



**THE ROLE OF THE COMMITTEE
TO THE CONVENTION ON THE ELIMINATION
OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

Chelsea Purvis¹

This report analyzes the role of the Committee to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). It provides an overview of the Committee's mandate under CEDAW, finding that its mandate is similar to those of other human rights treaty bodies to which the United States reports. Like other human rights treaty bodies, the CEDAW Committee engages with States parties through a process of dialogue. It cannot consider complaints from individuals against states that have not ratified CEDAW's Optional Protocol.

The report then reviews the principle criticisms of the Committee by opponents of U.S. ratification of the Convention, exploring both the Committee's most controversial recommendations and its contested legal authority. It discusses the contexts in which the Committee has made its most controversial recommendations and notes that each recommendation has had limited practical effect. The report explains that the CEDAW Committee does not have the legal authority to compel a State party to modify its law or values. If the United States were to ratify the Convention, the Committee's findings and recommendations would have no direct binding legal authority under either domestic or international law.

Finally, the report considers the effect that American participation might have on the Committee. U.S. ratification of CEDAW would allow the United States to contribute to the Committee's process of dialogue. The United States has found engagement with other human rights treaty bodies productive, even though it does not consider recommendations made by human rights committees to be legally binding. U.S. ratification would also permit the United States to participate in the selection of Committee members, making it more likely that Committee recommendations would even more fully reflect U.S. standards.

I. The Committee's Mandate

A. The CEDAW Committee

Article 17 of CEDAW establishes the CEDAW Committee, which began operating in 1982.² The Committee is composed of twenty-three experts "of high moral

¹ J.D. Candidate, Yale Law School. This report was prepared in connection with a course at Yale Law School, *International Law and Foreign Affairs*, under the supervision of Professor Oona A. Hathaway, with the assistance of Rebecca Crootof, Sara Solow, and Elizabeth Nielsen.

² Hanna Beate Schöpp-Schilling, Expert Member of the CEDAW Committee, *The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for*

standing and competence in the field covered by the Convention.”³ The Convention states that the Committee serves the purpose of “considering the progress made in the implementation of” CEDAW.⁴ The Committee describes its own mandate in similar terms: “The Committee’s mandate is very specific: it watches over the progress for women made in those countries that are the States parties” to CEDAW and “monitors the implementation of national measures” to fulfill States parties’ legal obligations under the Convention.⁵

The Committee’s core functions are to review States parties’ reports to the Committee, to take part in discussions with government officials, and to comment on country performance. The Committee “developed . . . [t]his procedure of actual dialogue,” which it deems valuable “because it allows for an exchange of views and a clearer analysis of anti-discrimination policies in various countries.”⁶ While the Committee offers focused comments to countries, it also issues general recommendations to raise awareness on certain issues.⁷

B. Comparison with Similar Committees

The Committee’s mandate is similar to the mandates of other international human rights committees to which the United States currently reports. For example, the Convention on the Elimination of Racial Discrimination (the CERD Committee), the Convention Against Torture (the CAT Committee), the International Covenant on Civil and Political Rights (the Human Rights Council or HRC), and the Inter-American Convention on Human Rights (the Inter-American Commission) all have associated committees. All of these committees are involved in a “periodic reporting process” with States parties, including the United States—a process that is understood to be a “quintessential function of human rights treaty bodies.”⁸ The United States also reports to the Committee for the Rights of the Child (CRC Committee).⁹

Achieving Gender Equality in Political Representation, Presentation Before the International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference on The Implementation of Quotas: European Experiences (October 22-23, 2004), *available at* www.quotaproject.org/CS/CS_Cedawbudapest04BSS.pdf.

³ Convention on the Elimination of all Forms of Discrimination against Women art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁴ *Id.*

⁵ *Committee on the Elimination of Discrimination against Women*, UNITED NATIONS, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited October 18, 2010).

⁶ *Id.*

⁷ *Id.*

⁸ Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 *YALE J. INT’L L.* 389, 405 (2009).

⁹ Although the U.S. has not ratified the Convention on the Rights of the Child, it has ratified two Optional Protocols under the Convention. *Id.* at 404 n. 75. These Optional Protocols stipulate that states can be parties to the Protocols without being parties to the Convention. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts art. 9(2), G.A. Res. 54/263, Annex I, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (May 25, 2000); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child

In general, the United States has tended to take the periodic reporting process for the various human rights committees more seriously than many other states. While “many states . . . submit incomplete or insufficiently inclusive reports” to treaty bodies, the United States “closely hews to the committee-issued guidelines in preparing its consistently lengthy and comprehensive submissions.”¹⁰ For the United States, submissions “are large and complex undertakings, involving substantial coordination with relevant U.S. Government agencies in the writing of book-length submissions.”¹¹

The CEDAW Committee also resembles other UN treaty-bodies, as well as the Inter-American Commission, in its effort to create a process of “constructive dialogue.”¹² For the typical UN treaty body, this dialogic process works as follows: A State party submits a report to the relevant committee; the committee provides the state with questions to be discussed at hearings in Geneva; the state presents written and oral reports at this hearing; and finally, after considering these reports, the committee produces its own report which “identifies areas of progress and areas of concern with the state’s human rights achievement” and offers conclusions and recommendations.¹³ As with the written step of the periodic reporting process, the United States takes the in-person procedures seriously for the treaties to which it is a State party. It sends “large, high-level interagency delegations” to Geneva and to the Organization of American States to take part in discussions with human rights treaty bodies.¹⁴

The CEDAW Committee can only consider complaints from individuals if a State party has separately agreed to an Optional Protocol.¹⁵ Of the 186 states that are party to CEDAW,¹⁶ just over half (100) are parties to the Protocol.¹⁷ This optional complaint

Pornography art. 13(2), G.A. Res. 54/263, Annex, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (May 25, 2000).

¹⁰ *Id.* at 407.

¹¹ *U.S. Treaty Reports*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/g/drl/hr/treaties/> (last visited Oct. 20, 2010).

¹² Melish, *supra* note 8, at 407.

¹³ *Id.* at 407.

¹⁴ *Id.* at 408.

¹⁵ “Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention

by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.” G.A. Res. 54/4, art. 2, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49, (Vol. I), (Dec. 22, 1999). There is no similar Optional Protocol to the Inter-American Convention on Human Rights. Individuals can bring allegations of American violations of the American Declaration on the Rights and Duties of Man (the Declaration) to the Inter-American Commission. The United States has participated thoroughly in these hearings despite the fact that it has not signed any Protocol assenting to such adjudications, and in fact claims arguing that the Declaration is not a binding treaty. See Melish, *supra* note 8, at 411-413.

¹⁶ *Status, Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Oct. 20, 2010).

¹⁷ *Status, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTION,

mechanism again resembles other UN human rights committees to which the United States reports, particularly the CAT Committee¹⁸ and the HRC (in both cases, the United States has declined to opt into the individual complaint procedure).¹⁹ Outside the Optional Protocol process, the CEDAW Committee “has no competence under the Convention to consider complaints from individuals or governments.”²⁰ In this respect, the Committee’s reach is weaker than both the CAT²¹ and CERD Committees,²² which are permitted to investigate complaints of treaty violations without State party permission using an “early warning/urgent action procedure.”²³

II. Criticisms of the Committee

Those who criticize the CEDAW Committee usually do so in the course of criticizing the CEDAW treaty as a whole. The core concern that critics express is that the Committee makes recommendations inconsistent with U.S. law and values, and therefore the United States would have to change its law or values if it were to ratify the treaty. We will address this criticism by, first, examining the Committee’s most controversial recommendations and, second, by describing the legal status of the Committee’s recommendations.

A. The Committee’s Controversial Recommendations

In 2002, as the Senate Committee on Foreign Relations was preparing a report to the Senate recommending that the United States ratify CEDAW, then-Secretary of State Colin Powell and Assistant Attorney General Daniel Bryant wrote to express opposition to ratification.²⁴ Both worried that, should the United States ratify, it might be forced to

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Oct. 20, 2010).

¹⁸ “A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.” Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 22 ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

¹⁹ “No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.” First Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 302.

²⁰ S. COMM. ON FOREIGN RELATIONS, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. REP. 107-9, at 5 (2d Sess. 2002).

²¹ Convention Against Torture, *supra* note 18, art. 20.

²² *Committee on the Elimination of Racial Discrimination - Early-Warning Measures and Urgent Procedures*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about>.

²³ Melish, *supra* note 8, at 410.

²⁴ Letter from Colin L. Powell, Secretary of State, to Joseph R. Biden, Chair, Senate Committee on Foreign Relations (July 8, 2002) [hereinafter Powell Letter], *in* S. COMM. ON FOREIGN RELATIONS, *supra* note 20, at

change its domestic law or values to conform to the CEDAW Committee's recommendations. Secretary Powell and Assistant Attorney General Bryant described several Committee recommendations as especially troublesome, and their worries have been echoed by other critics.

1. Mother's Day

Secretary Powell and Assistant Attorney General Bryant noted with disapproval the Committee's 2000 report on Belarus.²⁵ In its Concluding Observations in that report, the Committee had stated that it was "concerned by the continuing prevalence of sex-role stereotypes and by the reintroduction of such symbols as a Mothers' Day and a Mothers' Award, which it sees as encouraging women's traditional roles."²⁶ Assistant Attorney General Bryant argued that this statement was an example of the Committee "exploit[ing] CEDAW's vague text to advance positions contrary to American law and sensibilities."²⁷ Other opponents of CEDAW ratification have similarly criticized the Committee's statement to Belarus.²⁸

The Committee made the statement in its Concluding Observations as part of a broader, nuanced critique of the reinforcement of stereotypical female roles in Belarus. The Committee appears to have been troubled not with Mothers' Days in general but with Belarus's specific version of Mother's Day—particularly the Mother's Award, which is still given by the President of Belarus to Belarusian women who have given birth to and raised five or more children.²⁹ Taken in context, the Committee's recommendation was apparently aimed at promoting women's equal access to the labor market, a central goal of CEDAW. In the difficult transition to a market economy after the Cold War, Belarusian women—particularly rural women—suffered from marginalization in the labor market, a problem worsened because women were expected to bear the burden of domestic work.³⁰ Belarus's efforts to address women's marginalization in the labor market were problematic, according to the CEDAW Committee. Legislation "overemphasized women's traditional roles in the family and weakened their position in the labour market"³¹ The Committee encouraged Belarus in 2000 to engage in a

16-17; Letter from Daniel J. Bryant, Assistant Attorney General, to Joseph R. Biden, Chair, Senate Committee on Foreign Relations (July 26, 2002) [hereinafter Bryant Letter], *in* S. COMM. ON FOREIGN RELATIONS, *supra* note 20, at 17-19.

²⁵ *Id.*

²⁶ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations on the Committee on the Elimination of Discrimination Against Women: Belarus, ¶ 361, UN Doc. A/55/38 (Jan. 31, 2000).

²⁷ Bryant Letter, *supra* note 24, at 18.

²⁸ *See, e.g.*, Patrick Fagan, *Buyer Beware of CEDAW*, THE HERITAGE FOUNDATION OF AMERICA (2002), available at <http://heritage.org/Research/Commentary/2002/08/Buyer-Beware-of-CEDAW>.

²⁹ *President awards the Order of Mother to a number of Belarusian women for giving birth to and raising five and more children*, GOVERNMENT OF BELARUS (June 14, 2010), <http://www.president.gov.by/en/press90692.html>.

³⁰ Concluding Observations: Belarus, *supra* note 26, ¶ 340.

³¹ *Id.* ¶ 342.

legislative review so that “overly-protective” legislation would not prevent women from accessing employment.³² Indeed, the language of the recommendation that drew fire noticeably echoes Article 5 of CEDAW, which requires that States parties “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices . . . based on . . . stereotyped roles for men and women.”³³

The practical effect of the Committee’s recommendation to Belarus was limited. When Belarus made its next submission to the Committee, the country had not addressed the institutionalized gender stereotyping that the Committee criticized in 2000. In 2004, the Committee again expressed its concerns about “the persistence of stereotypes relating to the roles and responsibilities of women and men in society, which tend to place responsibility for child rearing primarily on women.”³⁴ The Mother’s Award which the Committee criticized was nonetheless awarded again in 2010.³⁵

2. The Decriminalization of Prostitution

In their 2002 letters to the Senate Committee on Foreign Relations, Secretary Powell and Assistant Attorney General Bryant criticized another recommendation that has been controversial to opponents of the ratification: the Committee’s 1999 recommendation that China decriminalize prostitution.³⁶ Powell stated that the Committee “called for legalized prostitution”³⁷ in China, and Bryant suggested that this recommendation was a “bizarre interpretation[] of CEDAW’s vague text.”³⁸ Other critics of the CEDAW Committee have found fault with this recommendation.³⁹

The Committee recommendation that drew Powell and Bryant’s fire stated that, because prostitution “is often a result of poverty and economic deprivation,”⁴⁰ the act itself be *decriminalized* (not legalized).⁴¹ The Committee urged China to protect prostitutes from HIV/AIDS and “to take measures for the rehabilitation and reintegration of prostitutes into society.”⁴² (Notably, CEDAW guarantees women equal rights education and health⁴³ and to employment and economic opportunity.⁴⁴ It also ties

³² *Id.* ¶¶ 359-360.

³³ CEDAW, *supra* note **Error! Bookmark not defined.**, Art. 5.

³⁴ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Belarus, ¶ 339, UN Doc. A/59/38 (March 18, 2004).

³⁵ GOVERNMENT OF BELARUS, *supra* note 29.

³⁶ Powell Letter and Bryant Letter, *supra* note 24.

³⁷ Powell Letter, *supra* note 24.

³⁸ Bryant Letter, *supra* note 24.

³⁹ See, e.g., Wendy Wright, *CEDAW: A Global Tool for Mischief*, SAVE MOTHER’S DAY: A CAMPAIGN TO EDUCATE AMERICA ABOUT THE DANGERS OF CEDAW (2009), available at <http://www.savemothersday.com/globaltool.shtml>.

⁴⁰ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, ¶ 288, UN Doc. A/54/38 (Feb. 5, 1999) [hereinafter Concluding Observations: China].

⁴¹ *Id.* ¶ 289.

⁴² *Id.*

⁴³ CEDAW, *supra* note **Error! Bookmark not defined.**, arts. 10, 12.

trafficking and exploitation to prostitution and obliges States parties to suppress both through legislation.⁴⁵) Contrary to Powell's claim, the Committee did not recommend legalizing prostitution.⁴⁶ In fact, the Committee recommended that China "investigate reports of local officials' involvement in trafficking and the exploitation of prostitution, and . . . prosecute all persons engaged in such practices."⁴⁷

The Committee encouraged China to implement regulations that would protect women sex workers. In this, its recommendation is consistent with the position of human rights groups such as Amnesty International, which has noted that in countries where prostitution is "rampant," regulation allows women "to come forward without fear of repercussions, to seek treatment to prevent HIV/AIDS and other sexually transmitted infections, to obtain health care and education, and to combat trafficking and sex slavery."⁴⁸

China, like Belarus, did not follow the CEDAW Committee's recommendation. In 2006, CEDAW again criticized China for the continued criminalization of prostitution.⁴⁹ The Committee worried that criminalization of prostitution made women subject to discrimination, which is prohibited by CEDAW. It argued "that the continued criminalization of prostitution disproportionately impacts . . . prostitutes rather than . . . the prosecution and punishment of pimps and traffickers. [The Committee] is also concerned that prostitutes may be kept in administrative detention without due process of law."⁵⁰

3. Access to Abortion

Opponents of the Committee have criticized the Committee's recommendations regarding access to abortion. Secretary Powell faulted the Committee's 1998 statement to Croatia, in which the Committee "strongly recommend[ed] 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."⁵¹

The Committee's recommendation was highly fact specific. It urged Croatia to protect legal rights already in place in domestic law. In Croatia in 1998, abortion laws

⁴⁴ *Id.* arts. 11, 13, 14.

⁴⁵ *Id.* art. 6.

⁴⁶ *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, AMNESTY INT'L USA, available at <http://www.amnestyusa.org/violence-against-women/ratify-the-treaty-for-the-rights-of-women-cedaw/page.do?id=1108216>.

⁴⁷ Concluding Observations: China, *supra* note 40, ¶ 291.

⁴⁸ AMNESTY INT'L USA, *supra* note 46.

⁴⁹ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, ¶ 19, CEDAW/C/CHN/CO/6 (Aug. 25, 2006).

⁵⁰ *Id.*

⁵¹ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Croatia, ¶ 117, UN Doc. A/53/38/Rev.1 (1998) [hereinafter Concluding Observations: Croatia].

were liberal relative to those of other countries.⁵² But financial pressures on hospitals interfered with women accessing legal abortion. As the Committee noted, “[S]ervices pertaining to women’s reproductive health are the first to be affected as a result of the Government’s financial constraints.”⁵³ Hospitals—perhaps as a means of cutting their budgets—were “refus[ing] to provide abortions on the basis of conscientious objection of doctors.”⁵⁴ Under Croatian domestic law, physicians in public hospitals were arguably prohibited from conscientiously objecting to providing abortions—a legal obligation the Committee encouraged the Croatian government to observe.⁵⁵ In its next report to the Committee in 2003, Croatia did not discuss hospitals’ failure to provide abortion to patients.⁵⁶ The Committee did not question Croatia on the issue.⁵⁷ Nonetheless, the practice that prompted the Committee’s earlier criticism remains largely unchanged: physicians still engage in conscientious objection and thus refuse to provide abortions even in publicly funded hospitals.⁵⁸

There have been other controversial recommendations on abortion by the Committee. Concerned Women for America’s Legislative Action Committee, for example, notes with disapproval that the Committee in a recommendation to Mexico “[c]riticized Mexico for a ‘lack of access . . . to easy and swift abortion.’”⁵⁹ In 1998, the Committee expressed concern that Mexico’s laws promoted inequality within families, given “the high rate of teenage pregnancy and the lack of access for women in all States to easy and swift abortion.”⁶⁰ This concern is rooted in CEDAW’s Article 16, which guarantees equality within the family.⁶¹ Article 16(e) gives women and men “[t]he same rights to decide freely and responsibly on the number and spacing of their children,” and

⁵² Abortion was permitted without restriction as to the reason, with parental authorization for minors and a gestational limit of twelve weeks. Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 INT’L FAMILY PLANNING PERSP. 56, 58 (1998).

⁵³ Concluding Observations: Croatia, *supra* note 51, ¶ 109.

⁵⁴ *Id.*

⁵⁵ Dalida Rittossa, *Taking the Right to Abortion in Croatia Seriously--One of the Basic Constitutional Rights or a Rudiment of the Right to Reproduction?* 13 CARDOZO J. L. & GENDER 273, 290 n.126 (2010).

⁵⁶ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Combined second and third periodic reports of States parties: Croatia, CEDAW/C/CRO/2-3 (Oct. 27, 2003).

⁵⁷ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, List of issues and questions with regard to the consideration of periodic reports: Croatia, CEDAW/PSWG/2005/I/CRP.1/Add.2 (Aug. 6, 2004); CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding comments: Croatia, CEDAW/C/CRO/CC/2-3 (Feb. 15, 2005).

⁵⁸ Christine McCafferty, *Women’s Access to Lawful Medical Care: the Problem of Unregulated Use of Conscientious Objection*, Council of Europe Social, Health and Family Affairs Committee, Doc. 12347, paras. 20, 30 (July 20, 2010).

⁵⁹ WRIGHT, *supra* note 39.

⁶⁰ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Mexico, ¶¶ 398-399, UN Doc. A/53/38 (May 14, 1998) [hereinafter Concluding Observations: Mexico].

⁶¹ CEDAW, *supra* note **Error! Bookmark not defined.**, art. 16.

it ensures that women “have access to the information, education and means to enable them to exercise these rights.”⁶²

As a means to address Mexico’s inequality within the family, the Committee recommended that Mexico “consider the advisability of revising the legislation criminalizing abortion” and that it “weigh the possibility of authorizing the use of the RU486 contraceptive.”⁶³ It also recommended that Mexican states “review their legislation so that, where necessary, women are granted access to rapid and easy abortion.”⁶⁴ The Committee’s 2006 recommendations to Mexico indicate that Mexico—like Belarus and China—did not abide by the Committee’s recommendations. The Committee noted that while abortion was legalized “in specific cases,” women still “do not have access to safe abortion services and to a wide range of contraceptive measures.”⁶⁵

B. The Committee’s Legal Authority

Opponents of the CEDAW Committee argue that the Committee’s recommendations will bind States parties—and would bind the United States if it were to ratify CEDAW. Wendy Wright, President of Concerned Women for America, argues that by ratifying CEDAW, the United States could “hand over our right” to make decisions on “the most controversial issues in America,” such as access to abortion, the decriminalization of prostitution, equal pay, and sex education.⁶⁶ Susan Yoshihara of the Catholic Family and Human Rights Institute describes the Committee as a “compliance committee” that can instruct States parties to change their domestic laws “without any authority from sovereign states.”⁶⁷

These concerns are unfounded. In fact, the Committee’s findings and recommendations have no direct binding legal authority under either domestic or international law. As the International Law Association stated after an extensive review of the status of treaty body findings, “It seems to be well accepted that the findings of . . . treaty bodies do not themselves constitute binding interpretations of . . . treaties.”⁶⁸ Governments do not consider treaty body recommendations “formally binding[,]” and they “may not give effect to [the recommendations] as a matter of course.”⁶⁹ Moreover, treaty bodies themselves do not consider their “concluding observations, *per se*,” to be

⁶² *Id.* art. 16(e).

⁶³ Concluding Observations: Mexico, *supra* note 60, ¶ 408.

⁶⁴ *Id.* ¶ 426.

⁶⁵ CEDAW, Comm. on the Convention on the Elimination of All Forms of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Mexico, ¶ 32, CEDAW/C/MEX/CO/6 (Aug. 26, 2006).

⁶⁶ WRIGHT, *supra* note 39.

⁶⁷ Susan Yoshihara, *CEDAW Reality Check*, CATHOLIC FAMILY AND HUMAN RIGHTS INSTITUTE (May 2, 2007), available at http://www.c-fam.org/publications/id.580/pub_detail.asp.

⁶⁸ INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE IMPACT OF FINDINGS OF UNITED NATIONS HUMAN RIGHTS TREATY BODIES 5 (2004).

⁶⁹ *Id.*

legally binding: “the plain text of all concluding observations adopted thus far makes clear that treaty bodies see their role as advisory and recommendatory.”⁷⁰

Recommendations of committees under human rights treaties do have some authority, even if that authority is not directly binding legal authority. The International Law Association has suggested that human rights committee recommendations and findings may “constitute, or may generate, ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’”⁷¹ It further suggests that subsequent practice is “to be taken into account in the interpretation of the treaty” under the Vienna Convention on the Law of Treaties (VCLT). The ILA acknowledges that under a traditional view of treaty interpretation, committee activities are not tantamount to “subsequent practice”—only “the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice.”⁷² However, it maintains that human rights treaties might differ from other treaties because and the subject matter of the treaties differ. Human rights treaties are aimed at protecting citizens against their own states; in this context, Committees play a special role in monitoring violations. Thus, the ILA suggests that it is “arguable that in interpreting these types of [human rights] treaties . . . , relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.”⁷³

Even given the special authority that human rights committee recommendations may hold, it is important to recognize that the CEDAW Committee lacks power to enforce its recommendations, and it cannot punish any country for violating or failing to implement CEDAW.⁷⁴ Treaty enforcement “is left to individual governments. The treaty grants no enforcement authority to the United Nations or any other international body.”⁷⁵ The Senate Committee on Foreign Relations affirms that the CEDAW Committee has “no power to enforce its recommendations,”⁷⁶ and even Secretary Powell acknowledged that “State Parties have always retained the discretion on whether to implement any recommendations made by the Committee.”⁷⁷

Because the Committee’s recommendations have no binding legal authority on States parties,⁷⁸ the Committee has impact on its States parties through an iterative

⁷⁰ Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 33 (2006).

⁷¹ INTERNATIONAL LAW ASSOCIATION, *supra* note 68, at 5.

⁷² *Id.*

⁷³ *Id.* at 6.

⁷⁴ *The CEDAW Committee: A Space for Our Rights*, ASSOCIATION FOR WOMEN’S RIGHTS IN DEVELOPMENT (AWRD) (Dec. 2, 2008), available at <http://www.awid.org/eng/Issues-and-Analysis/Library/The-CEDAW-Committee-A-Space-for-Our-Rights>.

⁷⁵ Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW. ENG. L. REV. 689, 713 (2004).

⁷⁶ S. COM. ON FOREIGN RELATIONS, *supra* note **Error! Bookmark not defined.**, at 5.

⁷⁷ Powell Letter, *supra* note 24.

⁷⁸ This is true even under CEDAW’s Optional Protocol: Although the Protocol establishes mechanisms for the submission and investigation of complaints, it provides the Committee with no mechanisms for

process of dialogue: requesting information from States parties, posing questions to the states, taking note of written and oral reports by states, and commenting on state practice. Through this process the Committee has influenced state practice in some countries: In Kuwait, for example, “Parliament voted to extend voting rights to women [in 2005] following a recommendation by the CEDAW Committee to eliminate discriminatory provisions in its electoral law.”⁷⁹ This decision was not mandated by the CEDAW Committee but the dialogue between Kuwait and the Committee helped encourage the legislative revision.

III. The United States’ Potential Role As a Party to CEDAW

If the United States were to become a party to CEDAW, it could join the process of dialogue and engagement with other States parties. The United States has found such dialogue with other human rights treaty bodies productive,⁸⁰ even though it has repeatedly made clear that recommendations made by human rights committees are not legally binding.⁸¹

U.S. engagement with the CAT Committee previews the kind of mutually respectful engagement the United States would likely have with the CEDAW Committee. In 2006, for example, the United States submitted its “lengthy” second periodic report to the CAT Committee, “participate[d] in a dialogue with the Committee” in person, and gave the CAT Committee “extensive written answers” and oral answers to its questions.⁸² The U.S. delegation acknowledged the government’s imperfections and emphasized its commitment to comply with CAT.⁸³ At the same time, in its 2007 one year follow-up report to the CAT Committee, the United States repeatedly asserted its right to disagree with the Committee’s recommendations. When the CAT Committee recommendations applied the CAT treaty where the United States felt that the treaty was not applicable, for example, the United States implied in its response that it would disregard these recommendations.⁸⁴ Thus the United States, while acknowledging its obligation to comply with CAT and taking its engagement with the CAT Committee seriously, did not treat the recommendations of the CAT Committee as legally binding.

As a State party to CEDAW, the United States could also participate in the process of appointing experts to the CEDAW Committee, allowing it to shape the

enforcing its recommendations. See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women Arts. 5-8, Oct. 6, 1999, [__],

⁷⁹ CEDAW TASK FORCE, FAST FACTS ABOUT CEDAW (2010), available at <http://www.cedaw2010.org/index.php/press-room/fast-facts-about-cedaw>.

⁸⁰ Melish, *supra* note 8, at 408-409.

⁸¹ *Id.* at 414.

⁸² U.S. STATE DEP’T, U.S. DELEGATION DEPARTURE STATEMENT (2006), available at <http://www.state.gov/g/drl/rls/68566.htm>.

⁸³ *Id.*

⁸⁴ U.S. STATE DEP’T, UNITED STATES RESPONSE TO SPECIFIC RECOMMENDATIONS IDENTIFIED BY THE COMMITTEE AGAINST TORTURE 5-6 (2006).

interpretation of the treaty.⁸⁵ Proponents of CEDAW ratification argue that the treaty already embodies American principles of human rights and equality,⁸⁶ but U.S. participation in the Committee would help ensure that Committee recommendations accord more fully with U.S. standards.

⁸⁵ States parties nominate gender experts for membership in the Committee. Members are then selected by states parties by secret ballot. During election, consideration is given not only to “equitable geographic distribution” but also “to the representation of the different forms of civilization as well as the principle legal systems.” Members serve four-year terms. CEDAW, *supra* note **Error! Bookmark not defined.**, Art. 17.

⁸⁶ See CEDAW TASK FORCE, *supra* note 79.