

USING INTERNATIONAL LAW TO PROMOTE MILLENNIUM HEALTH TARGETS: A ROLE FOR THE CEDAW OPTIONAL PROTOCOL IN REDUCING MATERNAL MORTALITY

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ABSTRACT

Over 500,000 women continue to die each year from pregnancy- and delivery-related causes, often in high-risk pregnancies. Globally, maternal mortality has decreased by 1 percent a year since the 1990s; in Sub-Saharan Africa, it has decreased by only 0.1 percent a year. As these statistics reveal, many nations are far off-track to attain the internationally-established Millennium Development Goal of reducing maternal mortality 75 percent by 2015. To meet the goal, the global community must address the role of restrictive abortion laws and policies in maternal deaths.

This article argues that there is creative space to do so through using international law, and in particular by launching an individual petition under the Convention on the Elimination of All Forms of Discrimination Optional Protocol for a safe abortion. The article demonstrates that CEDAW's General Comments and concluding observations provide an implicit right to safe abortions, at least in certain contexts. Further, the Optional Protocol provides powerful procedural mechanisms that bolster a petition for a safe abortion. Namely, it provides liberal exceptions to the 'exhaustion of domestic remedies' requirement that allow for international adjudication, and 'interim measures of protection' that could include mandating a life-saving abortion while a case is being reviewed. Key doctrinal developments over the past decade, coupled with the emerging quasi-judicial function of treaty bodies via Optional Protocols, have made international forums a vital

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space in which to articulate and affirm the right to safe abortion care, without which women will continue to suffer unnecessary death and injury.

INTRODUCTION

“And even if women bear themselves weary or they bear themselves out that does not hurt. Let them bear themselves out. This is the purpose for which they exist.”¹

Despite great advances in health, science, and technology over the past few decades, a pronounced, though largely invisible, health crisis is occurring across the globe as millions of women die or suffer permanent injury each year from pregnancy-related complications.² The burden is most significant in developing countries, which account for 99 percent of maternal deaths.³ Women “bear themselves weary or...bear themselves out”⁴ in high-risk pregnancies, suffering physical and mental harm as a consequence. Many face significant legal – as well as political, economic, and social – obstacles to receiving a safe abortion. These women confront a difficult choice: carry a high-risk pregnancy to term, or resort to clandestine and unsafe abortion practices.⁵ Either choice implicates a woman’s health and may result in mortality or injury.

The global community has acknowledged – through endorsing the United Nations Millennium Development Goals (“MDGs”) and other international development consensus documents – that nations can and should act to prevent maternal deaths and injuries. In one of the key MDGs, nations pledge to take urgent action to reduce maternal mortality

¹ Alicia E. Yamin & Deborah P. Maine, *Maternal Mortality As A Human Rights Issue: Measuring Compliance with International Treaty Obligations*, 21 HUM. RTS. Q. 563, 563 (1999) (quoting Martin Luther, *The Estate of Marriage*, in THE CHRISTIAN IN SOCIETY 46 (Walter I. Brandt ed., 1962)).

² See LALE SAY & MIE INOUE, WORLD HEALTH ORG., & SAMUEL MILLS & EMI SUZUKI, WORLD BANK, *MATERNAL MORTALITY IN 2005: ESTIMATES DEVELOPED BY WHO, UNICEF, UNFPA, AND THE WORLD BANK* 16 (2007) [hereinafter *MATERNAL MORTALITY 2005*], available at http://www.who.int/making_pregnancy_safer/documents/9789241596213/en.

³ See *id.* at 1.

⁴ Yamin & Maine, *supra* note 1 (quoting Martin Luther, *The Estate of Marriage*, in THE CHRISTIAN IN SOCIETY 46 (Walter I. Brandt ed., 1962)).

⁵ The World Health Organization estimates that in 2003, 20 million unsafe abortions took place, 98 percent of these in developing countries with restrictive abortion laws. WORLD HEALTH ORG., *UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2003* 1 (5th ed. 2007) [hereinafter *UNSAFE ABORTIONS*].

rates by 75 percent by the year 2015.⁶ Yet, according to the World Health Organization, many nations are far from meeting this development goal.⁷ The global maternal mortality rate declined only 1 percent each year between 1990 and 2005, far from the 5.5 percent needed to reach the target goal.⁸ In sub-Saharan Africa, conditions are far worse; the annual decline in maternal mortality has only been about 0.1 percent.⁹

A woman's *purpose* is not to suffer physical and mental injury or death due to restrictive laws. Reducing maternal mortality is "an economic, as well as a moral, social and human rights imperative."¹⁰ Yet, it is impossible to properly act on this imperative without responding to the role of restrictive abortion laws and policies in mortality and injury, particularly in the context of high-risk pregnancies. A woman's death or suffering under restrictive abortion laws and practices amounts to more than a "moral" choice on the part of a state or private actor. These are political choices that implicate women's rights.¹¹ Since the decision of whether to provide, and ensure, a safe abortion affects a woman's human rights, a state can and should be held accountable for its political choices.

Providing women with access to safe abortions in high-risk pregnancies saves lives and advances important rights. The controversial abortion debate is often framed in terms of a woman's right to privacy and to make decisions regarding her body. But the decision implicates many other important rights including those related to non-discrimination, equality, health and well-being, dignity, self-determination, and personhood. When viewed through the layered lens of this multitude of rights, the denial of access to a safe abortion becomes a magnifying glass of the many other *human rights* that have not yet been fully extended to *women*.¹²

⁶ U.N. DEP'T OF ECON. & SOC. AFFAIRS STATISTICS DIV., PROGRESS TOWARDS THE MILLENNIUM DEVELOPMENT GOALS, 1990-2005, GOAL 5: IMPROVE MATERNAL HEALTH 1 (2005) [hereinafter PROGRESS TOWARDS GOAL 5], available at http://mdgs.un.org/unsd/mdg/Resources/Attach/Products/Progress2005/goal_5.doc.

⁷ MATERNAL MORTALITY 2005, *supra* note 2, at 18.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ U.N. POPULATION FUND [UNFPA], MATERNAL MORTALITY UPDATE 2002: A FOCUS ON EMERGENCY OBSTETRIC CARE 2 (2003), available at www.unfpa.org/upload/lib.../201_filename_mmupdate-2002.pdf.

¹¹ See CATHERINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES, 1-14 (2006).

¹² *Id.*

This paper concerns a woman's right to an abortion when the procedure is necessary to preserve her physical and/or mental health. It articulates the content of this right as defined by the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and its treaty body (the "CEDAW Committee") in its issuance of General Recommendations and in its review of State party reports. Although the Convention does not expressly require that women be provided with safe abortion services, the CEDAW Committee has carved out a right to a safe abortion that should not be curtailed by moral or personal objections to abortion. This paper then evaluates CEDAW's Optional Protocol as a potential vehicle to advance women's access to safe abortion care. It shows that the CEDAW Optional Protocol, while still in its early years, is in a ripe position to promote women's access to safe abortion services.¹³ Significant doctrinal developments over the past decade – particularly those creating exceptions to the requirement that an applicant "exhaust domestic remedies" and those providing for protective interim measures – have bolstered CEDAW's ability to define and protect women's rights in this area. Because a woman's high-risk pregnancy is an urgent, life-endangering matter, the CEDAW Committee should use these procedural tools to protect a woman against summary violation of her rights by intervening and affording her a life-preserving abortion. An example is provided of a communication that an author¹⁴

¹³ A communication could also be brought under the International Covenant on Civil and Political Rights ("ICCPR") Optional Protocol or the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") Optional Protocol, which opened for signature in September 2009. The Human Rights Committee, which monitors States parties' implementation of the ICCPR, could adjudicate a communication alleging human rights violations under that Covenant, including violations of the rights to life and to physical integrity. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171. However, CEDAW, unlike the ICCPR, provides for non-discrimination in health care services and for the provision of "appropriate services in connection with pregnancy." Convention on the Elimination of All Forms of Discrimination against Women art. 12, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW Convention]. Also, as this article elucidates, the CEDAW Committee has emphasized women's rights regarding abortion care in its General Comments and Concluding Observations. Hence, this article focuses exclusively on the potential of launching a complaint under the CEDAW Optional Protocol. The Optional Protocol to the ICESCR is also in a solid position to address women's right to safe abortion services given the Committee on Economic, Social, and Cultural Rights' robust articulations regarding the right to health. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>.

¹⁴ Throughout this paper, the term "author" is used to refer to the complainant bringing a case before the CEDAW Committee via the CEDAW Optional Protocol. A model form for an

could bring before the CEDAW Committee regarding a safe abortion in a high-risk pregnancy.

In responding to this communication and upholding the rights guaranteed in the Convention, the CEDAW Committee should 1) request that the State party provide immediate, appropriate and concrete preventive interim measures of protection in order to avoid irreparable damage to the author (i.e. provide her with an immediate safe abortion); and 2) ultimately rule on the merits of the case, determining that the author and other women are indeed entitled to a safe abortion under these circumstances. In so doing, CEDAW can play a vital preventive role in protecting women's rights under the Convention and can also illuminate the potential role of international treaty bodies in elevating women's status, including their right to health.

I. FRAMING THE ISSUE

The World Health Organization estimates that approximately 536,000 women died from pregnancy-related complications in 2005.¹⁵ For every one of these maternal deaths, there are an additional twenty women who suffer serious injury, infection, or disease.¹⁶ Families and communities also suffer tremendously when a woman dies a preventable death. In Nicaragua, 115 women reportedly died of pregnancy-related causes in 2007, and eighty-seven of these women left a total of 305 motherless children behind.¹⁷

The burden of maternal deaths is the heaviest in developing countries, where 99 percent of maternal deaths take place.¹⁸ The adult lifetime risk of maternal death—the probability that a 15-year-old female will die from a maternal cause—is one in twenty-six across the African

author's communication under the CEDAW Optional Protocol and further guidelines for submission can be found online. U.N. Dep't of Econ. & Soc. Affairs, Div. for the Advancement of Women, Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women: Model Communication Form, *available at* <http://www.un.org/womenwatch/daw/cedaw/opmodelform.html>.

¹⁵ MATERNAL MORTALITY 2005, *supra* note 2, at 16.

¹⁶ PROGRESS TOWARDS GOAL 5, *supra* note 6, at 1.

¹⁷ MOVIMIENTO AUTONOMO DE MUJERES ET AL., REPORT ON THE VIOLATIONS OF WOMEN'S HUMAN RIGHTS TO THERAPEUTIC ABORTION AND EMERGENCY MEDICAL CARE, AND OF THE RIGHTS OF WOMEN'S HUMAN RIGHTS DEFENDERS: IN RESPONSE TO THE SECOND AND THIRD PERIODIC REPORT OF NICARAGUA 4 (U.N. Human Rights Comm. 2008), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MAM_CDC_IWHR.pdf.

¹⁸ See MATERNAL MORTALITY 2005, *supra* note 2, at 1; WORLD HEALTH ORG. [WHO], REVISED 1990 ESTIMATES OF MATERNAL MORTALITY: A NEW APPROACH BY WHO AND UNICEF 2 (1996).

continent; in Niger, it is as high as one in seven.¹⁹ Yet the majority of maternal deaths are preventable, even in countries with limited health finances and other resources.²⁰

High-risk pregnancies are a great contributor to these high mortality rates. When women must choose between carrying a dangerous pregnancy to term or seeking out an unsafe abortion, they implicate their life and livelihoods. Every year, an estimated 65,000 - 70,000 deaths occur due to unsafe abortion procedures, and nearly five-million women suffer temporary or permanent disability due to unsafe abortions.²¹ The burden of maternal mortality from abortion complications is not evenly distributed. The least economically privileged women tend to suffer the most pregnancy-related deaths. Within developing countries, restrictive abortion laws oftentimes have their most significant impact on young and poor women.²²

The World Health Organization estimates that in 2003, twenty-million unsafe abortions took place, 98 percent of these in developing countries with restrictive abortion laws.²³ Unsafe abortions have harmful effects on a woman's physical and mental health and are a key contributor to high maternal mortality rates. There are nuanced reasons for the high unsafe abortion rates. Many of the world's women remain subject to incredibly restrictive abortion laws, with several countries – such as Chile, El Salvador, Nicaragua, and the Dominican Republic – providing no exceptions to the imposition of criminal sanctions for abortion.²⁴ In other countries, exceptions are very narrowly drawn so that an abortion is allowed only when necessary to save the woman's life.²⁵

¹⁹ MATERNAL MORTALITY 2005, *supra* note 2, at 1.

²⁰ See WORLD HEALTH ORG. [WHO], BEYOND THE NUMBERS: REVIEWING MATERNAL DEATHS AND COMPLICATIONS TO MAKE PREGNANCY SAFER 1 (2004), *available at* http://www.who.int/making_pregnancy_safer/documents/9241591838/en/index.html. Maternal death is defined as “[t]he death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.” MATERNAL MORTALITY 2005, *supra* note 2, at 4.

²¹ UNSAFE ABORTIONS, *supra* note 5, at 4.

²² See, e.g., MOVIMIENTO AUTONOMO DE MUJERES ET AL., *supra* note 17 (describing the disproportionate impact of Nicaragua's restrictive abortion laws on young and poor women).

²³ UNSAFE ABORTIONS, *supra* note 5, at 1.

²⁴ HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS LAW AND ABORTION IN LATIN AMERICA 1 (July 2005), *available at* <http://www.hrw.org/legacy/backgrounder/wrd/wrd0106>.

²⁵ See UNSAFE ABORTIONS, *supra* note 5, at 2. Countries that only allow an abortion to save the woman's life include Afghanistan, Côte d'Ivoire, Kenya, and Myanmar. See Abortion Laws of the World, Berkman Center for Internet & Society at Harvard University, *available at* <http://cyber.law.harvard.edu/population/abortion/abortionlaws.htm> (last visited May 12, 2010) (providing a list of various countries' abortion laws).

Out of 193 countries evaluated in the year 2001, four countries did not permit an abortion to save the woman's life, seventy-one countries did not allow an abortion to preserve the mother's physical health, and seventy-three countries did not allow an abortion to preserve the mother's mental health.²⁶ Criminal prohibitions on therapeutic abortion services – i.e. services related to the deliberate termination of a pregnancy before a fetus can live independently for health reasons²⁷ – are still being enacted. For example, Nicaragua's Criminal Code was reformed in 2006 so as to impose an absolute ban on therapeutic abortion.²⁸ Since the reform, 2,500 women have gone abroad to obtain a therapeutic abortion, but poor and young women in Nicaragua are often left to bear themselves out in high-risk pregnancies.²⁹ Movimiento Autonomo de Mujeres, a women's organization in Nicaragua, has noted that twelve women have died as a result of the legal reform, but the true number of maternal deaths is likely much higher if one accounts for the sharp rise in young women who have committed suicide while pregnant, or the "indirect" causes of death such as aneurysms and hyperthyroidism.³⁰

Instituting a legal prohibition on abortion impacts women in three ways: 1) they are denied access to life- and/or health-saving safe abortion services; 2) they are denied access to or are detrimentally delayed in access to emergency obstetric care, including care after unsafe abortions; and 3) they often live in fear of seeking medical treatment for obstetric complications, and the doctors often fear treating them.³¹

Providing access to safe abortion services is not just a legal challenge. Even where abortion procedures are *de jure* permissible, many women confront heavily restricted access to these procedures because of a lack of adequate monitoring, regulation, and political will.³² Even where exceptions exist, medical professionals may refuse care out of a

²⁶ UNSAFE ABORTION, *supra* note 5, at 2.

²⁷ See MedlinePlus, Abortion – Surgical, <http://www.nlm.nih.gov/medlineplus/ency/article/002912.htm> (last visited Apr. 5, 2010). See also The Free Dictionary: Abortion, Therapeutic, <http://medical-dictionary.thefreedictionary.com/therapeutic+abortion> (last visited Apr. 5, 2010); HealthLine.com, Abortion, Therapeutic: Definition, <http://www.healthline.com/galecontent/abortion-therapeutic> (last visited Apr. 5, 2010).

²⁸ See, e.g., MOVIMIENTO AUTONOMO DE MUJERES ET AL., *supra* note 17, at i-ii.

²⁹ *Id.* at i.

³⁰ *Id.*

³¹ See, e.g., *id.* at 4 (describing the three-fold detrimental impacts of Nicaragua's criminal prohibition on therapeutic abortions).

³² UNSAFE ABORTION, *supra* note 5, at 2.

fear of personal criminal liability.³³ Further complicating the situation, many women confront social and cultural barriers to receiving safe abortion care. Certain states provide health care workers with a right to “conscientious objection” to performing an abortion.³⁴ Often no alternative medical provider is identified, resulting in reduced chances of receiving a safe abortion.

Importantly, the imposition of a legal or policy prohibition on abortion has not brought an end to the existence of such procedures. When a legal or other barrier exists to abortion procedures, many women turn to clandestine and unsafe abortion procedures, which contribute to the aforementioned high maternal mortality rates.³⁵ They may also suffer physical or mental harm from bringing the fetus to term.³⁶ Consequently, providing access to safe abortion services is a critical part of reversing these harms, meeting the Millennium Development Commitments to maternal health, and elevating women’s reproductive rights to ones that are cognizable and valued.

II. THE CEDAW CONVENTION AND THE CEDAW OPTIONAL PROTOCOL

There is creative space to meet the above stated goals, including the global commitment to maternal health, through the use of international law. Because restricting a woman’s access to a safe abortion infringes upon human rights that are codified and guaranteed on an international level, the restriction must be seen as implicating more than just the State. Many women are all-too-familiar with the limitations of domestic judicial remedies in affirming their rights; hence, international legal mechanisms, though operating at a distance from local realities, become a prime vehicle through which to vindicate rights.³⁷

³³ See *Llantoy Huamán v. Peru*, U.N. Human Rights Comm., ¶¶ 2.3-2.4, U.N. Doc. CCPR/C/85/D/1158/2003 (2005) (presenting a compelling and straightforward case of a young girl with an anencephalic fetus who could not obtain access to a safe abortion and had to carry the fetus to term).

³⁴ See WORLD HEALTH ORG. [WHO], *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 66 (2003) [hereinafter *SAFE ABORTION*].

³⁵ *Id.* at 7 (estimating that 13 percent of all maternal deaths are due to complications of unsafe abortion).

³⁶ *Id.* (discussing the harmful long-term health consequences, including infertility, that may result from an unsafe abortion).

³⁷ Donna Sullivan, *The Optional Protocol to CEDAW & Its Applicability “On the Ground,”* AWID.ORG, Jan. 2004, [http://www.awid.org/eng/Issues-and-Analysis/Library/The-Optional-Protocol-to-CEDAW-its-applicability-on-the-ground/\(language\)/eng-GB](http://www.awid.org/eng/Issues-and-Analysis/Library/The-Optional-Protocol-to-CEDAW-its-applicability-on-the-ground/(language)/eng-GB).

In particular, CEDAW and its corresponding Optional Protocol are uniquely positioned to address the need for safe abortions. This section describes international human rights treaties and their role in promoting women's right to health. It then discusses the history of CEDAW and the CEDAW Optional Protocol. It describes the successes and ongoing challenges of using such forums for vindicating human rights such as the right to health.

A. INTERNATIONAL HUMAN RIGHTS TREATIES AND THE RIGHT TO HEALTH

International human rights treaties provide an important legal framework for understanding and realizing States' commitments to health. These treaties codify a set of human rights that ratifying States endeavor to promote and protect, and by which they agree to be legally bound. International human rights treaties provide a legal and normative framework for States' public health decisions, and they hold governments accountable to an international forum for their choices.³⁸

Human rights and public health actions have complementary goals, as they both aim to promote and protect individual well-being by ensuring the adequate and equitable provision of health care services.³⁹ A human rights approach to public health focuses on each individual woman and her health status and needs. It aims to empower individual women, as well as communities, to act in response to health challenges.⁴⁰

In adopting the Universal Declaration of Human Rights in 1948, the world's nations began a process of codifying and ratifying (agreeing to be legally bound by) human rights. The Universal Declaration of Human Rights stated that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."⁴¹ This Article of the Universal Declaration has principles regarding the right to health that have subsequently been translated into individual international human rights treaties, including CEDAW.

³⁸ WORLD HEALTH ORG. [WHO], WOMEN'S HEALTH AND HUMAN RIGHTS : MONITORING THE IMPLEMENTATION OF CEDAW, 1-2 (2007) [hereinafter WOMEN'S HEALTH AND HUMAN RIGHTS], *available at* http://www.who.int/reproductivehealth/publications/gender_rights/9789241595100/en.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Universal Declaration of Human Rights art. 25, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

Each United Nations (“UN”) treaty has a monitoring system, through which ratifying State actions with respect to the right to health can be reviewed. Where necessary, a State party to the treaty may be prompted to change its laws, policies, and programs in order to fulfill its legal obligations.⁴² Each UN treaty has a treaty monitoring body that is comprised of members who are nominated by the State parties and who act as independent experts.⁴³ The treaty bodies have the following mandates: to monitor government efforts to fulfill the rights guaranteed under the respective international treaty instrument; to clarify and interpret rights outlined in the treaty by issuing General Comments or General Recommendations; and, in certain cases such as with the CEDAW Committee, to consider complaints from individuals or groups who allege that their rights under the treaty have been violated.⁴⁴ While each role of the treaty body is important in order to collectively promote and protect the right to health, this article focuses on the last role – that of considering an individual or group complaint – as a premier and under-utilized method through which to quickly and effectively realize a woman’s right to a safe abortion.

B. THE CEDAW CONVENTION

CEDAW was entered into force in 1981. Under the Convention, States parties express their commitment to eliminate discrimination against women in all its forms and in all spheres of women’s lives.⁴⁵ The

⁴² See WOMEN’S HEALTH AND HUMAN RIGHTS, *supra* note 38, at 1-3.

⁴³ *Id.* at 2-3 (noting that the ICESCR has its treaty body members selected by the United Nations Economic and Social Council).

⁴⁴ *Id.* (observing that certain treaty bodies such as CEDAW also have the authority to initiate inquiries regarding practices that may implicate rights outlined in the treaty).

⁴⁵ See CEDAW Convention, *supra* note 13, art. 2. Ratifying States parties commit to undertake affirmative measures to end discrimination against women, including: “(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.” *Id.*

Convention broadly prohibits any discrimination against women and requires full equality between the sexes, including in the provision of health care. Article 17 of CEDAW establishes a Committee on the Elimination of All Forms of Discrimination against Women, a committee of twenty-three independent experts elected by member states who are mandated with monitoring States' compliance with obligations under the Convention.⁴⁶ The Committee meets twice a year to review States parties' periodic reports under the Convention. As of May 2010, there were 186 States parties to CEDAW.⁴⁷

C. LIMITATIONS OF CEDAW AND OTHER INTERNATIONAL HUMAN RIGHTS TREATIES

The CEDAW Convention, like most international human rights treaties, has been subject to criticism. Critics have pointed to substantive and procedural weaknesses in the treaty that undermine its effectiveness in realizing the rights mentioned therein. This section describes these weaknesses, as articulated by a range of voices from within and outside the UN treaty body system.

First, most international treaties contain substantive provisions and a conceptual basis that may undermine their ability to be effectively implemented by States parties.⁴⁸ To encourage States parties to ratify international treaty instruments (a particular challenge against the historical backdrop of the Cold War), the drafters included broad limitation clauses, through which rights and freedoms can be curtailed or not granted on the basis of national security, public order, morality, and

⁴⁶ *Id.* art. 17. Committee members are nominated via secret ballots. Nominations must comply with CEDAW's requirements of equitable geographic representation and diversity of cultures and legal systems. Each expert serves a four-year term, with half of the committee members being replaced every two years. For a description of the nomination and selection process, see generally WOMEN'S HEALTH AND HUMAN RIGHTS, *supra* note 38, at 11.

⁴⁷ For a list of countries that have signed or ratified the Convention, see United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination Against Women, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited May 13, 2010).

⁴⁸ COMM. ON INT'L HUMAN RIGHTS LAW & PRACTICE, REPORT ON THE UN HUMAN RIGHTS TREATIES: FACING THE IMPLEMENTATION CRISIS (1996), *available at* <http://www.bayefsky.com/reform/ila.php> (discussing the substantive and procedural limitations of international treaties). The International Law Association's Committee replaced the former Committee on the Enforcement of Human Rights Law.

health.⁴⁹ Over time, these limitations clauses have been invoked less frequently, but they still exist.

Further, States parties can limit their obligations under a certain instrument by entering formal reservations – claims to exclude or modify the legal effect of certain provisions in their application to the State.⁵⁰ Notably, there are limitations surrounding the use of reservations. The Human Rights Committee (“HRC”) has emphasized that the reservations cannot undermine the “object or purpose” of a legal instrument, since this would be an inappropriate gesture for a State party to take with respect to a human rights treaty.⁵¹ The “object and purpose” of CEDAW is: 1) to create legally binding standards for women’s civil, political, economic, social, and cultural rights; 2) to establish these rights based on the principles of equality and non-discrimination; and 3) to provide supervisory machinery (in the form of the CEDAW Committee) for the obligations undertaken.⁵² Although States parties may, and often do, use reservations when ratifying CEDAW, their reservations should not undermine this object and purpose.

The CEDAW Committee has expressed concerns regarding the number and extent of reservations to the Convention. States parties have most frequently entered reservations with respect to Article 16, which provides that “States Parties shall take all appropriate measures to

⁴⁹ *Id.* An example of the invocation of such a limitation clause is as follows: during Iran’s 1993 appearance before the Human Rights Committee, a representative from Iran stated, “With reference to the freedoms of opinion and expression . . . Iran conformed strictly to the Covenant, whereby the exercise of those freedoms was subject to certain restrictions necessary ‘for respect of the rights or reputations of others’ and ‘for the protection of national security or of public order . . . or of public health or morals’. . . . The Islamic decrees thus imposed restrictions on the exercise of those freedoms only in the interests of maintaining social cohesion.” *Id.*

⁵⁰ See THE UNITED NATIONS HUMAN RIGHTS TREATIES: HOW TO COMPLAIN ABOUT HUMAN RIGHTS TREATY VIOLATIONS: THE BASIC INTERNATIONAL RULES, http://www.bayefsky.com/complain/4_rules.php (last visited Apr. 12, 2010).

⁵¹ Comm. on the Elimination of Discrimination against Women, *Working Paper: Reservations in the Context of Individual Communications*, U.N. Doc. CEDAW/C/2008/II/WP.2, at 2 (May 20, 2008) (noting that the Human Rights Committee adopted General Comment No. 24 regarding Reservations in 1994). In the General Comment, the Committee noted that the object and purpose of the Covenant is “to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken,” and that although reservations to non-derogable provisions are not necessarily contrary to the object and purpose of the Covenant, a State must justify such a reservation. Some States parties such as France, the U.K., and the U.S.A. have expressed strong negative reactions to General Comment No. 24. *Id.* (referencing the Human Rights Committee General Comment No. 24).

⁵² Int’l Women’s Rights Action Watch Asia Pacific, *The Validity of Reservations and Declarations to CEDAW: The Indian Experience*, IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES NO. 5, 2005, at 3.

eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure [a list of enunciated rights], on a basis of equality of men and women.”⁵³ The CEDAW Committee has noted that reservations may adversely impact women’s realization of substantive equality with men.⁵⁴ The Committee has not yet issued a pronouncement on the legal effect of reservations when it considers individual or group communications.⁵⁵

Second, and perhaps more important than the substantive limitations on a treaty’s application, the UN treaties lack a rigorous enforcement regime.⁵⁶ The procedural design of the treaty body monitoring system is as follows. A State party produces and submits a report on how its laws and policies comply with treaty obligations on a “periodic basis” (every four years in the case of CEDAW). After producing a periodic report, State representatives appear before the treaty body and answer questions in a “constructive dialogue” with treaty body committee members. Finally, the treaty body writes and distributes concluding observations on the State party report and the record of compliance with the legal provisions of the treaty.⁵⁷

The success of this reporting and monitoring process depends upon a range of factors including, namely: whether States meet their periodic reporting obligations and submit adequate reports; whether the treaty body committees have sufficient time to review the reports and question state representatives; whether NGOs and other third-parties submit supplementary information to highlight a State’s successes and/or shortcomings in meeting human rights commitments; the quality of the treaty body committee’s concluding observations; and the ability of the treaty body committee to follow up on inadequate reports or oral responses, and to effect change in States parties that are not compliant

⁵³ *Id.* at 4. In response to the reservations, the Committee has noted that “reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.” *Id.* at 5 (citing Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)*, ¶ 17, U.N. Doc. A/53/38/Rev.1 (1998)).

⁵⁴ *Id.* at 5 (citing Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)*, ¶ 17, U.N. Doc. A/53/38/Rev.1 (1998)).

⁵⁵ *Id.* at 5. “The question of whether the Committee considers that the determination of the permissibility of a reservation falls within its functions in the examination of an individual communication thus remains open.” *Id.*

⁵⁶ COMM. ON INT’L HUMAN RIGHTS LAW & PRACTICE, *supra* note 48.

⁵⁷ *Id.*

with the legal obligations under the treaty.⁵⁸ The process falters at many stages of the process. An estimated 45 – 80 percent of States parties to six UN treaties have overdue reports, with around half of these overdue reports being initial reports to the treaty body.⁵⁹ By January 1, 2000, there were 242 overdue reports to the CEDAW Committee from 165 States parties.⁶⁰ An average of 60 percent of States parties to six UN treaties have five or more overdue periodic reports.⁶¹ Many treaty body committees are confronted with a significant backlog from processing overdue reports. By one estimate, if all the overdue reports were submitted simultaneously to their respective treaty body committees, it would take the treaty bodies around eight years to process the backlog of reports.⁶²

Despite these substantive and procedural criticisms of CEDAW and other international human rights instruments, the treaties have advanced a range of important rights and treaty body committees have been able to elaborate on the content of the right to health through General Comments and Concluding Observations. The CEDAW Committee has issued elucidative General Comments regarding violence against women,⁶³ female circumcision,⁶⁴ women with disabilities,⁶⁵ and the avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (“AIDS”).⁶⁶ And as the periodic reporting process has taken place, certain States parties have amended, added, or removed laws and policies to comply with the Convention. For example, India universalized its

⁵⁸ *Id.*

⁵⁹ *Id.* As it opened its 30th review session, a Secretariat representative for the Committee Against Torture noted that in addition to the seven reports being considered during the session at hand, nineteen other overdue reports had been received – three initial reports, two second periodic reports, nine third periodic reports, and five fourth periodic reports. Press Release, Committee Against Torture Opens Thirtieth Session, U.N. Doc. HR/4655 (Apr. 28, 2003) (noting that the Committee had a total of 159 overdue reports).

⁶⁰ SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE 87 (2006).

⁶¹ COMM. ON INT’L HUMAN RIGHTS LAW & PRACTICE, *supra* note 48.

⁶² *Id.*

⁶³ Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 12*, U.N. Doc. No. A/44/38 (1989); Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 19*, U.N. Doc. No. A/47/38 (1992).

⁶⁴ Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 14*, U.N. Doc. No. A/45/38 (1990).

⁶⁵ Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 18*, U.N. Doc. No. A/46/38 (1991).

⁶⁶ Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation No. 15*, U.N. Doc. No. A/45/38 (1990).

Integrated Child Development Services Program in 1997, after ratifying CEDAW, and girls now represent almost half of preschool children in the country.⁶⁷ CEDAW has also helped advance women's equality in certain States that are parties to the Convention. Since China's ratification of CEDAW, legislation has been enacted that highlights equality between men and women and that guarantees joint ownership of property and equal inheritance.⁶⁸ In the public health arena, Argentina, Australia, and Mexico have created programs that provide indigenous and migrant women with health care services.⁶⁹ With the advent of Optional Protocols, these international human rights treaties hold even greater potential to advance individual rights in an international forum.

D. THE CEDAW OPTIONAL PROTOCOL

CEDAW also has an Optional Protocol (the "CEDAW Optional Protocol"), entered into force in 2000, which establishes procedures for the CEDAW Committee's investigation of individual or group complaints that allege grave or systematic violations of women's rights under the Convention. The primary purpose of the CEDAW Optional Protocol is to improve the enforcement of women's rights.⁷⁰ Notably, the CEDAW Optional Protocol is only available to those States parties that have ratified it. As of April 2010, there were ninety-nine States parties to the CEDAW Optional Protocol.⁷¹

The CEDAW Optional Protocol was adopted largely in response to heavy lobbying by women's human rights activists, who had a keen understanding of the strengths and limitations of international treaties in

⁶⁷ Amnesty Int'l USA, The Treaty and the Rights of Women Worldwide, <http://www.amnestyusa.org/violence-against-women/the-treaty-and-the-rights-of-women-worldwide/page.do?id=1108276> (last visited Apr. 1, 2010).

⁶⁸ *Id.* Another example of CEDAW helping to advance gender equality can be found in Lithuania. NGOs reported that during the prior eight years of CEDAW Committee review of Lithuania, a variety of efforts had been made involving government and non-government actors to help realize *de facto* gender equality and to implement the CEDAW Committee's recommendations. LIUDMILA MECAJEVA, SOC. INNOVATION FUND & AUDRONE KISIELIENE, EUROPEAN INNOVATION CTR., SHADOW REPORT ON THE IMPLEMENTATION OF CEDAW AND WOMEN'S RIGHTS IN LITHUANIA 2 (2008), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LithuaniaShadowReport41.pdf>.

⁶⁹ Amnesty Int'l USA, *supra* note 67.

⁷⁰ See Bal Sokhi-Bulley, *The Optional Protocol to CEDAW: First Steps*, 6 HUM. RTS. L. REV. 143, 143 (2006).

⁷¹ For a list of countries that have signed or ratified the Optional Protocol, see U.N. Treaty Collection, *supra* note 47.

securing rights.⁷² Activists recognized that many ratifying States had failed to enact national laws protecting rights guaranteed in the Covenant, and similarly had failed to adequately implement their own available domestic legal protections.⁷³

Further, the existing procedures for promoting the implementation of CEDAW at the national level – namely, the periodic reporting process of States parties and the CEDAW Committee’s issuance of General Recommendations explaining the Convention – were inadequate since they failed to create accountability and to explicate States parties’ obligations in individual circumstances.

As a result, starting at the 1993 World Conference on Human Rights, activists campaigned for a CEDAW Optional Protocol that would provide women and groups with the opportunity to seek remedies at an international level when domestic remedies were inadequate or otherwise not available.⁷⁴ By reviewing individual or group complaints in an international forum, the CEDAW Committee could provide justice in an individual case where rights had been violated and also create powerful incentives for other governments to follow CEDAW in order to avoid international censure.⁷⁵ The legal precedents established under such an Optional Protocol could also help elucidate how human rights protect individuals in a specific real-world context, and how the rights codified in the Convention are tangible and able to be realized for individual persons.⁷⁶

E. SUCCESSES AND REMAINING CHALLENGES UNDER THE CEDAW OPTIONAL PROTOCOL

By many accounts, the CEDAW Optional Protocol plays an essential and integral role in advancing women’s human rights.⁷⁷ When the Optional Protocol first opened for signature, senior officials noted that “in addition to providing an international remedy for violations of women’s rights, the Optional Protocol will act as an incentive for Governments to take a fresh look at the means of redress that are

⁷² See Sullivan, *supra* note 37 (providing a general discussion of the history of the Optional Protocol and the campaigning efforts surrounding its enactment).

⁷³ *Id.*

⁷⁴ *Id.* With the ongoing assistance of women’s human rights activists, the Optional Protocol was drafted and entered into force in less than five years. *Id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ See Sokhi-Bulley, *supra* note 70, at 157.

currently available to women at the domestic level.”⁷⁸ The CEDAW Optional Protocol, while largely underutilized, has had several notable successes in its early years. The CEDAW Committee’s first Optional Protocol decision on the merits, *A.T. v. Hungary*, addressed the issue of domestic violence with sensitivity and rigor; and it bolstered a growing global movement to raise awareness of domestic violence, cease its occurrence, and assist victims.⁷⁹ The Committee has used the “inquiry procedure” under Article 8 of the Optional Protocol⁸⁰ to bring to light a pattern of abductions, murders, and rapes of young women and girls in the *maquiladora* manufacturing companies in Mexico and to demand government action to stop the violation of these women’s rights.⁸¹

As with international human rights treaties, concerns remain regarding the effectiveness and adequacy of the Optional Protocol. Experience with similar communications procedures under other UN treaties has revealed substantive and procedural weaknesses with Optional Protocols. States parties to CEDAW must separately ratify the CEDAW Optional Protocol, and if they do not, they can avoid the Committee’s jurisdiction over individual or group communications and formal inquiries.⁸² Also, the process of ruling on the merits can be quite lengthy, with the Committee taking over one year to rule on the merits in *A.T. v. Hungary* whilst the author of the communication continued to suffer threats to her life from her abusive spouse.⁸³ In this same communication, it took the Committee almost one year to ensure that the author received interim measures of protection from her abusive husband, in accordance with Article 5 of the CEDAW Optional Protocol.⁸⁴

There are also enforcement and participation challenges to the effectiveness and adequacy of the Optional Protocol. When the CEDAW

⁷⁸ U.N. Div. for the Advancement of Women, *Joint Statement by the Special Adviser on Gender Issues and Advancement of Women, Ms. Angela E.V. King, and the High Commissioner for Human Rights, Mrs. Mary Robinson, on the Occasion of the Opening for Signature of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 10, 1999, <http://www.un.org/womenwatch/daw/news/akop.htm> (last visited Apr. 1, 2010).

⁷⁹ See Sokhi-Bulley, *supra* note 70, at 152.

⁸⁰ The inquiry procedure allows the Committee to initiate its own inquiries into “grave or systematic” violations of women’s rights. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, art. 8, U.N. Doc. A/Res/54/4 (Oct. 6, 1999) [hereinafter CEDAW Optional Protocol].

⁸¹ See Sokhi-Bulley, *supra* note 70, at 152-53.

⁸² See *id.* at 157.

⁸³ See *A.T. v. Hungary*, U.N. Doc. CEDAW/C/32/D/2/2003 (2005).

⁸⁴ See *id.* ¶¶ 4.1-4.8.

Committee does finally rule on the merits of a communication, it lacks concrete means of enforcing its judgment.⁸⁵ Further, activists seeking to use the Optional Protocol must ensure that the individuals whose rights have been violated are paramount and that these individuals are empowered to participate in the process.⁸⁶ The aforementioned weaknesses, no doubt, are noteworthy.

Significantly, these weaknesses are not unique in the CEDAW Optional Protocol context; rather, they are inherent to all international human rights treaties' Optional Protocols where they exist. Lack of enforceability is a concern that resonates across the landscape of international human rights treaties.⁸⁷ Yet, the penalties for non-compliance may be great for nations keenly interested in serving as leaders in the international community. The role of international pressure and "shame" in encouraging compliance should not be underestimated.

This article maintains that Optional Protocols play an integral role in promoting and protecting human rights. They do so by helping to develop jurisprudence regarding the content of rights, and by providing persons with an international legal forum in which to vindicate rights. The article embraces the possibility of an individual complaint under the CEDAW Optional Protocol as a heretofore unutilized, and yet potentially fruitful, forum for providing women with critically needed safe abortion services and thereby advancing women's human rights.

III. THE RIGHT TO SAFE ABORTION SERVICES UNDER CEDAW

The CEDAW Committee is in a ripe position to advance women's right to safe abortion services given that it has already articulated – implicitly, if not explicitly – a right to safe abortion services. Although the CEDAW Convention only requires access to "family planning" services⁸⁸ and does not expressly guarantee safe abortion care, the CEDAW Committee addresses abortion in General Recommendation 24 regarding "Women and Health" and in many concluding observations to States parties. The CEDAW Committee's commentary suggests that denying access to an abortion, at least under

⁸⁵ See Sokhi-Bulley, *supra* note 70, at 157.

⁸⁶ Sullivan, *supra* note 37.

⁸⁷ See Sokhi-Bulley, *supra* note 70, at 158; Heidi Gilchrist, Note, *The Optional Protocol to the Women's Convention: An Argument for Ratification*, 39 COLUM. J. TRANSNAT'L L. 763 (2001).

⁸⁸ CEDAW Convention, *supra* note 13, art. 14.

life-threatening circumstances, violates a woman's rights to life, health, and non-discrimination.

In General Recommendation 24, the CEDAW Committee notes that States parties have the duty to "respect, protect and fulfill women's rights to health care."⁸⁹ The Committee expressly requires that impediments to life-saving health services (such as excessive fees, spousal authorization requirements, or punitive provisions imposed upon women who undergo an abortion procedure) must be removed.⁹⁰ The Recommendation notes that "it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."⁹¹

In its concluding observations to States parties, the CEDAW Committee has consistently criticized restrictive abortion laws, viewing these laws as violations of the rights to life and health guaranteed under the Convention.⁹² When addressing the Mexican government, it "recommend[ed] that the Government consider the advisability of revising the legislation criminalizing abortion."⁹³ The CEDAW Committee has expressed continued concern about maternal mortality as a result of unsafe abortion procedures, framing the issue as a violation of a woman's right to life.⁹⁴ It has commented that the lack of access to safe and legal abortions tends to coincide with high rates of maternal mortality by restricting women to only unsafe procedures.⁹⁵

⁸⁹ U.N. Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women, Twentieth Session (19 January – 5 February, 1999), Twenty-first Session (7-25 June, 1999)*, Part One, ¶ 13, U.N. Doc. No. A/54/38/Rev.1 (1999) [hereinafter *CEDAW Report 1999*].

⁹⁰ *Id.* at Part One, ¶ 14.

⁹¹ *Id.* at Part One, ¶ 11.

⁹² These States parties include Chile, Colombia, Mexico, and the Dominican Republic. *See, e.g., id.* at Part Two, ¶ 228; *id.* at Part One, ¶ 393; U.N. Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)*, Part One, ¶ 354-427 (1998) [hereinafter *CEDAW Report 1998*]; *id.* at Part One, ¶ 337. *See also* CTR. FOR REPROD. LAW & POLICY & UNIV. OF TORONTO INT'L PROGRAMME ON REPROD. & SEXUAL HEALTH LAW, *BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS* 145-47 (2002) [hereinafter *BRINGING RIGHTS TO BEAR*].

⁹³ *CEDAW Report 1998, supra* note 92, ¶ 408. *See also* *BRINGING RIGHTS TO BEAR, supra* note 92, at 145-47.

⁹⁴ *See, e.g., CEDAW Report 1998, supra* note 92, at Part One, ¶ 337; *CEDAW Report 1999, supra* note 89, at Part One, ¶ 393. *See also* *BRINGING RIGHTS TO BEAR, supra* note 92, at 145-47.

⁹⁵ *See, e.g., U.N. Comm. on the Elimination of Discrimination against Women, Report of the Committee on the Elimination of Discrimination against Women (Fourteenth Session)*, ¶ 616, U.N. Doc. A/50/38 (1995) [hereinafter *CEDAW Report 1995*]; *CEDAW Report 1999, supra* note 89, at Part Two, ¶¶ 209, 228; *id.* at Part One, ¶ 207; U.N. Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination against Women*

The CEDAW Committee has also suggested that moral or personal objections to abortion should not be allowed to curtail women's protected reproductive rights under the Convention. For example, in its Concluding Observations to Croatia, the Committee explicitly considered the country's allowance of physicians' "conscientious objection" to abortion to be an "infringement of women's reproductive rights."⁹⁶ The CEDAW Committee strongly recommended that "the Government take steps to secure the enjoyment by women of their reproductive rights by, *inter alia*, guaranteeing them access to abortion services in public hospitals."⁹⁷ The World Health Organization has adopted a similar recommended "norm and standard" under which health professionals who conscientiously object are required to refer women to skilled colleagues who are not, in principle, opposed to the termination of a pregnancy allowed by the law.⁹⁸

IV. VINDICATING A WOMAN'S RIGHTS UNDER THE CONVENTION

Given the CEDAW Committee's affirmation of the need for access to a safe abortion, how precisely can a woman vindicate her rights when she is denied such access? This section investigates how she may utilize the CEDAW Optional Protocol to affirm her rights and obtain access to safe abortion care. A successful communication under the CEDAW Optional Protocol must be sensitive to three doctrinal areas: the state action concern, the historical affirmation of civil-political rights over social and economic rights, and the role of international law in remedying *ongoing* - and potentially *imminent* - rights violations. In fact, each of these legal constraints has been moderated in recent years, providing ample room for a successful claim against denial of access to safe abortion care.

(*Twenty-Third Session*), ¶ 158, U.N. Doc. A/55/38 (2000) [hereinafter *CEDAW Report 2000*].
See also *BRINGING RIGHTS TO BEAR*, *supra* note 92, at 146.

⁹⁶ See, e.g., *CEDAW Report 1998*, *supra* note 92, at Part One, ¶ 109.

⁹⁷ *Id.* at Part One, ¶ 117.

⁹⁸ *SAFE ABORTION*, *supra* note 34, at 66.

**A. A POSITIVE OBLIGATION TO ENSURE SAFE ABORTION:
REFRAMING THE STATE ACTOR ISSUE**

The role of international legal forums in remedying health-related rights violations – including those that transpire when a woman is denied an abortion – is still being articulated. International treaty bodies and tribunals have been increasingly willing to tackle systemic, grave violations of rights occurring via State actors.⁹⁹ Human rights jurisprudence has been stymied by the state action doctrine, under which one focuses on harms expressly committed by the government and its agents. Yet, many obstacles to safe abortion are imposed by private actors.

Women should be able to vindicate their rights against a State party to CEDAW irrespective of whether the actual violation occurs in the hands of a state or a non-state actor. When the State party fails to protect a woman from rights violations at the hands of a non-state actor, it can and should be held accountable. In other words, whether the violation takes place because of a *de jure* restriction on abortion, or because the state fails to intervene and provide a viable alternative in instances such as “conscientious objection” to protect a woman’s rights, should not be of consequence. Under the rationale expressed in *A.T. v. Hungary*, the State party has a positive obligation to take action to eliminate restraints on a woman’s exercise of her human rights.¹⁰⁰ In that case, the CEDAW Committee addressed domestic violence as a wider, societal problem for which the State party has a positive obligation irrespective of whether non-state actors conduct the physical violence.¹⁰¹ Similarly, the CEDAW Committee played a key role in the investigation into the disappearances of women in Chihuahua, Mexico despite the fact

⁹⁹ More recently, the European Court of Human Rights in Strasbourg is currently reviewing Ireland’s restrictive abortion laws, with the government of Ireland arguing that the state has the sovereign right to protect the life of the unborn child. *Ireland’s Abortion Law Challenged in European Court*, BBC NEWS, Dec. 9, 2009, <http://news.bbc.co.uk/2/hi/europe/8403013.stm>. See generally *Prosecutor v. Milosevic*, Case No. ICTY-02-54-T (2004) (case information sheet available at http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (1998) (sentencing transcript available at <http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cak81002e.pdf>).

¹⁰⁰ *A.T. v. Hungary*, U.N. Doc. CEDAW/C/32/D/2/2003 (2005) (regarding domestic violence against women).

¹⁰¹ See *id.*

that no state actor had been linked to the disappearances.¹⁰² The CEDAW Committee found that although the Mexican government was not directly implicated in the disappearances, its poor due diligence into women's disappearances constituted a violation of its commitments under CEDAW.¹⁰³ The state has an obligation and a duty to protect and fulfill its citizens' rights, and under CEDAW, the government can still be held accountable for inadequately addressing infringements of those rights at the hands of non-state actors.

By analogy, even if a State party had legally permissible abortions, it could be held responsible under CEDAW for a failure to investigate the actions of private parties who were preventing women from being able to obtain an abortion to preserve their physical or mental health. The pattern of restrictive behaviors by private actors that infringe upon women's rights would be a societal concern for which the State party is accountable.

B. AFFIRMING SOCIAL AND ECONOMIC RIGHTS: RIGHTS AS INTERCONNECTED

Some have criticized the human rights movement as being too narrow in that it is predicated upon a distinct public-private line that maps onto an affirmation of civil and political rights at the expense of social and economic rights. Professor David Kennedy has written:

Whether progressive efforts to challenge economic arrangements are weakened by the overwhelming strength of the "right to property" in the human rights vocabulary, or by the channeling of emancipatory energy and imagination into the modes of institutional and rhetorical interaction that are described as "public," the imbalance between civil/political and social/economic rights is neither an accident of politics nor a matter that could be remedied by more intensive commitment. It is structural, to the philosophy of human rights, to the conditions of political possibility that make human rights an emancipatory strategy in the first place, to the institutional character of the movement.¹⁰⁴

¹⁰² See Comm. on the Elimination of Discrimination Against Women [CEDAW], *Report on Mexico Produced by the CEDAW Under Article 8 of the Optional Protocol*, 14-17, CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005) [hereinafter *Report on Mexico*].

¹⁰³ *Id.*

¹⁰⁴ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 11 (2004).

As Kennedy observes, there has been a marked historic imbalance between recognition and affirmation of civil-political rights, as compared with socio-economic rights. Yet, this rigid course is challenging. There has been a disintegration of the public-private boundary that traditionally moored human rights jurisprudence to the narrow landscape of civil/political rights. The CEDAW Committee's evaluation of the issue of domestic violence – long considered a “private” issue – in *A.T. v. Hungary* is representative of a step towards achieving this goal.

Today's international legal forums – and in particular the CEDAW Committee under the Optional Protocol – are in a ripe position to expand their focus to address other cross-cutting rights violations such as those suffered when a woman is denied a safe abortion. As the CEDAW Committee has explained, restrictive abortion laws violate the right to health. And the right to health, typically classified as a social and economic right, must be considered in light of its interrelationship with other human rights; it is impossible to disentangle it from rights to non-discrimination, life, privacy, and many others. Once abortion is seen as interconnected to the realization of this broad range of rights, it becomes clear that one cannot choose to ignore socio-economic or “private” issues. It also becomes clear that “women affected by maternal mortality possess an inherent dignity that makes their preventable deaths a disgraceful social injustice.”¹⁰⁵

C. MOVING TOWARDS CONTEMPORANEOUS REVIEW OF RIGHTS CLAIMS

International forums advancing human rights have often been relegated to an *ex post* role, affirming rights under international conventions only *after* these rights have been summarily violated and only when no adequate domestic recourse is available. Under this approach, the author of a communication must exhaust domestic legal avenues, and only later look to international legal forums to provide recovery. Such a process could take years, during which time the political or civil context could change dramatically. This protracted timeline – and delayed intervention of international law – is unworkable in the context of a time-circumscribed situation, such as when a woman urgently needs safe abortion care. International legal forums cannot wait

¹⁰⁵ Yamin & Maine, *supra* note 1, at 564.

for a woman to be denied her right to life, by being left to unsafe abortion procedures or maternal death during pregnancy or delivery, before vindicating her rights.

Fortunately, the landscape appears to be changing, with certain international treaty bodies possessing increased ability to intervene to stop *ongoing* rights violations and grant protection to petitioners while a matter is being reviewed or adjudicated. As Section V(A) will discuss, the requirements for exhaustion of domestic remedies have been redefined and relaxed, and interim measures of protection can be made available while a case is being considered. CEDAW's Optional Protocol is a promising quasi-judicial forum for the investigation of alleged rights violations as they take place, and perhaps also when these rights violations are imminent.¹⁰⁶

V. PROVIDING FOR SAFE ABORTION SERVICES UNDER CEDAW'S OPTIONAL PROTOCOL

The following sections argue that the Optional Protocol is well-suited to address the need for access to safe abortion services and may aptly do so through: 1) applying an exception to the exhaustion of domestic remedies requirement under CEDAW Article 4; and 2) extending to a woman special interim measures of protection under CEDAW Article 5 – potentially including the life-protecting care a woman needs – while her communication is being considered.

In interpreting these two procedural mechanisms, this paper draws on the work of the Human Rights Committee (“HRC”) in implementing the International Covenant on Civil and Political Rights (“ICCPR”) Optional Protocol, a precursor to the CEDAW Optional Protocol. When CEDAW's Optional Protocol was first entered into force, Angela King, Special Adviser on Gender Issues and the Advancement of Women stated:

I am sure that all [CEDAW] members ... will study very carefully the practice so skillfully developed by this Committee in the application of the first Optional Protocol. Your case law and practice will serve to guide the CEDAW Committee as it develops its own approaches to providing relief in individual cases of violations of rights protected by the Women's Convention, and builds on the existing jurisprudence

¹⁰⁶ For example, in the Chihuahua, Mexico investigation, the CEDAW Committee demonstrated its ability to facilitate an investigation into the ongoing disappearances of women. *See Report on Mexico*, *supra* note 102, at 14-17.

that brings concrete meaning to the international norm of gender equality to which your Committee has contributed so much.¹⁰⁷

The practice of the HRC in implementing its Optional Protocol is instructive to the task at hand. As the following discussion will reveal, the jurisprudence and practice that have evolved under the ICCPR Optional Protocol can be extended to the situation at hand, namely the bringing of an urgent matter before the CEDAW Committee regarding the need for safe abortion services in a high risk pregnancy. Individuals in similarly urgent situations before the HRC have had their communications deemed admissible even when domestic remedies had not been fully exhausted. They have had interim measures applied to guard them from harm or injury while their communications were being considered.

A. THE EXHAUSTION OF DOMESTIC REMEDIES REQUIREMENT

First, it is important to evaluate the requirement that a party exhaust domestic remedies before being able to avail herself of review under the Optional Protocol. Unless an exception can be invoked to this general rule, a communication to the treaty body will likely be deemed inadmissible. The following discussion will demonstrate that under CEDAW's limited jurisprudence on exhaustion, and HRC's more expansive jurisprudence on the subject matter, the treaty body committees have suggested that the exhaustion of domestic remedies requirement is not intended to be overly stringent. The instance of a denied, yet necessary, abortion has several similarities to cases that have been ruled admissible despite State party defenses of non-exhaustion of domestic remedies. These similarities include time-urgency, practical impediments, and the unlikelihood of effective relief for the alleged rights violation.

The CEDAW Committee has had limited opportunities to comment on the exhaustion requirement. However, in the case of *B.J. v. Germany* regarding the harmful financial consequences the author B.J. suffered after an unwanted divorce, the dissenting opinion advocated a more flexible and context-dependent approach to determining admissibility. The dissent suggested applying an "unreasonable

¹⁰⁷ Angela King, Special Adviser on Gender Issues and Advancement of Women, Statement to the Human Rights Committee (Mar. 28, 2000), *available at* <http://www.un.org/womenwatch/daw/news/akhr.html>.

prolongation” exception to the rule that all domestic remedies must be exhausted.¹⁰⁸ Under this rule, domestic remedies must be exhausted *unless* the application of domestic remedies is unreasonably prolonged; they also need not be exhausted if domestic remedies are unlikely to bring effective relief.¹⁰⁹ The dissent explained that, although the five years of proceedings in which B.J. had been involved may not fall within the unreasonable prolongation exception in some cases, the outcome was different in a case where, as here, the subject matter of the proceedings was “basically the determination and granting of the financial/material sources of the survival of the author.”¹¹⁰

The CEDAW Committee’s flexible interpretation of the exhaustion requirement, measuring the time that has passed against the nature of rights being vindicated, should be employed when assessing a woman’s petition to be granted an abortion to preserve her rights to life, health, and non-discrimination. The adjudication of whether a woman should be granted such an abortion presents issues analogous to, and potentially more urgent than, those in *B.J. v. Germany* regarding the author’s financial and material sources of survival. Indeed, the abortion question implicates a woman’s *physical* and *mental* survival. When a woman is denied an abortion that is needed in order to preserve her physical or mental health, she must make a difficult decision: should she have a potentially-unsafe abortion procedure or should she attempt to deliver the child despite potential health complications or death that may ensue? Moreover, she must make this decision within a very short time-frame, often within just a few months of conception. If she wants to appeal the decision denying her an abortion, whether by contesting a legal prohibition on the procedure or attempting to rebuff the “conscientious objection” of a health care provider, she must also do so within a matter of months. In such a compressed time, the application of domestic remedies is unreasonably prolonged, as well as unlikely to bring effective relief, and should not preclude the Committee’s consideration of the communication.

The HRC’s jurisprudence on the exhaustion requirement is extensive and suggests that a communication contesting the denial of a necessary abortion should fall within an exception to the exhaustion of

¹⁰⁸ See *B.J. v Germany*, CEDAW Admissibility Decision, Communication No. 1/2003, U.N. Doc. A/59/38 (2004).

¹⁰⁹ *Id.* See also Sokhi-Bulley, *supra* note 70, at 145-46.

¹¹⁰ *B.J. v Germany*, CEDAW Admissibility Decision, Communication No. 1/2003, U.N. Doc. A/59/38 (2004).

domestic remedies requirement. The HRC in *Llantoy Huamán v. Peru* deemed a complaint filed by a minor, who was denied an abortion in a high-risk pregnancy, admissible on the grounds that “in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period.”¹¹¹ Notably, the author filed her complaint after suffering considerable harm from bringing the ill fetus to term; hence, the case did not address the instance of a complaint raised during the months when a safe abortion could have been granted.¹¹² However, the distinction between realized versus imminent harm should not preclude application of the same exceptions to the exhaustion requirement. It would undermine the Convention’s authority if a woman were required to suffer serious harm, or even death, before being able to vindicate her rights.

In other cases, the HRC has explicated that “domestic remedies must not only be *available* but also *effective*.”¹¹³ Practical impediments can make a remedy unavailable. For example, in a review of cases regarding the Jamaican State party, the HRC found that the filing of a motion in Jamaica’s Constitutional Court was not available to the indigent petitioners since they were not afforded legal counsel to help them avail themselves of a constitutional motion.¹¹⁴ With respect to legal counsel, the HRC has suggested that such counsel need not only be available, but it must also be adequate. In a communication brought against Uruguay, a petitioner was provided with court-appointed military defense counsel that failed to invoke the additional remedies that the State party argued needed to be pursued.¹¹⁵ The HRC still deemed the

¹¹¹ *Llantoy Huamán v. Peru*, ¶ 5.2, U.N. Doc. CCPR/C/85/D/1158/2003 (2005) (initial submission Nov. 13, 2002).

¹¹² *Id.* at ¶ 2.6 (stating that on January 13, 2002, the author gave birth to an anencephalic child who survived for four days).

¹¹³ *Arhuaco v. Colombia*, ¶ 5.3, U.N. Doc. CCPR/C/56/D/612/1995 (1996) (emphasis added).

¹¹⁴ TOM ZWART, *THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS: THE CASE LAW OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE* 189 (1994) (referring to the HRC communications with Jamaica, some of which are referenced in this note). *See, e.g.*, *Reid v. Jamaica*, ¶¶ 10.3-.5, U.N. Doc. CCPR/C/39/D/250/1987 (1990) (emphasis added); *Sawyers & Desmond v. Jamaica*, U.N. Doc. CCPR/C/41/D/226/1987 (1991); *Sawyers v. Jamaica*, ¶ 10.3, U.N. Doc. CCPR/C/41/D/256/1987 (1991); *Ellis v. Jamaica*, ¶ 9.2, U.N. Doc. CCPR/C/45/D/276/1988 (1992); *Hibbert v. Jamaica*, ¶ 6.2, U.N. Doc. CCPR/C/45/D/293/1988 (1992); *Wright v. Jamaica*, ¶ 3.6, U.N. Doc. CCPR/C/45/D/349/1989 (1992); *Gordon v. Jamaica*, ¶ 3.9, U.N. Doc. CCPR/C/46/D/237/1987 (1992).

¹¹⁵ ZWART, *supra* note 114, at 191; *Cubas v. Uruguay*, ¶ 6.1, U.N. Doc. CCPR/C/OP/1 (1985).

communication admissible on the grounds that the legal counsel was not adequate, and hence the pointed-to remedies were not “available” under the Optional Protocol definition.¹¹⁶

The HRC has also suggested that in order for a remedy to be effective, it must be capable of redressing the complaint, provided within a reasonable time of the incident, and not surrounded by tenuous and time-urgent circumstances. In *Llantoy Huáman v. Peru*, the logic was revealed that “a remedy which had no chance of being successful could not count as such and did not need to be exhausted.”¹¹⁷ In that case, the HRC focused on time urgency and, hence, the need for speed and efficiency in a judicial remedy. The lack of speed and efficiency, as is often characteristic of state forums, demands that international legal forums be made readily available. In another case where time-urgency resulted in a petitioner having no opportunity to avail himself of certain remedies, the HRC found a communication admissible. A communication was brought against Madagascar after the petitioner had been expelled from the country on 24-hours’ notice and escorted to the airport by soldiers armed with weapons.¹¹⁸ The HRC ruled that in light of the petitioner’s expulsion the potential remedy of an appeal was ineffective.¹¹⁹

Applying the HRC’s legal doctrine to the rights violations a woman confronts when she is denied an abortion to preserve her physical or mental health, the domestic remedies will often be neither “available” nor “effective.” They may not be available not only because of legal limitations, but also since she may lack adequate legal counsel, and financial and other resources, to avail herself of the remedies. If States cannot provide such resources to use domestic avenues of appeal, then the remedies are in essence unavailable. Also, the domestic remedies may not be effective if there is a lengthy legal appeals process that is drawn out, oftentimes for years. During this period of time, a woman’s rights – including her right to life – may have been violated.

B. THE AVAILABILITY OF INTERIM MEASURES OF PROTECTION

Jurisprudential developments under the Optional Protocols to the ICCPR and CEDAW have expanded the scope and authority of interim

¹¹⁶ ZWART, *supra* note 114, at 191.

¹¹⁷ *Llantoy Huáman v. Peru*, ¶ 5.2, U.N. Doc. CCPR/C/85/D/1158/2003 (2005).

¹¹⁸ *Hammel v. Madagascar*, ¶¶ 2.4, 19.2, U.N. Doc. Supp. No. 40 (A/42/40) (1987).

¹¹⁹ *Id.*

measures of protection available under the treaties. While the HRC did not consider Llantoy Huamán's case *before* she had suffered harm from denial of access to a safe abortion, if it had considered her case before she was forced to carry her child to term, then it could have ordered a special interim measure to afford her the safe abortion care she urgently needed.¹²⁰ The following section argues that under the CEDAW Optional Protocol, such interim measures should be afforded to women who risk injury or suffering due to a state's restriction of access to a safe abortion.

Under the rules of procedure that guide the treaty bodies under the ICCPR and CEDAW, communication authors may be afforded special interim measures to protect their rights when urgent human rights violations are perceived to be taking place.¹²¹ Interim measures under rule 86 of the ICCPR Committee rules, or under Article 5 of CEDAW's Optional Protocol, are an essential part of the Committee's role under the Optional Protocol.¹²² Allowing an irreversible measure – such as an execution or loss of life – to transpire while a case is pending would undermine the ability of the Optional Protocol to protect rights under the Covenant.¹²³

Under this logic, by refusing a woman palliative care when she risks imminent physical or mental harm from delivery or an unsafe abortion, the Committee would undermine the ability of the Optional Protocol to protect women's human rights. The interim measures ordered could potentially extend to granting a woman the medical intervention that she needs – i.e. a safe abortion – since, in granting this, the treaty body would be fulfilling the spirit of the commitment made in Article 5 to protect a person from urgent human rights violations or irreparable damage while her communication is being considered. Notably, in so doing, the Committee would not be ruling on the merits of the communication, as a ruling on the merits would take place at a later stage and would involve an assessment of Committee jurisprudence regarding States parties' obligation to provide safe abortion services.¹²⁴

¹²⁰ See *Llantoy Huamán v. Peru*, ¶ 5.2, U.N. Doc. CCPR/C/85/D/1158/2003 (2005).

¹²¹ U.N. Human Rights Council, *Rules of Procedure of the Human Rights Council*, Rule 86, U.N. Doc. CCPR/C/3/Rev.3 (1994); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, art. 5(1), U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

¹²² See Gino Naldi, *Interim Measures in the UN Human Rights Committee*, 53 INT'L & COMP. L.Q. 445, 445-49 (2004).

¹²³ See *id.* at 448.

¹²⁴ See *supra* Section II for an explication of how the Committee has heretofore articulated such an obligation.

If such an interim measure were ordered, its authority would be quite strong. Recent case law from the HRC has bolstered the authority of interim measures ordered by the treaty body committee. “As a matter of law, interim measures requested by the Committee, based as they are on procedural rules, have traditionally been considered to be hortatory and therefore non-binding. It nevertheless appears that compliance with such requests has been generally good.”¹²⁵

Recent case law under the ICCPR Optional Protocol suggests a stronger protective scope and seemingly binding nature of interim measures.¹²⁶ The failure of a State party to comply with treaty body interim protective measure requests has resulted in the HRC finding that the State party has seriously breached its obligations under the Optional Protocol. In *Piandiong et al. v. The Philippines*, the complainants had been sentenced to death after being convicted of robbery with homicide.¹²⁷ The HRC requested that the State party stay the execution under the interim relief rule, but the State party nonetheless proceeded with the execution. The HRC expressed grave concerns with the non-compliance with its request. It stated:

By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant... It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views...[A] State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.¹²⁸

The Committee’s stern condemnation of the unilateral action taken by the Philippines seems to have elevated the status of the special interim measures from merely hortatory to seemingly mandatory. States

¹²⁵ Naldi, *supra* note 122 (referring to academics who describe interim measures as possessing “a moral force”).

¹²⁶ *See id.*

¹²⁷ *Piandiong et al v. The Philippines*, U.N. Doc. CCPR/C/70/D/869/1999 (2000).

¹²⁸ U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶¶ 5.1-4, U.N. Doc. CCPR/C/PHL/2002/2 (2002) (referring to the International Covenant on Civil and Political Rights) (emphasis added); *see also* Naldi, *supra* note 122, at 447.

parties must adhere to special interim measures when failing to do so would preclude the Committee from fully considering and examining a communication before it.

It is noteworthy that the CEDAW Committee has also suggested that it will use interim measures under CEDAW Article 5 to protect an author's rights while her communication is being considered. In *A.T. v. Hungary*, the Committee requested that the State party "provide immediate, appropriate and concrete, preventive interim measures of protection to the author, as may be necessary to avoid irreparable damage to her."¹²⁹ In a similar manner, a woman facing imminent and "irreparable damage" – through an unsafe abortion, delivery complications in a high-risk pregnancy, or through attendant mental harm from the lack of a safe abortion alternative – should be afforded "immediate, appropriate and concrete preventive interim measures."¹³⁰

What types of interim measures should be made available when a woman has been restricted from obtaining a safe abortion? The CEDAW Committee has emphasized that both *physical* and *mental* harm are justiciable and remediable under the Convention. Indeed, the CEDAW Committee ordered that A.T. "receive[] reparation proportionate to the *physical and mental harm* undergone and to the gravity of the violation of her rights."¹³¹ Hence, in designing an interim measure to protect a woman's rights while her communication is being considered, both her physical and mental integrity should be considered. This means that the treaty body should consider not only a woman's physical health, but importantly also her mental well-being by ensuring her rights to autonomy and self-determination.

Also, the scope of preventive interim measures need not be limited to those provided for by state law. In *A.T. v. Hungary*, where no restraining order or adequate protection had been provided to A.T., the CEDAW Committee did not expressly limit the scope of protection to be afforded based upon the limitations in place under Hungarian law. Instead, it ordered such measures as are "necessary to avoid irreparable damage."¹³² The lack of a law or policy allowing safe abortions need not be dispositive under Article 5's broad, preventive, and protective scope.

¹²⁹ *A.T. v. Hungary*, ¶ 4.2, U.N. Doc. CEDAW/C/32/D/2/2003 (2005). The interim request was made ten days after the author submitted the communication to the CEDAW Committee.

¹³⁰ *Id.* ¶¶ 4.1-4.2.

¹³¹ *Id.* ¶ 9.6 (emphasis added).

¹³² *Id.* ¶ 4.2.

C. AN EXAMPLE COMMUNICATION UNDER THE CEDAW OPTIONAL PROTOCOL

The following hypothetical communication could be brought before the CEDAW Committee regarding a woman's petition for a safe abortion during a high-risk pregnancy. Hypothetical Author ("H.A.") is a citizen of State B, a State party to the CEDAW Convention and to the CEDAW Optional Protocol. H.A. suffers from an ectopic pregnancy, a pregnancy in which a fertilized egg is planted outside a woman's uterus or womb.¹³³ One ectopic pregnancy occurs in every forty to one hundred pregnancies.¹³⁴ An ectopic pregnancy cannot be brought to term; the developing cells must be removed in order to save the mother's life.¹³⁵ The medical condition requires emergency obstetric intervention and carries attendant risks of internal bleeding, leading to shock and potentially loss of life.¹³⁶ State B has an operative legal framework that criminalizes all abortion participants, including doctors who provide abortions and women who seek them. H.A. files an individual communication under the CEDAW Optional Protocol alleging that State B has violated rights guaranteed under the CEDAW Convention by criminalizing and prohibiting safe abortion services. H.A. specifies that State B has violated a range of rights provided for in the Convention, including her rights to: non-discrimination (Article 2); equality (Article 3); "non-subjugation to prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (Article 5(a)); "adequate family education" (Article 5(b)); "non-discrimination in the field of health care and provision of 'appropriate services in connection with pregnancy, confinement and the post-natal period'" (Article 12); "non-discrimination against women in other areas of economic and social life" (Article 13); and "non-discrimination against women in all matters relating to marriage and family relations" (Article 16).¹³⁷ In her

¹³³ For example, the fertilized egg may implant itself in a woman's fallopian tube – the tube through which an egg passes on its way from the ovary to the uterus. MedlinePlus, Ectopic Pregnancy, <http://www.nlm.nih.gov/medlineplus/ency/article/000895.htm> (last visited Feb. 16, 2010).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ CEDAW Convention, *supra* note 13 (explicating the various rights guaranteed to women). This example communication outlines only some of the rights violations that could be alleged. It is beyond the scope of this article to discuss the range of rights violations under the Convention on the Elimination of All Forms of Discrimination Against Women that could be alleged, and the merits of each claim.

initial submission, H.A. urgently requests effective interim measures, in accordance with CEDAW Optional Protocol Article 5,¹³⁸ in order to avoid potential irreparable harm to her self – i.e. to protect her life, which is endangered by her medical condition and the lack of available safe abortion care.

The Committee, in reviewing H.A.'s communication, sends a note to State party B for urgent consideration, requesting that State B provide immediate, appropriate and concrete preventive interim protection to H.A. – namely, that State B provide her with safe abortion care. This request does not imply a determination on the admissibility or merits of H.A.'s communication. The State party is requested to provide the Committee with a prompt response regarding the steps it has taken in order to avoid potential irreparable damage to H.A. and, thereby, allow the CEDAW Committee to effectively rule on the admissibility and merits of the communication.

The Committee then proceeds to rule on the admissibility of the communication, noting that there are liberal exceptions to the 'exhaustion of domestic remedies' requirement that apply to cases like this one where the following factors are present: 1) time-urgency; 2) potential practical impediments (such as the lack of legal counsel or financial resources to pursue other legal action); and 3) an unlikelihood of effective relief under domestic law given the criminal prohibition on abortion services. Lastly, the Committee rules on the merits of the communication, determining that H.A. and other women are entitled to a safe abortion under these circumstances.

VI. CONCLUSION

This paper has demonstrated that key doctrinal developments over the past decade, and the extension of the role of treaty bodies such as CEDAW to include a quasi-judicial function, have expanded the potential role of international forums in articulating and affirming women's rights. There is a critical need to promote women's humanity by protecting their right to safe abortion services, in the absence of which women will continue to suffer preventable death or lasting injury. While abortion policies should not be regarded as "moral" decisions, even through the narrow and distorted lens of "morality," one cannot ignore the moral indignity in allowing women to die and suffer unnecessarily.

¹³⁸ CEDAW Optional Protocol, art. 5.

Moreover, States parties to CEDAW cannot fulfill their promise to protect the rights of women on an equal basis with men¹³⁹ if they allow women to continue to suffer under restrictive abortion laws and policies.

If women are near the midpoint of their quest to finally be recognized as human,¹⁴⁰ how can they move forward to conquer the next half of their journey? Upon first glance, one might view the CEDAW Optional Protocol as an inadequate remedy for the same reasons that many view the CEDAW Convention as ineffective – namely, the absence of sanctions and penalties for non-compliance with its recommendations and rulings. International law has often been criticized for its “soft governance” and the lack of teeth that provide real content to legal commitments. Yet, under closer analysis of the HRC and CEDAW Committee jurisprudence, a more optimistic view emerges. The Committees have carved out liberal exceptions to the exhaustion of domestic remedies requirement, as well as a more binding content to special interim measures that can protect individual authors before the treaty bodies. The CEDAW Committee is well-situated to confront head-on the problem of access to safe abortions in the context of high-risk pregnancy. The CEDAW Optional Protocol may be a premier forum under which women’s human right to health can be vindicated.

¹³⁹ *Id.* art. 2.

¹⁴⁰ Catherine MacKinnon, Book Discussion and Signing at Harvard Law School: Are Women Human? and Other International Dialogues (Nov. 16, 2007) (notes on file with author).