culture and traditional practices. In fact, it is a cultural belief in Indian societies that domestic violence is a private issue to be resolved privately within the family.³⁹⁵ This indifference perpetuates the societal belief that male superiority and domination in the family are acceptable, and it becomes an excuse for the State parties.³⁹⁶ The negative effect of culture in national and international efforts to eliminate domestic violence against women cannot be underestimated.³⁹⁷

Recently in 2014, the CEDAW Committee highlighted the need to take concrete steps to address the challenges of cultural relativism to ensure adequate protection and enforcement of women's rights in India.³⁹⁸ The Committee, in its concluding observations, reminded India to think about its declarations regarding articles 5(a) to modify the social and cultural norms, and 16(1) and (2) of the CEDAW that guarantee women non-discrimination and economic independence in the family. It stressed that India's failures in these regards are not in agreement with its constitutional guarantees of equality and non-discrimination.³⁹⁹ Accordingly, the Committee pointed out that India has not done enough to change, modify or eliminate stereotypes and deeply harmful patriarchal practices. The Committee urged India to: (a) review its standpoint on articles 5(a), 16(1) and (2); (b) in accordance with its obligation under article 2(f) of CEDAW, to adopt a

³⁹⁴ CEDAW, General Recommendation No. 19 *supra* note 179; CEDAW, General Recommendation No. 28, *supra* note 205; CEDAW, General Recommendation No. 34 *supra* note 233 at paras 26 and 27; and, ECOSOC General Comment No. 20 *supra* note 197 at para 27.

³⁹⁵ Mehr Khan "Domestic Violence against Women's and Girls" (2006) 6 United Nations Children's Fund at 11 online:< <https://www.unicef-irc.org/publications/pdf/digest6e.pdf>>.

³⁹⁶ Sandra Martin et al. "Domestic violence across generations: findings from northern India" (2002) 31:3 International Journal of Epidemiology 560.

³⁹⁷ *supra* note 349 at para 76.

³⁹⁸ CEDAW Committee Concluding Observation, 2014, *supra* note 385 at para 20.

³⁹⁹ *Ibid.*

“comprehensive national campaign and strategy with specific goals and times to eradicate patriarchal beliefs and stereotypes and cultural practices that deprive women of the right to enjoy human rights and freedom; and, (c) to engage in “awareness raising and educational efforts” to eliminate all harmful traditional practices for the benefit of both men and women.⁴⁰⁰

The Committee’s efforts, obviously, are to provide effective guidance to India not only to rethink implementation of its obligations under articles 5(a), 16(1) and (2), but also to create comprehensive national strategies with the involvement of NGOs to protect women from cultural practices that cause domestic violence against women. However, the lingering concern is whether India will conscientiously carry out the tasks with the goal to achieve desired outcomes.

To conclude, cultural practices and discriminatory attitudes toward Indian women make it difficult for the U.N. treaty bodies to ensure that their rights are protected as guaranteed under the U.N. human rights treaty system.

b. Quality of India’s Reports

As discussed in Chapter Two, the quality of State reporting is very important to achieving the objectives of the U.N. treaty system in its efforts to monitor compliance of State parties with their duties to promote and protect human rights under the different treaties. Effective reporting helps the treaty bodies to monitor the administrative, legislative, and judicial measures that State parties take to promote, protect, and enforce human rights.⁴⁰¹ It also helps them to frame lists of questions, to generate constructive dialogues, and to give effective advice through their concluding observations on how States can improve their compliance efforts. The State reports are required not only to mention legal, administrative, and judicial measures taken by them, but also to identify

⁴⁰⁰ *Ibid.*

⁴⁰¹ ISHR Simple Guide, *supra* note 87 at 48.

any factors or difficulties encountered in implementing the treaties.⁴⁰² This part examines how seriously the Indian Government has taken its obligation to submit periodical reports to the treaty bodies.

India has submitted various reports in accordance with treaty articles that oblige a State party to submit regular periodical reports and to explain its progress in the advancement of human rights.⁴⁰³ These reports are reviewed at various intervals by the treaty bodies, normally in the presence of State representatives. As discussed in Chapter Two, each treaty body has framed guidelines relating to the content of the reports that are supposed to be followed by State parties.⁴⁰⁴ Overall, the quality of State reporting on domestic violence has been poor. The failure of the Indian Government to submit its periodical reports according to the prescribed guidelines has been a major obstacle to assessing its progress on rights. It also limits the ability of the treaty bodies to frame relevant lists of questions that need urgent attention and, most importantly, to give adequate and sufficient advice regarding protection and enforcement of human rights, including women's rights in India.⁴⁰⁵

In 2005, the Indian Government submitted reports before the CEDAW Committee wherein it provided information on domestic violence but only as to the enactment of legislation.⁴⁰⁶ The government did not respond to the requests the Committee had made in the previous concluding

⁴⁰²OHCHR, “*The United Nation Human Rights Treaties System*” (2012) online:<<http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>> at 22.

⁴⁰³ CEDAW, *supra* note 51, article 18; ICESCR, *supra* note 36, articles 16 and 17; and, ICCPR, *supra* note 35, article 28(1).

⁴⁰⁴Harmonized Guidelines on Reporting 2006, *supra* note 137 at chapter-1.

⁴⁰⁵The Committee on the Elimination of All Forms of Discrimination against Women, *List of Issues and Questions with regard to the Consideration of Periodic Reports*, UN Doc. CEDAW/C/IND/Q/3, (2006) 1 at para 8 [CEDAW, List of Ques. 2006].

⁴⁰⁶ *Ibid* at para 8.

observations, namely: to provide statistics and information on violence against women, disaggregated according to caste, ethnic, and religious groupings, including the incidence of customary practices such as dowry deaths and dowry harassments.⁴⁰⁷ India's failure to provide this information limits the Committee's capacity to propose further concrete plans to be pursued to ensure full implementation of recommendations to achieve gender equality.⁴⁰⁸ Consequently, notwithstanding the development of a national plan of action to address violence against women, violence against women increased.⁴⁰⁹ India did not provide any reasons for the increase in domestic violence. It also failed to provide full information on steps taken or planned to address violence against women, including domestic violence, in a comprehensive, coordinated, and concerted manner.⁴¹⁰

A second important factor that makes the input of the Committee less effective is when a State fails to provide evaluative information. The descriptive information given to the treaty bodies on important matters compromises the capacity of the treaty bodies to effectively assess the conditions of women facing domestic violence. On several occasions, the Indian Government only mentioned that it is committed to eliminating all forms of violence against women, including domestic violence, and that it had enacted new legislation on domestic violence, the Domestic Violence Act, 2005. It did not, however, offer any information about the enforcement of the legislation.⁴¹¹ For example, in its 2005 State report, the Government mentioned in a very descriptive way:

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ CEDAW, India's State Report 2005, *supra* note 360 at para 346.

In addition to the Indian Penal Code, a new law on domestic violence, ‘Protection from Domestic Violence Bill, 2002’ had been introduced in the Parliament on 8th March 2002 to address the hitherto hidden form of violence against women in the domestic sphere. The present Government has committed to enact a law on domestic violence.⁴¹²

It was the same in its ICESCR report. While addressing domestic violence, it only descriptively said in paragraph 232:

While trying to protect the institution of family the Government has recognized the problem of domestic violence / harassment usually against women and children. The Dowry Prohibition Act of 1961 makes the giving and taking of dowry and harassment for dowry punishable. An offence of “dowry death” has been inserted in the Indian Penal Code.⁴¹³

Furthermore, in paragraph 233, it stated:

An offence of ‘cruelty to wife by her husband or his relatives’ has been made punishable under the Indian Penal Code. A legislation for protecting women from being subjected to domestic violence has been enacted as the protection of women from Domestic Violence Act, 2005.⁴¹⁴

Clearly, the Indian Government did not present its reports in a thorough manner, particularly, by evaluating the effectiveness of the new law. Therefore, by failing to provide quality State reports, the Indian Government effectively frustrates the capacity of the treaty bodies to offer assistance by way of guidance, recommendations and questions, for the protection of women’s rights against domestic violence in India.

4.3.2 Sexual Trafficking: Overview

Sexual trafficking against women is a major social problem in India.⁴¹⁵ It can be seen through the NCRB report in 2013 which collected data and reported that the incidence of sexual trafficking

⁴¹² *Ibid.*

⁴¹³ ECOSOC, India’s State Report, 2006 *supra* note 373 at para 232.

⁴¹⁴ *Ibid* at para 233.

⁴¹⁵ NCRB Data 2016, *supra* note 355 at 512.

had increased by 10.9%, and by 38.3 per cent over 2009.⁴¹⁶ In 2013, a Government Committee, the Justice Verma Committee, was constituted to look into possible amendments of the criminal law to provide for quicker trial and enhanced punishment for criminals committing extreme violence against women.⁴¹⁷ The Committee expressed serious concern regarding the prevalence of sexual trafficking against women and girls in India.⁴¹⁸ It is difficult to obtain the actual number, but since the last decade, sexual trafficking has emerged as one of the major human rights abuses against women in India.⁴¹⁹

There are several reasons why women are targeted more than men. These factors include the extreme poverty in which many women live, and other causes like lucrative employment propositions for them in big cities, easy money, promises of better pay, population explosion, gender discrimination and cultural practices.⁴²⁰ The Special Rapporteur on Violence against Women highlighted that women from minority groups, scheduled caste, scheduled tribes, and women belonging to the Dalit community are especially vulnerable to sexual trafficking.⁴²¹

Human rights treaty bodies have addressed sexual trafficking on several occasions while analyzing Government reports. In 2014, the CEDAW Committee's concluding observation praised the Indian Government for taking positive steps to combat sexual trafficking by establishing the

⁴¹⁶ National Crime Records Bureau, *Crimes in India: Statistics* (New Delhi: Ministry of External Affairs, 2013) at 391 online:< <http://www.nisc.gov.in/PDF/NCRB-2013.pdf>> [NCRB Data 2013].

⁴¹⁷ Justice J S Verma, Report of the Committee on Amendments to Criminal Law, (2013), online:< http://www.thehindu.com/migration_catalog/article12284683.ece/BINARY/Justice%20Verma%20Committee%20Report%20on%20Amendments%20to%20Criminal%20Law> [Verma Committee].

⁴¹⁸ *Ibid* at 167.

⁴¹⁹ *Ibid*.

⁴²⁰ Tripathi & Vibha Arora, *supra* note 390 at 351.

⁴²¹ Rashida Manjoo, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, U.N. Doc. A/HRC/26/38/Add.1, (2014).

anti-trafficking units, bringing awareness-raising programmes, and creating a task force on human trafficking.⁴²² The Committee raised, however, the issue of lack of efforts by the Government to tackle the root cause of sexual trafficking of women.⁴²³ The *Committee on Economic, Social and Cultural Rights* and the *Committee on the Rights of the Child* have also given attention to tackling sexual trafficking against women in India.⁴²⁴ They recommended several measures for rescuing and rehabilitating the victims of sexual trafficking.⁴²⁵

The difficulties in this arena are three-fold: (a) Culture; (b) Quality of Concluding Observations and General Comments; and (c) the role of NGOs. These are discussed below.

a. Cultural Relativism

Cultural and religious practices persist in Indian society as major challenges to efforts to protect and enforce women's rights against sexual exploitation.⁴²⁶ The several discriminatory cultural and religious practices against women in India⁴²⁷ include devadasi, basavi, and jogin.⁴²⁸ Devadasi is a cultural and religious practice in which women from lower castes, at young ages, are "married" to

⁴²² CEDAW Committee Concluding Observation, 2014, *supra* note 385 at para 6(b).

⁴²³ *Ibid* at para 22.

⁴²⁴ ICESCR, Concluding Observation, 2008, *supra* note 384 at para 66; and, The Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Report of India*, UN Doc. CRC/C/IND/CO/3-4, (2014) at para 85 [CRC, Concluding Observation 2014].

⁴²⁵ *Ibid*.

⁴²⁶ Abrar Karan, "Understanding cultural female sex work in India and why tradition must be challenged" (9 December 2016) *The Lancet Global Health* (blog), online:< <http://globalhealth.thelancet.com/2016/12/09/understanding-cultural-female-sex-work-india-and-why-tradition-must-be-challenged>>.

⁴²⁷ Marie Karmen Matusek, *Under the Surface of Sex Trafficking: Socio-Economic and Cultural Perpetrators of Gender-Based Violence in India* (MA Thesis, Old Dominion University 2016) at 12 online:< https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1007&context=gpis_etds>.

⁴²⁸ The practices such as jogin and basavi have same meaning as a devdasi practice. See also; Devdasi Practice and Status of Devdasi, Chapter-III online:< http://shodhganga.inflibnet.ac.in/bitstream/10603/127601/9/09_chapter%203.pdf> at 41.

a Hindu Goddess and sexually exploited by temple patrons and higher caste individuals.⁴²⁹ The term “devadasi” is a Sanskrit word that means “female slave of God.”⁴³⁰ The practice of devadasi is inseparable from sexual trafficking because men from higher classes sexually exploit women under the sanction of culture and religious belief.⁴³¹ The devadasi system is still prevalent in some parts of India due to the strength of the relationship between religious belief and sexual exploitation.⁴³² Every year thousands of girls between the ages of five and ten are dedicated to the Goddess.⁴³³

India has ratified several treaties, including CEDAW and CRC, under which the State is obligated to take measures to prevent and address trafficking and sexual exploitation among women and girls.⁴³⁴ In General Recommendation 19, the Committee on the Elimination of All Forms of Discrimination against Women set out guidance for States to take “specific preventative and punitive measures to overcome sexual exploitation.”⁴³⁵ The social belief of peoples toward devadasi and other similar practices gives social sanction to them and makes it difficult for the Government to protect women against sexual trafficking.⁴³⁶ The devadasi system still persists because of cultural pressure, economic necessities, and social constructions of the basis of the devadasi institutions.⁴³⁷ Thus the crime of trafficking women for sexual exploitation is very high

⁴²⁹ NCRB Data 2013, *supra* note 416 at 171.

⁴³⁰ Albritton Erin, “Against Her Will: Devadasi Culture in South India” *Origins* (1998) 89 at 90 and 91 online:<<https://origins.osu.edu/sites/origins.osu.edu/files/origins%20-%20july%201993%20-%20devadasi.pdf>>.

⁴³¹ *Ibid* at 90.

⁴³² Ankur Singhal, “The Devdasi System: Temple Prostitution in India” (2015) 22:1 *UCLA Women's Law Journal* at 107 at 111 [Ankur Singhal].

⁴³³ *Ibid* at 112-113.

⁴³⁴ CEDAW, *supra* note 51, art 6; and, CRC, *supra* note 53, art 39.

⁴³⁵ CEDAW, General Recommendation No. 19 *supra* note 179 at paras 12-16.

⁴³⁶ CEDAW, India’s State Report 2005, *supra* note 360 at para 139.

⁴³⁷ Ankur Singhal, *supra* 432 at 113-116.

in India. Due to this, recommendations and suggestions provided by U.N. treaty bodies are not responded to and, therefore, have failed to bring desired results regarding the elimination of sexual trafficking.

The key challenge is the failure of State parties to take systematic actions to eliminate these kinds of stereotypes and harmful practices against women. In Chapter Three it was noted that State parties are required to declare that trafficking of people is a crime and to punish the trafficker to ensure the criminal justice for the victims of sexual trafficking. However, cultural practices have prevented State parties from performing the obligations effectively. In its 2005 report before the CEDAW Committee, India mentioned that to curb the traditional practices of devadasi and jogin and others, various states like Karnataka, Andhra Pradesh, Maharashtra, Goa, Orissa, and Tamil Nadu have enacted laws and were taking serious initiatives to prevent the dedication of the young girls to deity.⁴³⁸ But India admitted in paragraph 140 of the report that:

The legal provisions alone cannot stop trafficking in women. This problem is deeply rooted because of traditional customs and practices like devadasi, etc., which are exploited by traffickers to sexually exploit women.⁴³⁹

In other words, the Government itself admitted that cultural and religious beliefs make it difficult for India to protect women from discriminatory and exploitative practices. The existence of these cultural practices is a violation of the principles of UDHR and other treaties that guarantee human rights. To follow up the Government report, the CEDAW Committee, in its list of questions, commented that the Government had mentioned in its reports that these discriminatory and stereotype cultural practices are major obstacles to the safety of women.⁴⁴⁰ The Committee therefore recommended that India should establish a viable strategy to overcome the impediments

⁴³⁸ CEDAW, India's State Report 2005, *supra* note 360 at 139.

⁴³⁹ *Ibid* at para 140.

⁴⁴⁰ CEDAW, List of Ques. 2006, *supra* note 405 at 3.

to the practical realization of women's rights.⁴⁴¹ The practices are so deeply rooted and, due to the failure of State laws, the application of international law becomes even more difficult. The continuance of stereotypes and religious practices makes women more vulnerable in Indian societies, and results in violations of basic women rights otherwise guaranteed by the U.N. system.

Another issue that limits the Indian Government in fulfilling its international compliance by protecting women against sexual trafficking is the issue of casteism in India. In 2007, the *Committee on the Elimination of Racial Discrimination*, after reviewing India's report, also commented on the effects of cultural relativism on discrimination. It paid attention to the right to remedy through the criminal justice system for victims of sexual trafficking.⁴⁴² These important rights require the State to investigate, prosecute, and punish sexual trafficking against women. However, the Committee expressed its concern over India's casteism and highlighted that in most cases, women belonging to a lower caste are the most vulnerable and, therefore, most likely to become victims of sexual trafficking.⁴⁴³ It is important to note that because of cultural norms, mostly higher classes, or the dominant classes, sexually exploit Dalit women through devadasi. These practices enjoy social sanction, as some members of the higher classes believe it is prestigious to have sexual relations with lower caste girls.⁴⁴⁴ These forms of ritualized trafficking of women impelled the Committee to urge:

the State party to effectively prosecute and punish perpetrators of acts of sexual violence and exploitation of Dalit and tribal women, sanction anyone preventing or discouraging victims from reporting such incidents, including police and other law enforcement officers, take preventive measures such as police training and public education campaigns on the

⁴⁴¹ CEDAW Committee Concluding Comment, 2007, *supra* note 380 at para 21.

⁴⁴² The Committee on the Elimination of Racial Discrimination, *concluding observations of the Combined fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth Periodic Report of State Parties India*, UN Doc. CERD/C/IND/CO/19, (2007) at para 15 [ICERD, Concluding Observations, 2007].

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid* at para 18.

criminal nature of such acts, and provide legal, medical and psychological assistance, as well as compensation, to victims.⁴⁴⁵

This statement provided guidance to India in 2007 to take concrete measures to ensure criminal justice response. The Committee's demand was responded in 2014, in the fourth and fifth periodic reports to the CEDAW Committee. In the reports India provided information on all legislative, administrative and policy measures that it had adopted to combat sexual trafficking of women.⁴⁴⁶ However, the Committee pointed out that India had not taken sufficient and systematic action to ensure the criminal justice for victims.⁴⁴⁷ To support the Committee's claim, the NCRB, in its 2016 statistics report, mentioned that the number of women trafficked rose by 22% to 10,119 from 2015.⁴⁴⁸ This shows that trafficking of women in India is still a major human rights issue and the U.N. Committee's efforts have not made much difference here because of cultural practices.

b. Quality of Concluding Observations and General Comments

The quality of concluding observations and comments are other major obstacles in the treaty bodies' efforts to address sexual trafficking. Although the Indian Government has submitted periodical reports to various treaty bodies in which it has provided information on the measures it took on the protection of women against sexual trafficking, the quality of the concluding observations and comments undermines the effectiveness of the U.N. reporting system. The major issue is that, although the purpose of writing Committee reports is to deliver guidance and advise

⁴⁴⁵*Ibid* at para 15.

⁴⁴⁶ The Committee on the Elimination of All Forms of Discrimination against Women, *Combined Fourth and Fifth Periodic Report of State Parties India*, UN Doc. CEADW/C/IND/4-5, (2012) at para 22 [CEDAW, India's State Report 2012].

⁴⁴⁷ *Ibid*.

⁴⁴⁸ NCRB Data 2016, *supra* note 355; see also, Nita Bhalla, "Almost 20,000 women and children trafficked in India in 2016" (9 march 2017) *Reuters* (blog), online:<https://www.reuters.com/article/us-india-trafficking/almost-20000-women-and-children-trafficked-in-india-in-2016-idUSKBN16G29G>>.

the State party, the concluding observations provided by the treaty bodies are formal and descriptive in nature, with significant repetition. More importantly, the treaty bodies have failed to follow up on their concluding observations, contrary to article 40 of ICCPR, article 21 of ICESCR, and article 21 of CEDAW.

In 2007, the CEDAW Committee, in its concluding comment, provided descriptive and formal pointers on how to combat all forms of discrimination against women in India.⁴⁴⁹ The Committee failed to comment on the major issue of sexual trafficking against women. Prior to the issuance of its concluding comments, the Committee, in the list of issues, addressed sexual trafficking and asked India to review its existing legislation. However, it failed to give advice to India on how to protect women against this violation.⁴⁵⁰ Then in 2010, after reviewing the second and third periodical reports of India, the Committee's concluding observations again failed to address sexual trafficking against women. Most of the information in the concluding observations concerned the Gujrat Massacre that took place in 2002, where the primary issues were torture, murder, gang rape, forced nudity, and other kinds of violence.⁴⁵¹ Although this was a terrible event that required special attention, the Committee totally neglected sexual trafficking, which was specifically raised by the Government in its State report. This neglect of sexual trafficking is detrimental to the sustained focus that the Committee should give to it for the sake of the victims of this crime in India.

⁴⁴⁹ CEDAW Committee Concluding Comment, 2007, *supra* note 380; and, The Committee on the Elimination of All Forms of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, 47th Sess, UN Doc. CEDAW/C/IND/ CO/SP.1, (2010) [CEDAW, Committee Concluding Observation, 2010].

⁴⁵⁰ CEDAW, List of Ques. 2006, *supra* note 405 at para 9.

⁴⁵¹ CEDAW, Committee Concluding Observation, 2010, *supra* note 449 at para 5.

Then in 2014, after reviewing the third and fourth periodic reports of India, the Committee only provided normative guidance. For example, it recommended the review of the Immoral Traffic (Prevention) Act, to include new provisions addressing prevention of trafficking in women and girls, and the economic and emotional rehabilitation of the victims.⁴⁵² The Committee did not explain the substantive measures that India should take to protect and rehabilitate victims, or to prevent other females from becoming victims of sexual trafficking. It is useful that the Committee recommended that India address the root causes of trafficking, such as by promoting alternative income-generating activities to develop the economic potential of women.⁴⁵³ However, the Committee gave generic recommendations that do not account for the particularities of the Indian context. For example, they do not address how India could eliminate the cultural practices that trap women and young girls into becoming victims of sexual trafficking. Therefore, the Committee falls short in giving substantive advice in their concluding observations to tackle the issue of sexual trafficking against women in India.

Another issue is that the concluding observations lack detail. Too many times, the treaty bodies only express their regret about a State party's compliance failures or weaknesses or only praise a State party by providing positive comments on the actions it took to promote and protect human rights in its territory. They rarely elucidate how a State party can enforce and protect women's rights. For example, the *Committee on Economic, Social and Cultural Rights*, in its concluding observations, appreciated the opportunity it was afforded to hold a dialogue with State representatives, and appreciated the answers to the questions it raised. But with respect to sexual trafficking cases, the Committee only mentioned its concern that sexual trafficking is a serious

⁴⁵² CEDAW Committee Concluding Observation, 2014, *supra* note 385, at para 23 (a).

⁴⁵³ *Ibid* at para 23(b)

problem faced by India, but suggested no solutions to it.⁴⁵⁴ In sum, it can be safely said that the quality of concluding observations and comments remains a major obstacle to the work of the U.N. treaty system to help protect, promote and enforce women's rights in India.

c. A limited role for NGOs

As discussed in Chapters Two and Three, civil society and non-governmental organizations have an important role in the human rights system. The system allows NGOs to contribute valuable information and to raise questions that have not been discussed by State parties in their reports. The involvement of NGOs at the international level enables them to provide important information and data to the system. Their involvement and contribution of valuable information help the treaty bodies to monitor the compliance of State parties in respect of the protection, promotion, and enforcement of women's rights.

In the case of sexual trafficking against women, NGOs, with the assistance of India's National Human Rights Commission (NHRC), have set up a program to help prevent the trafficking of women and children in India.⁴⁵⁵ In 2005, the Government of India, in its State report, mentioned that civil society organizations and NGOs are encouraged to undertake schemes sponsored by the Government to protect women and girls from sexual trafficking.⁴⁵⁶ They work at the grass-roots level to among other things to provide support by way of rehabilitation to women who have been sexually exploited. However, certain obstacles have impeded the working of the treaty bodies because of limitations that NGOs face in playing their roles.

The key challenge is that NGOs require financial assistance and cooperation from governments to work successfully at the ground level to protect and enforce women's rights. The

⁴⁵⁴ ICESCR, Concluding Observation, 2008, *supra* note 384 at para 27.

⁴⁵⁵ CEDAW, India's State Report 2005, *supra* note 360 at 51.

⁴⁵⁶ *Ibid* at para 156.

lack of State support for civil society organizations and NGOs in this enterprise is one of the major obstacles in this regard in India. NGOs constantly highlight their need for financial assistance from the Indian national Government.⁴⁵⁷ The failure of the Government to provide financial assistance and cooperation limits the promotion and protection of human rights in the country. This situation adversely affects the contribution of NGOs to reporting, as they are limited in their ability to file shadow reports to raise important issues that Governments fail to address, such as sexual trafficking. For example, in 2008, the *Committee on Economic, Social and Cultural Rights*, while reviewing the combined second to fifth reports, mentioned that India's NHRC and State Human Rights Council (SHRC) do not receive adequate financial support.⁴⁵⁸ Of course, the Committee could only recommend that India enhance its support to NGOs to enable them to better participate in the promotion and protection of human rights, including women's rights.⁴⁵⁹

Another issue is the limited participation of NGOs in constructive dialogue between the State party and the Committee. Like State party reports, NGOs and civil society organizations submit alternative reports, called shadow reports, regarding the condition of human rights issues. The failure of treaty bodies to consider the NGOs' reports, or read them accurately, has become an obstacle to the treaty bodies' abilities to monitor the compliance of State parties to protect, promote, and enforce women's rights against gender discrimination, including sexual trafficking.⁴⁶⁰ Due to workload and time constraints, Committee members not always read NGO reports and in some cases they fail to give them fair opportunities to express their views on the

⁴⁵⁷ ECOSOC, India's State Report, 2006, *supra* note 373 at para 11

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid* at para 49.

⁴⁶⁰ The International Convention on the Elimination of All Forms of Racial Discrimination, *Summary record of 1797th meeting*, 70th Sess, UN Doc. CERD/C/SR.1797 at para 36.

compliance of a State party.⁴⁶¹ This was observed in CEDAW Committee’s summary record of its 1886th meeting with the State representative of India, where the Committee discussed major issues, including the sexual trafficking of young girls and women in India.⁴⁶² Mr. Joshi, State representative of India during the discussion, stated that no opportunity was given to the NGO representatives to raise their voice against the condition of human rights in the country.⁴⁶³ This lack of fair opportunities not only limits the role of NGOs, but also undermines the potential of the treaty system to achieve its objective to protect, promote, and enforce women’s rights in India. This above analysis highlights that the limited role of NGOs limits the effectiveness of the work of the treaty bodies to curb sexual trafficking.

4.3.3 Reproductive Rights: Overview

Article 12 of the ICESCR states that the right to reproductive health is an integral part of the right to health.⁴⁶⁴ This is reflected in other international human rights treaty provisions, which oblige State parties to take all appropriate measures to eliminate discrimination against women in the field of health care, including family planning.⁴⁶⁵ Obviously, the failure of States to ensure the rights of women to health care violates these international human rights instruments.

As a party, India carries legal obligations to ensure access to health care for women without discrimination, which includes access to reproductive care. In several of its State reports, India mentioned several plans and policies that it has introduced to protect, promote, and enforce

⁴⁶¹ *Ibid* at 38.

⁴⁶² CEDAW, India’s Summary Record 761(A), *supra* note 361 at para 35.

⁴⁶³ *Ibid*.

⁴⁶⁴ ECOSOC General Comment No. 22, *supra* note 246 at para 1.

⁴⁶⁵ *Ibid*, see also, CEDAW General Recommendation No. 24, *supra* note 267 at paras 11,14,18,23,26,29,31 and, The Committee on the Rights of the Child, “*The rights of the child to the enjoyment of the highest attainable standard of the health: General Comment No. 15*”, (2013) [CRC, General Comment No. 15].

women's reproductive rights. For example, in 2005, before the CEDAW Committee, India mentioned that:

India is committed to achieve the goal of "Health for All by 2000A.D." In this direction, a large network of institutions for health care has been established in both rural and urban areas. There is a total of 137,271 sub-health centers, 22,975 primary health centers and 2,935 community health centers in rural areas. Several policies, programmes and schemes have been initiated and implemented.⁴⁶⁶

India expressed its commitment to protecting the reproductive rights of women, citing its Reproductive and Child Health (RCH) Program.⁴⁶⁷ It explained that the aims of the policy are: to ensure reduction of maternal and infant mortality, create awareness about health care rights, and improve health care delivery systems.⁴⁶⁸ The Government introduced this plan to ensure the promotion of safe deliveries in health care institutions and at home. It also mentioned other programs, like the National Rural Health Mission (NRHM) and Family Welfare Program, to protect the reproductive rights of women.⁴⁶⁹

In its 2012 State report, the Government talked about other programs, like the "Mother and Child Tracking System" (MCTS) to track pregnant women and children for positive health outcomes.⁴⁷⁰ The Reproductive and Child Health Program under the National Rural Health Mission focuses on the reduction of maternal mortality and total fertility ratios. Janani Suraksha Yojana (JSY) is a safe motherhood plan introduced to promote institutional delivery with special focus on pregnant women belonging to the lower caste.⁴⁷¹ The Government also provided information to the CRC that, to protect the reproductive rights of women, the Indira Gandhi

⁴⁶⁶ CEDAW, India's State Report 2005, *supra* note 360 at para 245.

⁴⁶⁷ *Ibid* at para 247.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ *Ibid* at paras 248 and 250.

⁴⁷⁰ CEDAW, India's State Report 2012, *supra* note 446 at para 77.

⁴⁷¹ *Ibid* at para 78.

Matritva Sahyog Yojana (IGMSY), a 100% centrally sponsored scheme, was introduced in 53 districts covering all States and union territories of the country.⁴⁷² These schemes ensure a better environment by providing cash incentives for improved health and nutrition to pregnant and lactating women.⁴⁷³

However, even after the launch of the programs, the violation of reproductive rights of women in India continues to be very common. The U.N. treaty bodies have, on several occasions, highlighted the need for special attention to the protection and promotion of the reproductive rights of women, but the Indian Government has not effectively addressed the real challenge to reduce the violation of reproductive rights. There are still some concerning issues which are yet to be addressed properly. Issues such as lack of awareness, social and cultural barriers, and lack of education are still very much present and make it difficult for women to enjoy their reproductive rights. In fact, the full enjoyment of reproductive rights remains a distant goal for many women in India. The specific challenges in the U.N. treaty system that undermine the working of different treaty bodies in protecting the women's reproductive rights are: (a) lack of timely State reports; and (b) lack of enforcement. These challenges are analyzed in detail below.

a. Overdue State Reports

It has already been noted in this thesis that timely submission of State reports is one of the most important feature for the effective working of the U.N. treaty bodies.⁴⁷⁴ In the case of reproductive rights, the delay in State reporting matters more because the consequences of violation of reproductive rights are severe to women's right to life and health.⁴⁷⁵ In Chapter Three it was noted

⁴⁷² The Committee on the Rights of the Child, *List of Issues and Questions with regard to the Consideration of third and fourth periodic reports of India*, (2014) UN Doc. CRC/C/IND/Q/3-4/Add.1 at para 32.

⁴⁷³ *Ibid.*

⁴⁷⁴ Anne F. Bayefsky, *supra* note 31 at 4.

⁴⁷⁵ CEDAW, *supra* note 51, articles 12, 17, 23, 25, and 27; and, CRC, *supra* note 53, article 27.

that the CEDAW Committee and the *Committee on Economic, Social and Cultural Rights* have urged State parties to make health care services available and accessible for the protection and promotion of reproductive health.⁴⁷⁶ Further, treaty bodies urged State parties to perform their obligation to respect, protect and fulfill women's reproductive rights. However, the challenge of long delays in State reports has limited the working of the U.N. bodies to monitor the compliance of India regarding the protection and enforcement of women's reproductive rights. The Indian government's record of submission of periodical reports to different treaty bodies has been very poor. As already noted in earlier chapters, the failure of States to submit periodical reports regarding measures they have taken to improve the conditions for the enjoyment of reproductive rights has not allowed for scrutiny of their efforts. This failure also means that the Committee's assistance to enable the Government to promote and enforce the reproductive rights of women has been limited or thwarted.

For example, while reviewing the combined second and third periodic reports of India at its 761st and 762nd meetings before the CEDAW Committee, the Committee members pointed out that the reports were long overdue. Although the Government submitted the overdue reports and provided information about introduction of new plans and policies, it failed to explain the impact of its programs and policies adopted to promote reproductive rights.⁴⁷⁷ The Committee observed that India failed to provide information on what practical steps it had taken to ensure the enforcement and implementation of legislation, like the Preconception and Prenatal Diagnostic

⁴⁷⁶ CEDAW, General Recommendation No. 34, *supra* note 233 at paras 11, 14, 26 and 29.

⁴⁷⁷ CEDAW, India's Summary Record 761(A), *supra* note 361 at para 21; The Committee on Elimination of All Forms of Discrimination against Women, *Summary record of 762nd meeting*, 37th Sess, UN Doc. CEDAW/C/SR.762(A) at para 25 [CEDAW, India's Summary Record 762(A)].

Techniques (Prohibition of Sex Selection) Act 1994, to protect and enforce reproductive rights.⁴⁷⁸ This long delay of nine-years in the submission of reports, along with insufficient information in the reports, made it difficult for the Committee to assess India's compliance with their requirement to protect and enforce reproductive rights under CEDAW.

Several policies adopted by the Indian government in relation to reproductive rights are mainly for women who are either poor or live in rural areas. Further, the initiatives taken by government are the result of specific directions such as reduction of maternal and infant mortality or to promote institutional delivery with special focus on pregnant women belonging to the lower caste.⁴⁷⁹ While adopting several plans and policies relating to reproductive rights for women, the Indian government did not pay much attention to ensuring the accessibility of reproductive health care services in an affordable manner for women living in tribal areas.⁴⁸⁰ The statistics reveal the poor conditions of reproductive rights, including that maternal mortality is still very high and, in as many as 12 States, the rate of safe deliveries of babies is less than 25%, which is a matter of great concern.⁴⁸¹ In fact, data shows that India has the highest number of maternal deaths in the world, at 130,000 a year.⁴⁸² However, the real figure may even be higher.⁴⁸³ The failure to report in a timely way misses this "policy window" and gives opportunity to India to avoid the scrutinization of their efforts taken to promote and protect women's reproductive rights. This also

⁴⁷⁸ *Ibid.*

⁴⁷⁹ CEDAW, India's State Report 2012, *supra* note 446 at paras 76, 77 and 78.

⁴⁸⁰ Inter State Adivasi Women's Network (ISAWN) et al, "India NGO CEDAW Shadow Report And status of Adivasis/ Tribal Women in India" 58th Sess, (2014) at 12.

⁴⁸¹ *Ibid* at para 23.

⁴⁸² CEDAW, India's Summary Record 762(A), *supra* note 477 at para 16.

⁴⁸³ *Ibid.*

leads to a form of unaccountability for these State efforts, suggesting that their effort alone is sufficient.

India's long overdue reports adversely affects the work of other treaty bodies as well. While considering the fifteenth to nineteenth periodic reports from 1996-2006, the *Committee on the Elimination of Racial Discrimination* regretted that India's reports were long overdue.⁴⁸⁴ This long delay meant it could not provide effective recommendations and suggestions on the enforcement of women's reproductive health rights relating to pregnancy, the post-natal period, and adequate nutrition during pregnancy and lactation.⁴⁸⁵ It also limits understanding the relevant difficulties that India had faced over those ten years.⁴⁸⁶ As a result, the Committee could not provide any extensive guidance but only say that:

“there is a need to ensure equal access to reproductive health services and to increase the number of doctors and of functioning and properly equipped primary health centers and sub-centers in tribal and rural areas for the protection and promotion of women's reproductive rights.”⁴⁸⁷

Under the ICESCR, the status of India's reporting is even worse. The *Committee on Economic, Social and Cultural Rights* also raised a concern over long overdue reports.⁴⁸⁸ While considering the second to fifth periodic reports of India in 2008, the Committee pointed out that there was 15-year delay in submission of the reports.⁴⁸⁹ This was 15 years during which India did not take seriously its international commitment to protect women's reproductive rights.

⁴⁸⁴ The Committee on the Elimination of Racial Discrimination, *Report submitted by India under Article 9 of the Convention: The Combined fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth Periodic Report of State Parties India*, UN Doc. CERD/C/IND/19, (2006) at para 1.

⁴⁸⁵ *Ibid* at para 118.

⁴⁸⁶ *Ibid* at para 119.

⁴⁸⁷ ICERD, Concluding Observations, 2007, *supra* note 442 at para 24.

⁴⁸⁸ ECOSOC, India's State Report, 2006, *supra* note 373 at para 1.

⁴⁸⁹ *Ibid*.

Consequently, the Committee could not scrutinize the true state of women's reproductive rights in India. Although India submitted its reports after this delay, it failed to address the lack of implementation of the legislative and judicial measures relating to women's reproductive rights.⁴⁹⁰ India's poor compliance left the Committee to give limited suggestions, rather than substantive recommendations. The Committee only suggested:⁴⁹¹

The State party must significantly increase its health-care expenditure, giving the highest priority to reducing maternal and infant mortality rates and to prevent and treat serious communicable diseases, including HIV/AIDS. The Committee further recommends that the State party take effective measures to fully implement the National Rural Health Mission (2005-2012) and ensure the quality, affordability and accessibility of health services without hidden costs, especially for disadvantaged and marginalized individuals and groups.⁴⁹²

In the end, the Committee simply asked India to submit its sixth periodic report by 30th June 2011 and to provide detailed information on the steps it had taken to implement the recommendations given under the concluding observations.⁴⁹³ Even after more than seven years, the Government has yet to submit its sixth periodical report to the Committee. Thus, the Committee cannot monitor India's compliance with its own measures taken after 2008 to protect, promote, and enforce women's reproductive rights.

To conclude, long delays in India's reports is one of persistent challenges in the effective working of the U.N. treaty system for the protection and enforcement of women's rights. It remains a serious question how the U.N. treaty system can work effectively for the promotion and protection of women's rights if States are not willing to fulfill their reporting obligations.

⁴⁹⁰ *Ibid* at 38.

⁴⁹¹ ICESCR, Concluding Observation, 2008, *supra* note 384 at para 73.

⁴⁹² *Ibid*.

⁴⁹³ *Ibid* at para 89.

b. Lack of Enforcement

The limited enforcement of the treaty bodies' recommendations and comments is one of the biggest challenges in the UN treaty system. The lack of implementation of recommendations defeats the purpose of issuing general recommendations like General Recommendation No. 24 of CEDAW, which requires States to "implement a comprehensive national strategy" to protect women's reproductive rights.⁴⁹⁴ In the case of reproductive rights in India, the problem of limited enforcement is very common. Even after recommendations given by the different treaty bodies, there have not been significant changes in the protection of reproductive rights of women in India.⁴⁹⁵ One of the major issues is that the power of an international body to make redistributive decisions is limited, in contrast to local or domestic political actors.⁴⁹⁶ This leaves them to wait for the State party to demonstrate its commitment by taking appropriate measures to properly enforce women's reproductive rights.⁴⁹⁷ The proper implementation of recommendations made by treaty bodies requires significant efforts and commitment from legislative and administrative authorities in India. The limited efforts and commitment of State authorities makes it more difficult for the U.N. treaty system to enforce recommendations for the protection and enforcement of women's reproductive rights in India.

For example, the CEDAW Committee has always affirmed the reproductive rights of women when it reviews India's reports. In 2007, the Committee specifically asked the Government

⁴⁹⁴ CEDAW General Recommendation No. 24, *supra* note 267 at paras 37-38.

⁴⁹⁵ Human Rights Law Network, Centre for Reproductive Rights, "Supplementary information on India, scheduled for review by the Committee on the Elimination of Discrimination against Women during its Pre-Sessional Working Group" (2013) at 2.

⁴⁹⁶ Sushma Sharma, "Reproductive Rights and Women's Health: A New Prospective" (2015) 4:4 *IJHSSI* 51 at 53 [Sushma Sharma].

⁴⁹⁷ *Ibid.*

to give significant attention to female health in pregnancy-related mortality.⁴⁹⁸ The Committee urged India to prioritize decreasing maternal mortality rates by establishing adequate delivery services and assuring access to women for health services, including safe abortion and gender-sensitive comprehensive contraceptive services.⁴⁹⁹ The enforcement of these recommendations requires full commitment from legislative and administrative authorities.⁵⁰⁰ Although these authorities have introduced various plans, policies, and schemes to promote women's reproductive health care services, they are not properly implemented. The poor result was noted by the Committee when it reviewed India's report in 2014 that maternal mortality in some States in India remains high because of lack of access to safe abortion and poor post-abortion care.⁵⁰¹ As a result, these women have poor access to basic health care services, like safe abortions, pre-natal and post-natal care, safe deliveries, and adequate nutrition during lactation, which is a violation of article 10(h) and 16 of the CEDAW.

The second major issue for India in the enforcement of recommendations relating to women's reproductive rights is the lack of financial resources.⁵⁰² Under CEDAW Article 12 and General Recommendation 24, States are obligated to utilize the "maximum extent of their available resources" to ensure women's access to health services.⁵⁰³ However, the health system of India has been chronically underfunded which makes it difficult to implement recommendations

⁴⁹⁸ CEDAW Committee Concluding Observation, 2007, *supra* note 379 at para 41.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ CEDAW Committee Concluding Comment, 2007, *supra* note 380 at para 73; and, CRC, Concluding Observation 2014, *supra* note 424 at paras 65 and 66.

⁵⁰¹ CEDAW Committee Concluding Observation, 2014, *supra* 385 at para 30.

⁵⁰² Comptroller and Auditor General of India (CAG), Report no. 8 – performance audit of national rural health mission (NHRM) – Ministry of Health & Family Welfare (MOHFW), (2009), *online*: <http://www.cag.gov.in/html/reports/civil/2009_8_PA/chap_5.pdf> at 43-44 [CAG Report].

⁵⁰³ CEDAW, General Recommendation No. 24, *supra* note 267 at para 17, 27.

provided by the U.N. treaty bodies.⁵⁰⁴ India has long been investing less of its gross domestic product in health care.⁵⁰⁵ On several occasions, the treaty bodies have issued recommendations which require huge financial resources from the State to implement. The *Committee on the Elimination of Racial Discrimination* has urged India to ensure equal access to reproductive health services and increase the number of doctors in order to protect the right to health.⁵⁰⁶ The CEDAW Committee also asked for the expansion of availability and access to reproductive health and information services in an affordable manner for women. However, the lack of financial resources meant these recommendations could not be fully implemented.⁵⁰⁷ Although the schemes and policies to enhance enjoyment of reproductive rights have received additional support, the budget available to the National Rural Health Mission (NRHM) has not been enough to ensure acceptable health care of women.⁵⁰⁸

Lack of funds is not only a major challenge in the enforcement of reproductive health care recommendations. As well, it compromises the effective working of the U.N. treaty system in its efforts to protect women's reproductive rights in India.

4.4 Summary

India has ratified different U.N. treaties for the protection and enforcement of human rights. However, the enjoyment of human rights is still a distant goal for women. The above assessment of the working of the U.N. treaty system through three case studies on women's rights, namely,

⁵⁰⁴ CAG Report, *supra* note 502 at 43.

⁵⁰⁵ Sushma Sharma, *supra* note 496.

⁵⁰⁶ ICERD, Concluding Observations, 2007, *supra* note 442 at para 24.

⁵⁰⁷ The Committee on Elimination of All Forms of Discrimination against Women, *Summary record of 1220th meeting*, 48th Sess, UN Doc. CEDAW/C/SR.1220 at para 14 [CEDAW, India's Summary Record 1220].

⁵⁰⁸ CAG Report, *supra* note 502 at 44.

domestic violence, sexual trafficking, and reproductive rights, reveals that the challenges that the U.N. treaty system has faced have impeded the development of an effective regime to protect and enforce women's rights in India. These challenges include cultural relativism, overdue State reports, poor quality of State reports, limited implementation of recommendations, and the limited role of NGOs in advancing the implementation and upholding of women's rights.

Cultural practices like dowry and devadasi still enjoy social sanction in Indian societies, despite the existence of countervailing domestic and international law. Although the practices are no longer as prevalent as they once were, thanks in large part to the legislation many women are still dedicated to them for religious, economic, and social reasons. Consequently, the treaty bodies and the State find it difficult to protect women from abuses like domestic violence and sex trafficking. The limited participation of NGOs in constructive dialogue with U.N. experts also undermines the effective working of the U.N. treaty system. So does poor compliance by India under the reporting system. India's long overdue and poor-quality reports elicit limited enforcement recommendations from the treaty bodies which, in turn, are unable to effectively monitor India's compliance under the U.N. treaties. All of these challenges of the U.N. treaty system have limited its effective working in regard to the protection and enforcement of women's rights in India.

Clearly, the treaty system is in critical need of reform to achieve its objective, which is the protection and enforcement of human rights all over world, especially the rights of women. The truth is that the denial of women's rights is the denial of the rights of half of humanity.

Chapter-5: Conclusion

This thesis has highlighted that the U.N. treaty bodies carry a weight of responsibilities for the protection and enforcement of women's rights. In particular, it was argued that State parties that voluntarily ratified the U.N. treaties must respect their reporting obligations to ensure the coherent and effective working of the treaty system regarding compliance assessment. It was observed, however, that the reality is that the system faces several challenges that have compromised the ability of the treaty bodies to effectively monitor treaty implementation and compliance by State parties. The question raised by these challenges, therefore, is how the treaty bodies can ensure that with the support of State parties treaty implementation can become reasonably outcomes-oriented.

The thesis explored in detail the role of the U.N. human rights treaty system and its enforcement mechanisms in protecting and enforcing human rights, with a specific focus on the rights of women. With specific reference to three issues-domestic violence, sexual trafficking, and reproductive rights-the system is facing considerable challenge in the effective protection and enforcement of women's rights. As analyzed, the weaknesses of the system include: cultural relativism, long delays in and poor quality of State reports, poor quality of concluding observations, limited implementation of recommendations, and limited role of NGOs.

Cultural relativism has compromised the working of the U.N. treaty system to monitor the compliance of State parties for the protection and enforcement of women's rights. Cultural relativism limits the State parties' actions and enables State parties to evade their State responsibilities for the protection and promotion of women's rights. The case study of India shows that despite positive developments, cultural practices like dowry, devdasi and basavi limits the effective working of treaty bodies to protect and enforce women's rights in India. Cultural dominance over individual behaviour is believed to justify discrimination against women and

thereby, even after guidance provided by treaty bodies on several aspects, violation of women's rights in the forms of domestic violence, sex trafficking, and reproductive rights is very common.

The second key challenge noted is that the system is designed on the basis of State compliance, but poor compliance of State parties has emerged as major roadblock in the effective working of the U.N. treaty system for the protection and enforcement of women's rights. The long delays in and poor quality of State reports have limited treaty bodies in analyzing what actions State parties have taken to improve the conditions of women's rights in State parties' jurisdictions. The case study of India showcases that India has failed to submit reports at regular intervals with delays of 8-15 years. As well, the reports it submitted have not been of the required evaluative quality. The weak reporting compliance of India has limited treaty bodies like the CEDAW Committee, the *Committee on the Economic, Social and Cultural Rights*, and the *Committee on the Elimination of Racial Discriminations* to scrutinize the conditions of women's rights in India.

The third major challenge that has undermined effective working of the treaty bodies for the protection and enforcement of women's rights is the weak concluding observations provided to State parties. It was noted in earlier chapters that many times, treaty bodies issue concluding observations which are formal and descriptive in nature, with significant repetition across comments. Due to this, the purpose of issuing concluding observations is compromised. The case of India highlighted that on several occasions the treaty bodies did not provide India the concrete guidance it needs in order to take necessary steps to improve the condition of women's rights. India only receives normative assistance, which does not help or push it to act upon the treaty bodies' concluding observations. Thus, India illustrates quite sharply the failures of the U.N. treaty regime to assure reasonably effective protection and enforcement of women's rights.

Fourth, the limited implementation of the recommendations provided by the treaty bodies to State parties has also compromised the effective working of the U.N. treaty system for the protection and enforcement of women's rights. India's case study highlighted that treaty bodies have guided State parties to take appropriate actions and to adopt a comprehensive national strategy for the protection of women's reproductive rights in national jurisdictions. However, the rate of maternal mortality in India is very high and women belonging to tribal areas or rural areas are still unable to get access to health care services in an affordable manner.

Another key challenge is the limited role of NGOs which has also limited the effective working of the treaty bodies for the protection and enforcement of women's rights. The limited involvement of NGOs at the international level makes them unable to provide valuable information to treaty bodies to scrutinize the true state of human rights including women's rights. The case study of India shows that NGOs are restricted in their ability to offer their analyses of the conditions of women's rights to help the treaty bodies confront issues that are not raised by the State parties in their State reports. Due to this, many issues are left unaddressed by treaty bodies while having constructive dialogue with State officials face-to-face.

The thesis displayed the weaknesses in the system through a case study on India which shows that the system is in critical need of reform. Although the U.N. treaty system has paid significant attention to the formal protection of women's rights, there is still a need to strengthen the effective working of the system in making these commitments through the protection and enforcement of human rights.

The debate about strengthening the system has been going on for a while. In 1997, the Independent Expert, Mr. Philip Alston, issued his final report which focused on enhancing the

long-term effectiveness of the U.N. human rights treaty system.⁵⁰⁹ In 2005, the former High Commissioner for Human Rights, Ms. Louise Arbour, in her Plan of Action, proposed reforming the system by introducing a unified standing treaty body to improve its monitoring of State compliance with treaty obligations.⁵¹⁰ The proposal was not adopted because it was not based on proper consultation with States parties, NGOs and treaty bodies' members.⁵¹¹

In 2009 under Navneethem Pillay, the Office of the High Commissioner for Human Rights (OHCHR) paid special attention and made key proposals to initiate a process for strengthening the U.N. treaty system.⁵¹² It stated that the vision for the future must be to enhance the accessibility and impacts of the treaty system to protect and enforce human rights.⁵¹³ Pillay's objective was to create a more rational, coherent, coordinated, and effective system to deliver the goals for which it was established.⁵¹⁴ The discussion on these key proposals among State parties led them to adopt General Assembly Resolution 68/268 in April 2014.⁵¹⁵ This resolution set out numerous provisions that address the challenges of the U.N. treaty system presented in the thesis. Therefore, this thesis supports the provisions set out by General Assembly Resolution 68/268 which are discussed below.

⁵⁰⁹ Philip Alston, *supra* note 19 at 1.

⁵¹⁰ Louise Arbour, *Concept Paper on the High Commissioner's Proposal for a unified standing treaty body*, (2006), UN Doc. HRI/MC/2006/2.

⁵¹¹ *Ibid.*

⁵¹² UNHCHR Report *supra* note 2 at 7.

⁵¹³ *Ibid.*

⁵¹⁴ *Supra* note 135 at 7.

⁵¹⁵ GA Res 68/268, *supra* note 14 at 1.

5.1 Directions for State Parties: Simplified Reporting Procedure

1. State parties need to fulfil their reporting obligations by submitting State reports at regular intervals to treaty bodies. These reports must be detailed, evaluative, and focused. They must not be loose and perfunctory accounts of their treaty compliance duties. The treaty bodies must seriously assert their authority to push, in our case, India to not only submit its reports, but also to provide information on actions it takes to improve enjoyment of women's rights within its jurisdiction.

The General Assembly urged the treaty bodies to “simplify the reporting procedure”, and to set a limit for questions. This proposal is to ensure that States conform to strict page limitations for their reports.⁵¹⁶ States should utilize this format to provide their “common core document”, offering a comprehensive account of updated information on the most recent developments regarding human rights and women's rights protection within their jurisdictions.⁵¹⁷ As noted in earlier Chapters, the reporting process has different phases, such as preparation and submission, a face-to-face dialogue with the treaty body considering the report, and a follow-up to implement recommendations adopted by the treaty bodies. When these steps are followed, the reports subsequently submitted should help treaty bodies to draw up useful guidance for the parties after analyzing the human rights conditions they report on. The simplified reporting procedure, if followed, should help countries like India to present more creditable accounts of their human rights protection efforts. Subsequently, they

⁵¹⁶ *Ibid* at para 2.

⁵¹⁷ *Ibid* at para 3.

- would benefit more from the guidance they receive to help them to keep improving their performance.
2. The proposed “simplified reporting procedure” has another significant advantage: it would help to deal with the obstacle of culture to human and women’s rights promotion, protection and enforcement. As discussed in the case study, India’s cultural practices, such as dowry payment and devdasi, are still prevalent and enjoy social sanction to justify violence against women. This is the case despite the presence of prohibiting legislation. The simplified reporting procedure would oblige States to highlight major issues, like adverse cultural practices, in their State reports. This would enable the treaty bodies to understand the actions taken by the State to address the problem and be in a better position to offer more useful guidance relating to eliminating such gender-based discrimination against women.⁵¹⁸

5.2 Directions for Treaty Bodies

1. The major roadblock identified in the thesis as limiting the effectiveness of the compliance monitoring work of the treaty bodies regarding the protection and enforcement of women’s rights is the marginal quality of their concluding observations.⁵¹⁹ Concluding observations are issued to facilitate the implementation of their recommendations at national level. It was explained that the treaty bodies offer only normative guidelines and use diplomatic language in their observations, not concrete, focused and implementable directions. This allows States to avoid observing them. The General Assembly asks the treaty bodies to adopt more focused and targeted

⁵¹⁸ *Ibid.*

⁵¹⁹ UNHCHR Report *supra* note 2 at 60-62.

concluding observations containing concrete and achievable recommendations.⁵²⁰ The recommendations must reflect the dialogue with the State party. To make them better structured, their length, paragraphs, and sub-paragraphs must be reduced and be addressed to achievable objectives.⁵²¹ Those objectives must relate to major areas of concern to ensure that they provide proper guidance to State parties on what practical steps are necessary to ensure protection and enforcement of women's rights.⁵²² If the treaty bodies implement this recommendation, it would facilitate national implementation of their guidance and, overall, help to improve national protection and enforcement of women's rights.

2. It was also discussed that the limited role of NGOs is one of the major roadblocks to the effective working of the U.N. treaty system to protect and enforce women's rights. It was identified in Chapter Three that, although the treaty bodies have constructive dialogues with State parties, they do not give adequate opportunities to NGOs to take part in discussions to highlight the principal areas of concern that are not discussed by State parties. Therefore, it was proposed to introduce official private meetings for treaty bodies with NGOs before those bodies meet State parties to discuss State reports.⁵²³ The treaty body and NGOs meetings would give proper opportunity for NGOs to express their views regarding the condition of women's rights in State jurisdictions. It would also ensure that the treaty bodies do not rely solely on State reports to assess women's rights conditions in State jurisdictions.

⁵²⁰GA Res 68/268, *supra* note 14 at para 6.

⁵²¹ UNHCHR Report *supra* note 2 at 61.

⁵²² *Ibid.*

⁵²³UNHCHR Report *supra* note 2 at 66-67.

The foregoing reform suggestions are quite obvious. Their potential to facilitate improved implementation of treaty bodies' obligations is also obvious. The changes would enhance timely State reporting and concrete combating of cultural practices that undermine respect for women. If followed by the States, the changes would push them to enforce rights protection rules and principles to reverse discrimination and abuse of women. The changes would also push States to take more intentional and conscientious actions to produce these outcomes. Finally, the suggested changes would empower the U.N. treaty bodies to exercise greater influence and authority over the State parties to get them to implement their human and women's rights protection obligations with greater commitment.

It does not seem that any more material and personnel resources are needed to carry out these suggestions than have been used to run the current ineffective system. So then, my final word is that it is time for the General Assembly Resolution 68/268 of April 2014 to be implemented, beginning from within the U.N. treaty system.

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