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Paternity Leave as a Human Right

The right to Paternity Leave,
Parental Leave for the Father,
as a Way to Actual Gender Equality
in the View of CEDAW and other
International Instruments

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Preface

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Elisabeth Håkansson

Summary

The pursuit for equality between men and women is an ongoing struggle. One of the largest differences between men and women in general is the amount of time spent taking care of children and the home. This difference between men and women is one of the reasons women have less opportunity to pursue a career, be financially independent or take part in politics in most parts of the world.

This difference is highly significant and the best way to correct this and actually realize gender equality is to pursue an equal division of the work and responsibility of the home. One way to begin is to ensure that from a child's birth the parents are equally responsible for the care of the child. Mothers should not only be offered leave to take care of the child, but fathers should also be offered leave. It should be as normal for a father as for a mother to care of the child. It should be a human right for men to be able to take paternity leave.

The examination of whether paternity leave is a human right starts with exploring the main instrument of women's human rights: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This thesis will explore whether such a right can be found in CEDAW. The thesis then continues to examine whether a right is provided for under other international instruments and whether the concept 'paternity leave' is supported in the work for women's equality in the world.

The examination of all the different relevant documents reveals that the right to paternity leave can be claimed under Article 26 of the International Covenant of Civil and Political Rights. This right can be claimed if a national law or policy discriminates against a man if such a leave is only offered to a women. A right to paternity leave should also be possible for a father to claim under Article 11 of CEDAW. This right may be claimed when a denial of paternity leave leads to discrimination against him that may affect the mother of his child as well as. The examination of all the different documents also reveal that there is good reason for concluding that non-discrimination as to sex is a customary international law.

Sammanfattning

Att uppnå målet jämställdhet är en pågående dust. En av de största skillnader mellan män och kvinnor är hur mycket tid man spenderar för att ta hand om hem och barn. Just denna skillnad mellan män och kvinnor är en av anledningarna till att kvinnor generellt i världen har mindre möjlighet att göra karriär, bli finansiellt oberoende eller ta del i politik.

Den här examensuppsatsen argumenterar för att denna skillnad mellan män och kvinnor är väldigt signifikant och att det enda sätt att ändra på mäns och kvinnors olika möjligheter är att ha försöka uppnå en jämställd delning av jobb och ansvar i hemmet. Ett sätt att uppnå detta är att se till att föräldrarna är lika ansvariga för att ta hand om barnet redan från barnets födsel. Inte bara mammor bör bli erbjudna mammaledighet utan även pappor borde bli erbjudna pappaledighet. Detta med målet att det skall vara lika normalt för en pappa som en mamma att ta hand om sitt barn. Det borde vara en mänsklig rättighet för pappor att kunna ta pappaledighet.

Undersökningen om pappaledighet skulle kunna ses som en mänsklig rättighet börjar med att undersöka huvudkonventionen för kvinnors rättigheter the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) och om en sådan rättighet kan hittas där. Uppsatsen fortsätter sedan med att undersöka om rätten kan hittas i någon annan internationell konvention eller om annat arbete för kvinnor jämställdhet i världen behandlar pappaledighet.

Efter att undersökt alla de olika relevanta dokumenten så visar det sig att rätten till pappaledighet skulle kunna sökas under artikel 26 av the International Covenant of Civil and Political Rights (ICCPR) om en lag eller myndighets agerande diskriminerar mot en man om sådan ledighet bara erbjuds kvinnor. Det skulle också kunna vara möjligt att kräva en sådan rätt under artikel 11 av CEDAW, eftersom att avslå någons begäran om pappaledighet är en diskriminering som bland annat också påverkar hans barns mamma. Undersökningen av de olika dokumenten visar även att det finns god anledning att dra slutsatsen att rätten till att inte bli diskriminerad mot på grund av kön är en internationell sedvanerätt.

Abbreviations

Art.	Article
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSW	Commission on the Status of Women
CRC	Convention on the Rights of the Child
DAW	Division for the Advancement of Women
DEDAW	Declaration on the Elimination of Discrimination against Women
EC	European Community
ECOSOC	United Nations Economic and Social Council
<i>e.g.</i>	<i>exempli gratiā</i> ; for example
edn.	edition
eds.	editors
<i>et seq.</i>	<i>et sequentes</i> ; and the following
<i>etc.</i>	<i>et cetera</i> ; and so on
EU	European Union
GA	General Assembly of the United Nations
HRC	Human Rights Committee
IANWGE	Inter-Agency Network of Women and Gender Equality
<i>Ibid.</i>	<i>Ibidem</i> ; in the same page, same as the one just mentioned
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
<i>i.e.</i>	<i>id est</i> ; that is to say; in other words
ILO	International Labour Organization
ILC	International Law Commission
ILM	International Legal Materials
INSTRAW	United Nations International Research and Training Institute for the Advancement of Women
NGOs	Non-Governmental Organisations
No.	Number

OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OJ	Official Journal of the European Union
OSAGI	Office of the Special Advisor on Gender Issues
para.	paragraph
paras.	paragraphs
p.	page
pp.	pages
PFA	Platform for Action
Res.	Resolution
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Program
UNFPA	United Nations Population Fund
UNIFEM	United Nations Development Fund for Women
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics
Vol.	Volume

Symbols of United Nations Documents

Elements Denoting the Principal Organ that Worked on the Text

A/-	General Assembly; starting with the 31 st session, symbols were expanded to include numbers denoting the session (e.g. A/31/- or A/C.3/31/-)
E/-	Economic and Social Council; starting in 1978 documents include the year (e.g. E/1978/-)
HRI/	References to human rights instruments in general

Elements Denoting the Group who Worked on the Text

-/AC./-	<i>Ad Hoc</i> committee or similar group
-/C./-	Standing, permanent or sessional committee
-/CN./-	Commission
-/WG./-	Working group

Elements Denoting the Nature of the Document

-/SR.-	Summary records of meetings
-/CRP.-	Conference room paper
-/GEN/-	General Comments or General Recommendations
-/MC/-	Meeting of chairpersons of treaty bodies

Elements Denoting Modification of the Text

-/Add.	Addendum
-/Corr.	Corrigendum

Elements Denoting Distribution

-/L.-	Limited distribution
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1 Introduction

1.1 Subject

In the middle of the 90s the work for gender equality shifted from a sole focus on women to a recognition of the necessity to involve men in the work. The cooperation of men in the work is imperative not only within the family and community but also in the society and in politics at large.¹ The United Nations Population Fund (UNFPA) stated in its publication *State of the World Population 2005* that:

“Gender equality, and the social transformation it implies, is most likely to be achieved when men recognize that the lives of men and women are interdependent and that the empowerment of women benefits everyone.”²

The realization of actual gender equality is dependant on men and women taking equal part in all areas of society. Women’s reproductive role continues to be seen as a stigma with employers, and women’s income levels persistently lag behind those of men with comparable skills.³ Employment and parenthood are difficult roles to combine. Women have historically been responsible for the home and children while men have been associated with earning income for the family. Attitudes concerning gender division of labour may hinder women from fully participating in the public world and men from fully participating in family life.⁴ The unequal division of labour within the family derives from women’s role as the primary caregiver. This entails such consequences in society as women earning less for the same work, having a harder time in getting hired and promoted, and not taking part in political life nearly as much as men. There is a growing awareness of the dysfunctional nature of narrow traditional roles for men and women.⁵

A 2007 report by the ILO states that there are persistent gender gaps in employment and pay, for example, in the EU, men and women’s gross

¹ UNFPA *State of the World Population 2005: The Promise of Equality – Gender Equity, Reproductive Health and the Development Goals* (UNFPA, 2005) p. 57.

² *Ibid.*

³ L. Haas and P. Hwang, ‘Parental Leave in Sweden’, and B. Cohen ‘Parental Leave in Europe: Policy Implications’, both in P. Moss and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) pp. 13, 55, 62 and 297; and L. Carlson, *Searching for Equality, Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* (Iustus Förlag, Uppsala, 2007) p. 20.

⁴ P. Moss and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) pp. 11-12.

⁵ J. Brown, ‘Fatherwork in the Caribbean: Examples of Support for Men’s Work in Relation to Family Life’, in S. Ruxton (ed.), *Gender Equality and Men - Learning from Practice* (Oxfam GB, Oxford, 2004) p. 119.

hourly earnings through all establishments and across the economy is 15 per cent lower than men's wages.⁶ There is a need to address gender discrimination in occupation and remuneration and the issue of reconciling work and family responsibilities. Female labour force participation stood in 2004 at 56.6 per cent world wide, with the highest female participation in North America at 71.2 per cent, and the lowest in the Middle East and North Africa at 32 per cent.⁷ Throughout the world, women in 2004 held 28.3 per cent of legislative, senior official or managerial positions.⁸

One of the first to have a parental leave scheme driven by state policy was Hungary in 1967.⁹ Parental leave, in some kind of form, was later introduced in Sweden in 1974, initially for 6 months. After this followed Italy, who had had maternity leave in place since 1971, with introducing leave for fathers. After that followed parental leave in Norway in 1977; Finland in 1978; Iceland in 1980; Denmark, France, Greece and Portugal in 1984; West Germany and Belgium in 1985; Spain in 1989; the Netherlands in 1991; US in 1992; and Australia in 1993. After the above, a number of additional countries have followed with such leave. The first country to have, while offering parental leave, a non-transferable period of leave available to fathers, was Norway in 1993.¹⁰ By the close of the last century, in total 36 countries offered paid parental leave, including all of the, at the time, 15 EU countries, which all offered paid leave of 13 weeks or more.¹¹

The primary basis of the United Nations work to promote, protect and monitor human rights is the International Bill of Human Rights. The bill comprises of the *Universal Declaration of Human Rights* (UDHR), the *International Covenant of Civil and Political Rights* (ICCPR), and the *International Covenant of Economic and Social Rights* (ICESCR). Although not binding, the UDHR has been the inspiration for more than 60 human rights instruments on a range of issues such as for example women's rights.¹² That everyone is equal is a fundamental right that is declared in Article 1 in the Universal Declaration of Human Rights (UDHR). Article 2 of the UDHR declares that men and women are equal and are entitled to enjoy the rights set forth in the declaration. Even though the UDHR was written in 1948, today men and women are not always treated equally, nor

⁶ *Equality at Work: Tackling the Challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session 2007, Report I (B), the International Labour Organization, accessible at <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf>, visited on 10 December 2007, p. 20.

⁷ *Ibid.*, p. 16, table 2.1.

⁸ *Ibid.*, p. 20, table 2.5.

⁹ E. Drew, *Parental Leave in Council of Europe Member States* (Council of Europe, Directorate General of Human Rights, Strasbourg, 2005) p. 15.

¹⁰ L. Arnlaug, *Working Parents and the Welfare State: Family Change and Policy Reform in Scandinavia* (Cambridge University Press, 2002) p. 93.

¹¹ 'Balancing Work and Family Life: Helping Parents into Paid Employment', in *OECD Employment Outlook 2001* (OECD, Paris, May 2001) p. 145; and P. Moss and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) p. x.

¹² <www.unhchr.ch/udhr/miscinfo/carta.htm>, visited on 10 December 2007.

do they always enjoy the same rights. There are different approaches on how to correct this discrepancy. The United Nations has tried a few different approaches to enhance equality: banning discrimination, giving women special rights and reinterpreting existing human rights provisions. Even though equal rights for men and women exist on paper, in reality, women have less choice in how to live their life. Women have in general a greater responsibility in parenting, hence this has been a serious obstacle for women in achieving equality. Lately the focus has shifted to include men in the work for equality, and one way to do this is to shift the household burden. One suggestion is to promote sharing the care of the children. One way to promote sharing is to give men the right to claim paternity leave.

Gender equality simply encourages an improved use of human resources. While women need to gain a foothold in the labour market and men need to enter the sphere of family care on equal terms with women.

Below is an excerpt of a statement that was made by Sweden on a discussion on a revision of the *Maternity Protection Convention* at the 88th session of the ILO's International Labour Conference in 2000:¹³

“A second, optional part of the Convention should proceed from a purely maternity-related to a parental benefit. This would make the Convention a modern, forward-looking instrument reflecting current developments. The primary aim of a parental benefit is consideration of the child's best interests.

Gender equality is a further aim. Enabling both parents to take leave when their children are small would affirm that fathers too have a duty of participation in the supervision and care of children.”

1.2 Thesis Question

This thesis will try to answer the question whether a right for men to claim paternity leave or parental leave for fathers exists in international human rights law. Subsequently, this will be discussed and analysed from the point of view that it is a pre-requisite to the achievement of actual gender equality. This thesis will thus examine two main themes: the right to actual gender equality, and whether this is a customary international law, and the human right to paternity leave. The two themes are closely intertwined.

¹³, *Maternity Protection at Work, Revision of the Maternity Protection Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95)*, the International Labour Conference, 88th session 2000, item 4, the International Labour Organization, Geneva.

1.3 Purpose

Without governments ensuring this right along with incentives to actually claim it, the level of equality between men and women will not be able to reach beyond the 'glass ceiling'. Therefore, the study in this thesis is motivated by an interest to explore if a right to paternity leave exists. Legal and social policies in most societies do not facilitate paternal participation. Existing practices more commonly restrict and limit the opportunities for male involvement in the family than the other way around. Fathers' rights to employment have been emphasized over mothers' rights to employment and in many countries there does not exist an awareness of the problem of not having equal parental responsibilities/rights.

In international law there also seems to be a lack of awareness of men's involvement in enhancing women's equality. There is a dimension missing in conventions and other instruments regarding the issue of equal parenting. Maternity protection exists in human rights conventions for pregnant women, however sometimes such provisions can be used to hold women back. From the children's view one should also consider a child's right to both its parents.

1.4 The Concept 'Paternity Leave'

Paternity leave as a concept used in this thesis needs to be explained. The definition of paternity leave can be confusing since there is sometimes an overlap or blurring between this and parental leave. Furthermore, parental leave also differs from maternity leave and there is sometimes also a blurring here between the concepts. Leave connected with the birth of a child is usually divided into three different types: the leave that concerns the health of the mother, which is a leave of short duration in connection with giving birth and breastfeeding, sometimes called 'maternity leave' or 'mother days'; the short term of leave assigned to the father just after the birth of a child, sometimes called 'paternity leave' or 'father days'; and the longer period of leave granted to fathers and mothers during a period of weeks or months to take care of the child after the maternity leave, called 'parental leave'. Furthermore, when the father or the mother is on parental leave it is sometimes called being on 'paternity leave' or 'maternity leave'.

In this thesis, different institutions and organizations use these concepts somewhat differently, but it should be clear from the context what kind of leave is discussed. When I choose to use the concept 'paternity leave', I mean parental leave taken by the father. The reason I use this is to emphasize the leave actually taken by the father under the umbrella 'parental leave' since generally most of the leave taken by parents under parental leave is taken by the mother. The purpose of this thesis is to discuss the right to leave in connection with the birth (or adoption) of a child, that is at least several months in duration and that enable either of the parents to

take care of the child and to bond with him or her, while at the same time ensuring that the parents have some kind of security with respect to employment.

1.5 Theories on Women's Human Rights

Gender is an ideological and cultural construction, and it is defined as the social meanings given to biological sex differences. Gender relations is used to try to understand the social construction of gender identities and the asymmetry of power between the sexes.¹⁴

Since the 1945, the beginning of a human rights culture has swept across the globe.¹⁵ The most important framework to the realisation of women's human rights in the international legal order is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁶ CEDAW has both a women-centred political focus, and a universal conception of human rights focus.¹⁷ The Convention, with its substance and institutional framework, took in many feminists' concerns when it was written.¹⁸ The articulation and enforcement of rights cannot be of the same efficacy throughout the world. Legal, political, economic and cultural institutions shape the differences and further understanding of these differences is needed to enhance women's rights.¹⁹

Some countries regulate the public sphere more than the private one. This private/public distinction can prevent law from remedying a situation of discrimination, serious harm and injustice in the private sphere to which women generally are more vulnerable than men.²⁰ This division of society into a private and a public sphere has been criticised both historically and analytically. Regarding *e.g.* the home sphere it has been questioned if a clear boundary can be drawn between the private and the public spheres. However, most countries that see the home and the family as essentially private spheres are willing to forgo this when confronted with such things as child abuse or domestic violence. Further, some also see that the disadvantages within the private sphere, such as unequal division of domestic labour, spill over into opportunities in the public sphere. Historically it has been argued that the distinction of private/public tends to consign women's lives into the private sphere, and thus puts their lives outside the scope of political intervention. Some consider that the existence

¹⁴ *1999 World Survey on the Role of Women in Development* (United Nations, New York, 1999) p. ix.

¹⁵ R. Rorty, 'Human Rights, Rationality and Sentimentality', in S. Shute and S. Hurley (eds.), *On Human Rights* (The Oxford Amnesty Lectures, New York, 1993) p. 111.

¹⁶ N. Lacey, 'Feminist Legal Theory and the Rights of Women', in K. Knop (ed.), *Gender and Human Rights* (Oxford University Press, 2004) p. 53.

¹⁷ *Ibid.*, p. 22.

¹⁸ *Ibid.*, pp. 54-55.

¹⁹ *Ibid.*, pp. 55-56.

²⁰ H. Charlesworth and C. Chinkin, *The Boundaries of International Law- A Feminist Analysis* (Manchester University Press, 2000) p. 57.

of this view can explain why it has taken so long for child abuse, domestic violence, marital rape and domestic work to get on the political agenda. The critique of the division has resulted in, for example, state responsibility for domestic violence.^{21 22}

The new emerging status of human right challenges the autonomy and authority of sovereign states. However, the mix of domestic legislation, declarations and reservations to Conventions also challenges human rights. Criticism has been raised regarding the increase of human rights in the last couple of decades. In the international community the question of whether one can talk of universal rights across different cultural and economic contexts sometimes arises. Some argue that the recognition of more rights only leads to competition between them and specific rights might be less strong.²³

1.6 Men's Role in Women Achieving Equality

There are two reasons for enhancing men's share of responsibility for the children; for the child and for equality between men and women. To argue that fathers should be more involved in their children's care for their children's best interest seems less controversial than arguing men should do this for better equality in the work place.²⁴

Along with the need for more men to involve themselves in the care of their children, a change needs to come about in the views of gender roles. In society, there is a need for a change in attitudes towards female employment and changes in household structures. In addition, equal responsibilities in the home is just one side of the coin, there also needs to be social services in place, such as day-care so that women and men can go back to work.²⁵

Although a traditional division of labour can give men the opportunity to evade domestic labour and responsibility for childcare, more and more men

²¹ C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) p. 99.

²² N. Lacey, 'Feminist Legal Theory and the Rights of Women', in K. Knop (ed.), *Gender and Human Rights* (Oxford University Press, 2004) p. 22; and H. Charlesworth, 'What are "Women's International Human Rights"?'', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) pp. 64-65.

²³ N. Lacey, 'Feminist Legal Theory and the Rights of Women', in K. Knop (ed.), *Gender and Human Rights* (Oxford University Press, 2004) pp. 36-37.

²⁴ L. Bekkengen, *Man får välja - om föräldraskap och föräldradedighet i arbetsliv och familjeliv* (Liber AB, Malmö, 2002) p. 122.

²⁵ E. Sundström, *Gender Regimes, Family Policies and Attitudes to Female Employment: A Comparison of Germany, Italy and Sweden* (Doctoral Dissertation in Sociology at the Faculty of Social Sciences, Umeå University, 2003) pp. 39-41.

feel a growing dissatisfaction when such a division deprives them of a close relationship with their children. Employers in some countries are obliged to provide time off for paternity leave, and in other countries, some employers provide for it in their personnel policies. The recognition of the importance of providing men with the right to take paternity leave is slowly coming. Parental leave as a concept and practice is relatively recent. When it was introduced, it was associated with women's employment and seen as an extension of maternity leave.^{26 27}

The goal is for both parents to use parental leave equally, in order to enhance equality in the workplace and at home. However, a majority of parents taking leave to care for their children are in all countries women.²⁸ This is so even in the Nordic countries.²⁹ There are several reasons why parental leave is not as well used among fathers as among mothers. One major obstacle is the gender pay gap, where the family would generally lose more financially if the father, rather than the mother, would take the leave. Another obstacle might be negative reactions from managers and colleagues, and hence men might fear a negative effect on their career. Furthermore, the already existing inequalities between men and women in employment might also give fathers an advantage in negotiations within the family about who should take parental leave.³⁰

Employers have started to value fathers taking leave to care for their children. Some value it as an experience similar to working abroad or having served in the army. Some Governments, such as Sweden, have stressed the benefits for the father to take parental leave in public campaigns.³¹ These are for example the development of communication and interpersonal skills, the enhanced ability to multi-task and to become a 'whole' person.³² An example of campaign messages to increase men's share of the taking of parental leave is e.g. "How many men on their deathbed say they spent too little time with their boss?".³³ Beneficiaries of parental leave are according to OECD: children, workers, employers, the labour market and society as a whole.³⁴

²⁶ E. Drew, *Parental Leave in Council of Europe Member States* (Council of Europe, Directorate General of Human Rights, Strasbourg, 2005) p. 32.

²⁷ T. Chapman, *Gender and domestic life- Changing Practices in Families and Households* (Palgrave Macmillan, New York, 2004) p. 57.

²⁸ *Ibid.*, p. 35.

²⁹ *Ibid.*

³⁰ L. Haas and P. Hwang, 'Parental Leave in Sweden', in P. Moss and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) pp. 13 and 45-68.

³¹ See an example of a campaign in the Supplement.

³² L. Haas and P. Hwang, 'Parental Leave in Sweden', in P. Moss, and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) p. 51.

³³ E. Drew, *Parental Leave in Council of Europe Member States* (Council of Europe, Directorate General of Human Rights, Strasbourg, 2005) p. 39.

³⁴ 'Long Term Leave for Parents in OECD Countries', in *OECD Employment Outlook 1995* (OECD, Paris, June 1995) p. 171.

1.7 Structure

Since paternity leave *per se* does not exist as a human right in any of the Human Rights Conventions, a large part of this essay will be descriptive in that it will examine other relevant international instruments and documents one by one in ascertaining if there is a consensus in the International community on the issue.

This thesis is structured in the following way. Chapter 2 discusses the method used in international law in determining the hierarchy of sources in international law, which is used in determining the importance of the different sources used. Chapter 3 then examines CEDAW, the main instrument on the advancement of women's rights. The thesis looks into what the *travaux préparatoires* and other relevant documents, such as the General Recommendations of the CEDAW Committee, provide. The next chapter, Chapter 4 covers relevant provisions in other international human rights conventions and documents, and further whether General Comments or case law issued by Treaty Committees shed further light. Chapter 5 discusses gender equality and international law and gives some background information some concepts and issues needed for the analysis in the final chapter, Chapter 6.

2 Method

The subject matter of the thesis is quite extensive and examines many different kinds of sources. This Chapter will therefore try to explain the importance given to the different kinds of sources that Chapters 3 and 4 will cover.

2.1 Sources of International Law

In international law there is neither one single body able to create law binding on everyone, nor one system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law to everyone. However, despite clashes with state's sovereignty and the problem of telling if a particular rule amounts to a legal rule, international law does exist and can be ascertained. There are 'sources' available from which rules of international law can be extracted and analysed. The authoritative statement of the sources of international law is Article 38(1) of the Statute of the International Court of Justice (ICJ):^{35 36}

Article 38

1. The Court, whose function it is to decide in accordance with international law such dispute as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³⁷

Even though this formulation is technically limited to the sources of international law that the ICJ must apply, it is generally recognized that the provision lists the universal perception of such sources. This results both from the fact that the ICJ must decide cases submitted to it 'in accordance with international law', and that all member states of the UN are by virtue of Article 93 of the United Nations Charter *ipso facto* part of the Statute. The

³⁵ See e.g. I. Brownlie, *Principles of Public International Law 6th edn.* (Oxford University Press, 2003) p. 5; and Sir R. Y. Jennings and Sir A. F. Watts (eds.), *Oppenheim's International Law 9th edn.* (Longman Group, London, 1992) p. 24.

³⁶ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 65-66 and P. Malanczuk, *Akehurst's Modern Introduction to International Law 7th edn.* (Routledge, New York, 1997) p. 35.

³⁷ *Statute of the International Court of Justice*, Article 38(1).

same Article states that non-member states of the United Nations specifically can become parties to the Statute of the ICJ.³⁸

It has been suggested by some writers to categorize the distinctions in this provision such that the law-creating processes are exclusively: international conventions, custom and the general principles of law; while judicial decisions and academic writing are regarded as law-determining agencies that deal with the verification of alleged rules. However, in reality, such a division between provisions is not always possible; a treaty in many cases merely reiterates rules of Customary Law and the ICJ may in its judgments for example create law in the process of interpreting existing law. Sometimes a distinction is made between formal and material sources; formal sources, it is claimed, have a more mandatory character and embody a 'constitutional mechanism' for identifying the rules; material sources comprise the actual content. However, this distinction has been criticized particularly in view of the specificities of international law. The attempt to establish a clear separation of substantive and procedural elements does not work as well in international law as in domestic law.³⁹

2.1.1 International Conventions

An 'international convention' in Article 38(1)(a) is an agreement whereby a state in a written agreement binds itself legally to act in a certain way. Treaties, covenants, statutes and declarations are all included in the term 'international conventions'. They are also the major instrument of cooperation between states in international relations.⁴⁰ Some consider treaties the most important source of international law since the express consent of the contracting parties are required, and they are the major instrument for cooperation between states.⁴¹

So-called law-making treaties, which can be contrasted with those that merely regulate limited issues between a few contracting States, are intended to have a general effect and are treated as sources of international law. The obligations there imposed are over and above those imposed upon contracting parties. For a treaty to be a law-making treaty, the participation of a large number of states is required.⁴² Such treaties are e.g. agreements whereby states elaborate on their perception of international law on any given topic to guide them for the future in their conduct, declare existing law or codify existing customary rules. Agreements that prescribe rules of conduct to be followed and may produce rules that bind all are e.g., the

³⁸ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 66-67.

³⁹ *Ibid.*, p. 67; and I. Brownlie, *Principles of Public International Law 6th edn.* (Oxford University Press, 2003) p. 5.

⁴⁰ P. Malanczuk, *Akehurst's Modern Introduction to International Law 7th edn.* (Routledge, New York, 1997) p. 37.

⁴¹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 88-89.

⁴² I. Brownlie, *Principles of Public International Law 6th edn.* (Oxford University Press, 2003) p. 13.

Antarctic Treaty and the Genocide Convention. Agreements that declare the existing law or codify existing customary rules are e.g., the Vienna Convention on Diplomatic Relations of 1961.⁴³

The ICJ considered in the *North Sea Continental Shelf* cases the possibility that a provision in a treaty, coupled with *opinio juris*, could lead to the creation of a new customary rule binding on all states. The Court stated that this is “one of the recognized methods by which new rules of customary international law may be formed”⁴⁴. However, the ICJ at the same time declared that such a provision had to be “of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.⁴⁵ It has been argued for the possibility that such treaty provisions of ‘norm-creating character’, may become Customary Law even without having to demonstrate *opinio juris*, and with a short passage of time.⁴⁶ Though recognizing the importance of human rights treaties that contain potential norm-creating provisions, this is going too far. The consequence could be that some states legislate for all, with the need for dissenting states to actually enter into contrary treaties.⁴⁷ The ICJ also stated in the *Nicaragua* case that “customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content”⁴⁸. Rules with the same content may be subject to different principles and application when they are being interpreted.⁴⁹

Generally, only States Parties to a treaty are bound by it.⁵⁰ The major exception to this is that the provision itself in the treaty at some point becomes Customary Law.⁵¹ In such a case all states, also so called third states, are bound by the provision whether they were a party to the treaty or not. Also, there is a possibility that a treaty gives rights to third states, if parties to the treaty intended so.⁵² In addition, some kinds of treaties have provisions that create obligations *erga omnes*, i.e. provisions binding on all

⁴³ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 89-90.

⁴⁴ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 20 February 1969, ICJ, Judgment, *I.C.J. Reports 1969*, p. 3, para. 71.

⁴⁵ *Ibid.*, para. 72.

⁴⁶ M. B. Akehurst, ‘Custom as a Source of International Law’, 47 *British Yearbook of International Law* (1974-5) pp. 43-44 and 49-52.

⁴⁷ A. A. D’Amato, ‘The Concept of Human Rights in International Law’, 82 *Columbia Law Review* (1982) pp. 1145-1146.

⁴⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, para. 179.

⁴⁹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 91.

⁵⁰ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969 (1155 UNTS 331) Article 34.

⁵¹ *Ibid.*, Article 38.

⁵² *Ibid.*, Article 36.

states and benefiting all states.⁵³ Examples are multi-lateral treaties that establish a particular territorial regime such as the Suez Canal.⁵⁴

2.1.2 International Custom

Custom can be described as an authentic expression of a community's needs and values at any given time. In light of the nature of the international system, with no centralized government, it is a dynamic source of law. Customary rules of law can be deduced from the behaviour and practice of states. The problem with this is when to tell if an action by a State reflects a belief to be bound by a legal rule or if it is merely courtesy. Another issue is how fast a new customary rule can be created. Sometimes the process of creating a new customary rule is considered too slow to accommodate the evolution of international law.⁵⁵ According to Article 38(1)(b) 'international custom' constitutes "evidence of a general practice accepted as law". Two necessary elements can be detected from this: the material facts, which are the actual behaviour of states, and the subjective belief of states that this behaviour constitutes law. The ICJ noted in the *Libya/Malta* case that the substance of Customary Law must be "looked for primarily in the actual practice and *opinio juris* of states".⁵⁶ *Opinio juris* is necessary in order to distinguish international law from principles of morality; states may pursue a line of action that is not legally required through a feeling of good-will and/or in the hope of reciprocal benefits.⁵⁷

2.1.2.1 State Practice

The actual practice of states with regard to duration, continuity, repetition and generality has to be considered. Whether a practice is considered to have been around for enough time will depend on the circumstances of the case and the nature of the usage of a practice. In certain situations, a valid rule of law can form without having to undergo a long gestation of time, a so-called rule of 'instant' Customary Law.⁵⁸ Further, when considering continuity and repetition, the ICJ stated in the *Colombian-Peruvian Asylum Case* that a customary rule must be "in accordance with a constant and uniform usage practiced by the States in question" and that the rule had to constitute the expression of a right appertaining to one state and a duty incumbent to another.⁵⁹ The ICJ stated in the *Fisheries Case* that before a custom could come into existence, some degree of uniformity amongst state

⁵³ A. Aust, *Modern Treaty Law and Practice 2nd edn.* (Cambridge University Press, 2007) pp. 258-259.

⁵⁴ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 836.

⁵⁵ See e.g. I. Detter De Lupis, *The Concept of International Law* (Norstedts, Stockholm, 1987) pp. 112-116.

⁵⁶ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 3 June 1985, ICJ, Judgment, *I.C.J. Reports 1985*, p. 13, para. 27.

⁵⁷ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 69-71.

⁵⁸ *Ibid.*, pp. 70 and 72.

⁵⁹ *Colombian-Peruvian Asylum Case (Colombia v. Peru)*, 20 November 1950, ICJ, Judgment, *I.C.J. Reports 1950*, p. 266, pp. 276-277.

practices was essential, and it dismissed the United Kingdom's argument that a particular custom existed on the grounds that there had been insufficient uniformity of behaviour.⁶⁰ In the *North Sea Continental Shelf* cases the ICJ stated that state practice had to be 'both extensive and virtually uniform in the sense of the provision invoked' for a new customary rule to have been formed.⁶¹ In the *Nicaragua* case the ICJ further elaborated on this and stated that it was not necessary that the practice had to be 'in absolutely rigorous conformity' with the alleged customary rule, and that it was sufficient that the conduct of states in general was consistent with such a rule.⁶² Also, just as important as duration and generality is for the formation of a new customary rule, so is the acceptance and recognition of the custom of the major powers in that particular.⁶³ If an *opinio juris* can be clearly established, Bin Cheng argues in the *Journal of International Law* that repetition of a conduct not is necessary.⁶⁴

The basis of Customary Law is States' behaviour. Evidence of 'state practice' is not limited to actual, positive action but covers all other state activity such as speeches, informal documents, official publications, governmental statements, diplomatic interchanges, etc, from which states views on international law can be obtained.⁶⁵ However not all evidence of practice is given equal weight.⁶⁶ In addition, evidence of state practice can also be found in Resolutions in the General Assembly, decisions of international and domestic judicial institutions, Government's comments on drafts on different topics by the International Law Commission, treaties and the general practice of international organizations.⁶⁷ International organizations' behaviour can also be instrumental in creating Customary Law. This was held to be the case in the Advisory Opinion of the ICJ, the *Reparations* case, where the declaration that the UN possessed international personality was partly based on its actual behaviour.⁶⁸ The International Law Commission has stated that "[r]ecords of the cumulative practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations".⁶⁹

⁶⁰ *Fisheries Case (United Kingdom v. Norway)*, 18 December 1951, ICJ, Judgment, *I.C.J. Reports 1951*, p. 116, pp. 131 and 138-139.

⁶¹ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 20 February 1969, ICJ, Judgment, *I.C.J. Reports 1969*, p. 3, para. 74.

⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, para. 186.

⁶³ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 76.

⁶⁴ B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law* (1965) pp. 35-39.

⁶⁵ M. B. Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1974-5) p. 10.

⁶⁶ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 80.

⁶⁷ *Ibid.*, p. 78.

⁶⁸ *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, ICJ, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, pp. 178-180.

⁶⁹ *Yearbook of the International Law Commission, 1950, Vol. II* (ILC, 1950) p. 372, para. 78.

2.1.2.2 Opinio Juris

However, in order for a customary rule to have come into existence, settled state practice alone does not suffice; this must be followed by an *opinio juris*, a conviction by the state that its behaviour “is rendered obligatory by the existence of a rule of law requiring it”,⁷⁰ ⁷¹ The state performing the action also somehow has to confirm that its behaviour comes from a legal obligation and not from purely political or moral conviction.⁷²

2.1.3 General Principles of Law

The provision “general principles of law recognized by civilized nations” was inserted into Article 38 of the Statute to cover instances when a case arises and there are no rules covering that situation. Most scholars accept that ‘general principles of law’ comprise a separate but fairly limited source of law. Such principles are e.g. estoppel, *res judicata*, *pacta sunt servanda*, and good faith.⁷³ There are however, some who believe that ICJ Statute Article 38(1)(c) can be used for the maturation of international standards into customary law, and that the distinction will be blurred between general principles of international law in Article 38(1)(c) and international customary law in Article 38(1)(b) in the future.⁷⁴

2.1.4 Judicial Decisions and Teachings

Judicial decisions are according to Article 38 supposed to be used as a subsidiary means of interpretation, however they are still very important as a source of international law. While, Article 59 of the Statute states that decisions only have binding force between the parties and in respect of the particular case under consideration, the ICJ still strives to follow its previous judgments and writers quote judgments as authoritative decisions. The phrase ‘judicial decisions’ also encompasses decisions of the Permanent Court of Justice, international arbitral awards and rulings of municipal courts. Specifically, national court judgments may constitute evidence of a customary rule’s existence, and they may afford examples of a state’s behaviour, which as we have seen above, is a necessary element in establishing a rule of customary law.⁷⁵

⁷⁰ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 20 February 1969, ICJ, Judgment, *I.C.J. Reports* 1969, p. 3, para. 77.

⁷¹ *The Case of the S.S. “Lotus”*, 7 September 1927, PCIJ, Judgment No. 9, P.C.I.J. Publications, Series A, Vol. 2, No. 9-16, p. 28; M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 80; and P. Malanczuk, *Akehurst’s Modern Introduction to International Law 7th edn.* (Routledge, New York, 1997) p. 44.

⁷² M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 78.

⁷³ *Ibid.*, pp. 92-98.

⁷⁴ T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) pp. 88-89.

⁷⁵ *Ibid.*, pp. 103-105.

The other subsidiary means for determining rules of law in Article 38 is ‘the teachings of the most highly qualified publicists of the various nations’. Academic writers have historically had a lot of influence, however sovereignty, treaties and custom has put the importance of writers on the decline; books are more often used as a method in discovering what the law is than as a source of actual rules.^{76 77}

The hierarchy of the sources as indicated in Article 38(1) is important; judicial decisions and writings clearly have a subordinate function; and general principles of law complement custom and treaty law. However, the issue of priority between custom and treaty law is more complex, and they can be said to be of equal authority. One general rule is that the one later in time will have priority; another one is that a special rule prevails over a general rule; however, the application in a specific case might be different.⁷⁸

In addition, there are superior principles that always have priority.⁷⁹ One such is *jus cogens* norms. *Jus cogens* norms, or peremptory norms, are rules of general international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”.⁸⁰ Almost universal recognition from an overwhelming majority of states across an ideological divide is required for a rule to be a *jus cogens* norm.⁸¹ Article 53 of the Convention on the Law of Treaties states that if a treaty conflicts with a *jus cogens* norm, the treaty is void. The same also applies to customary rules. There are very few rules that have been recognized as *jus cogens* rules, however those generally accepted as such are prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity, torture and the right to self-determination.⁸² Gender discrimination as a *jus cogens* rule or customary law is still debated.⁸³ Another superior norm is the concept of *erga omnes* obligations. Such obligations arise towards the international community as a whole when peremptory norms are violated. The Court stated in the *Barcelona Traction* case that *erga omnes* obligations derive from rights that “all states can be held to have a legal interest in their protection.” due to the very

⁷⁶ *Ibid.*, pp. 105-106.

⁷⁷ *Ibid.*, p. 116.

⁷⁸ M. B. Akehurst, ‘The Hierarchy of the Sources of International Law’, 47 *British Yearbook of International Law* (1974-5) pp. 273-280.

⁷⁹ *Ibid.*, pp. 280-281.

⁸⁰ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969 (1155 UNTS 331) Article 53.

⁸¹ M. B. Akehurst, ‘The Hierarchy of the Sources of International Law’, 47 *British Yearbook of International Law* (1974-5) p. 284.

⁸² *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, 5 February 1970, ICJ, Judgment, *I.C.J. Reports 1970*, p. 3, para. 34.

⁸³ See e.g. R. J. Cook, ‘Women’s International Human Rights Law: The Way Forward’, in R. J. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994) p. 13; R. J. Cook and C. Chinkin, ‘The Gender of *Jus Cogens*’, in B.B. Lockwood (ed.), *Women’s Rights – A Human Rights Quarterly Reader* (Johns Hopkins University Press, Baltimore, 2006) p. 92; and M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 267; also see more in Chapter 5.2.

nature of such obligations.⁸⁴ Further, “all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole”.^{85 86}

2.1.5 Activities of International Organizations as a Source of International Law

Some believe that Article 38 cannot be seen as an entirely exhaustive statement of the sources of international law. The growth of international organizations since the adoption of the Statute has been accompanied by proposals that acts of international organizations also should be recognized as a source of international law.⁸⁷ For example, since many of the organs of international organizations are composed of representatives of states, acts of such an organ can simply be seen as acts of those States Parties. In how a State votes and their explanations thereto, one can find evidence of state practice and states’ understanding of the law.⁸⁸ Most of the activities associated with international organizations can however, be fitted within the two categories ‘international conventions’ and ‘international custom’.⁸⁹

One of the issues that have grown in importance since the Statute was adopted, is the question of resolutions and declarations of the General Assembly. Some resolutions of the General Assembly are legally binding for both the United Nations’ organs and its member states;⁹⁰ others are only recommendatory, putting forward opinions with varying degrees of majority support. A large number of highly important resolutions and declarations have been adopted by the General Assembly over the years, and these have inevitably had actual impact on the direction of modern international law. On such an occasion the way states vote and the reasons they give of this constitute evidence of state practice and states’ understanding of the law.⁹¹

In the *Nicaragua* case the Court expressed a cautious view that attitudes of states surrounding the adoption and application of the General Assembly

⁸⁴ *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, 5 February 1970, ICJ, Judgment, *I.C.J. Reports 1970*, p. 3, para. 33.

⁸⁵ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, (Cambridge University Press, 2002) p. 245.

⁸⁶ *Ibid.*, pp. 187-188 and 242-245; M. B. Akehurst, ‘The Hierarchy of the Sources of International Law’, 47 *British Yearbook of International Law* (1974-5) pp. 281-285; A. Aust, *Modern Treaty Law and Practice 2nd edn.* (Cambridge University Press 2007) pp. 13 and 319-320; and M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 116.

⁸⁷ Sir R. Y. Jennings and Sir A. F. Watts (eds.), *Oppenheim’s International Law 9th edn.* (Longman Group, London, 1992) pp. 45-47.

⁸⁸ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 108.

⁸⁹ Sir R. Y. Jennings and Sir A. F. Watts (eds.), *Oppenheim’s International Law 9th edn.* (Longman Group, London, 1992) pp. 45-47.

⁹⁰ See e.g. Article 17 of the Charter of the United Nations, which provides that the General Assembly shall approve the budget of the Organization, and any financial and budgetary arrangements with the Specialized Agencies.

⁹¹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 108.

resolution could be used to derive an *opinio juris*.⁹² A concept can go from a political and moral principle to a legal right and consequent obligation, which was the case with the concept ‘self-determination’.⁹³ The fact that representatives of virtually all states are present in the General Assembly enhances the organ’s possibility of generating state practice. Resolutions from the General Assembly may speed up the course of the legislation of a state practice and enable a speedier adoption of customary law more in tune with the modern world.⁹⁴

In the Advisory Opinion, the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that General Assembly resolutions can even if they are not binding have normative value. To establish if a resolution can “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris* [...] it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character [o]r a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.⁹⁵ However, attention should also be given to the fact that the General Assembly is a political organ and its resolutions may sometimes be the result of heavy political compromises that were never intended to be ascribed legal value. A resolution passed by an international organization is never in itself a source of customary law, but must be examined together with all other available evidence.⁹⁶

International organizations may also have organs that are not composed of representatives of member states, and such organs may in some instances be capable of constituting a source of law.⁹⁷ The practices of other international organizations’ practice other than the United Nations may also be evidence of an existing custom, however, caution should be used. In addition, documents do not have to be binding before exercising an influence in international politics. Sometimes specific non-binding instruments, documents or non-binding provisions in treaties are put in a category called ‘soft law’. This indicates that even though a specific provision in such a document is not binding “its importance within the general framework of international legal development is such that attention requires to be paid to it”.⁹⁸ Such documents are for example, guidelines,

⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, para. 188.

⁹³ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 110-111; and I. Brownlie, *Principles of Public International Law 6th edn.* (Oxford University Press, 2003) p. 15.

⁹⁴ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 109.

⁹⁵ *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, *I.C.J. Reports 1996 (I)*, p. 226, para. 70.

⁹⁶ P. Malanczuk, *Akehurst’s Modern Introduction to International Law 7th edn.* (Routledge, New York, 1997) p. 53; and M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 110.

⁹⁷ P. Malanczuk, *Akehurst’s Modern Introduction to International Law 7th edn.* (Routledge, New York, 1997) p. 52.

⁹⁸ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 110-111.

codes of practice or standards, and recommendations; they can signal the development of guidelines that ultimately may become legally binding rules. Governments have for a long time issued joint statements of policy or intention, which has been recognized in international practice as a way to announce diplomatic exchanges, common positions on policy issues, or making political commitments to one another. Such documents are referred to as non-binding agreements, joint statements or declarations and gentlemen's agreements. However, what is decisive as to the status of whether such documents create a legally binding relationship is not the name of the document but the intention of the parties.⁹⁹

Another important institution in international law is the International Law Commission, whose object is to promote the development of international law and its codification. It prepares drafts of conventions on topics of international law that usually in due time emerge as treaties. The International Law Commission can be said to be involved in at least two of the major sources of international law: its drafts may form basis of 'international conventions', and the ICJ considers its work as part of the whole range of 'state practice' which can lead to new rules of customary law. The ICJ gives great importance to the Commission's work and considers draft Articles in its judgments. Although the International Law Commission is by far the most important body for the study and development of international law, other bodies such as for example the International Law Organization, are involved in developing international law in their respective spheres.¹⁰⁰

Further, international legal obligations may also come out of unilateral acts of states and statements made by relevant state officials intended to have legal consequences.¹⁰¹ Unilateral acts are not 'sources of law' under Article 38(1) of the Statute of the ICJ, however, they may constitute 'sources of obligation'.¹⁰² For this to happen, the element of publicity and the intention to be bound by the state making the declaration is crucial. Intention can be ascertained by way of interpreting the act and the principle of good faith is also significant. The ICJ stressed in, *inter alia*, the *North Sea Continental Shelf* cases that statements made by states limiting their freedom of action, should be interpreted restrictively.¹⁰³ In the *Jan Mayen* case, the Court used a unilateral statement made by a Ministry of Foreign Affairs as evidence of a particular view taken by the state.^{104 105}

⁹⁹ *Ibid.*, pp. 110-112.

¹⁰⁰ *Ibid.*, pp. 112-114.

¹⁰¹ I. Brownlie, *Principles of Public International Law 6th edn.* (Oxford University Press, 2003) pp. 612-614.

¹⁰² UN Doc. A/57/10(SUPP), *Report of the International Law Commission*, Fifty-fourth session (29 April-7 June and 22 July-16 August 2002), 20 September 2002, p. 215, para. 411.

¹⁰³ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 20 February 1969, ICJ, Judgment, *I.C.J. Reports 1969*, p. 3, para. 28.

¹⁰⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, 14 June 1993, ICJ, Judgment, *I.C.J. Reports 1993*, p. 38, para. 28.

2.2 Interpretation of Treatys – VCLT Articles 31 and 32

When interpreting the meaning of a provision in a treaty the rules one should use in international law are codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).¹⁰⁶ The International Court of Justice has in several cases stated that the principles contained in Articles 31 and 32 reflect customary international law.^{107 108}

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 contains the general rule of interpretation and according to its paragraph 1 one must consider each of three elements when interpreting a

¹⁰⁵ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 114-115.

¹⁰⁶ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969 (1155 UNTS 331).

¹⁰⁷ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, 3 February 1994, ICJ Judgment, *I.C.J. Reports 1994*, p. 6, para. 41; and *Kasikili/Sedudu Island (Botswana v. Namibia)*, 13 December 1999, ICJ, Judgment, *I.C.J. Reports 1999 (II)*, p. 1045, para. 18.

¹⁰⁸ So far there has actually not been a case where the International Court of Justice has found that the Vienna Convention on the Law of Treaties does not reflect Customary Law, and it is most likely that the Court will take a similar approach in respect of most of the other provisions it has not yet ruled on ; see A. Aust, *Modern Treaty Law and Practice 2nd edn.* (Cambridge University Press, 2007) p. 13.

provision in a treaty. Any interpretation of a treaty and its provisions should be done “in good faith in accordance with the ordinary meaning to be given to the terms” when taking the context and its object and purpose into consideration.¹⁰⁹ The three paragraphs in Article 31 do not create a hierarchy per se, but a logical order of progression: the text is the natural starting point, next the context, and then any other subsequent material that might bring light to the matter. The reference to ‘context’ in paragraphs 2 and 3 of the article are meant to link them with paragraph 1 in determining the ordinary meaning. ‘Object and purpose’ is mostly used to confirm or discard an interpretation. Paragraph 2 specifies that ‘context’ for the purpose of interpretation shall mean material that the parties have agreed upon in connexion with the conclusion of the treaty.¹¹⁰ Any subsequent practice or agreement between the parties in regard to the application or interpretation of the treaty, along with any relevant rule of international law, shall according to paragraph 3 be taken into account together with the context.¹¹¹ Further, VCLT Article 31(3)(b) should also be taken into account regarding resolutions interpreting normative instruments such as e.g. the UN Charter. Circumstances at the adoption of the resolutions, such as whether it was unanimous or near unanimous and reactions to the adoption may weaken or strengthen whether the resolutions normative character.¹¹² If the parties actually apply the treaty in one way, however precise the text is, it is a good indication of what they consider it to mean as long as the practice is consistent or accepted by all parties.¹¹³

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

The preparatory work of a treaty, the *travaux préparatoires*, is not included in Article 31. That article is meant as the primary rule in interpreting a treaty for clarifying the meaning of a text, and unless the interpretation when using Article 31 “leaves the meaning ambiguous or obscure”, or “leads to a result that is manifestly absurd or unreasonable”, there is no need to use

¹⁰⁹ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969 (1155 UNTS 331) Article 31(1).

¹¹⁰ *Ibid.*, Article 31(2).

¹¹¹ *Ibid.*, Article 31(3).

¹¹² T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) p. 88.

¹¹³ A. Aust, *Modern Treaty Law and Practice 2nd edn.* (Cambridge University Press, 2007) pp. 234-235 and 241.

supplementary means of interpretation.¹¹⁴ However, Article 32 provides that supplementary elements, “including the preparatory work of the treaty and the circumstances of its conclusion”,¹¹⁵ can in certain circumstances be used to ‘confirm’ the meaning resulting from the application of Article 31. The *travaux préparatoires* can be useful to ascertain what those who negotiated the treaty intended. Included in them are written material, such as successive drafts of the treaty, explanatory statements by an expert consultant at the codification conference, conference records, interpretative statements that are uncontested by the chairman of a drafting committee and International Law Commission Commentaries. Lastly, the principal subsidiary means of interpretation in Article 32 only gives examples of such means and one can for example, also use other treaties on the same subject which use the same or similar terms.¹¹⁶

2.3 The Choice of Sources and the Use of Articles of Interpretation in VCLT

The hierarchy of sources in determining a rule of law as given by Article 38 of the ICJ Statute, as well as the meaning of each source, are highly relevant in this thesis. The particularities of the sources will in the analysis be used as an aid to determine whether there is enough foundation to conclude the existence of a new human right. A rather large part of this Chapter has therefore been devoted to how a customary law can come into being, and thus how to determine if state practice and *opinio juris* exist. What is also relevant is the importance of international agreements, for example General Assembly resolutions, in determining state practice or *opinio juris*. Judicial decisions and opinions of scholars will also be used as subsidiary means in determining a rule of law.

When determining whether a specific right in a Convention exists; the text will be examined to ascertain the ordinary meaning of a provision in light of its context and object and purpose. The *travaux préparatoires* and General Recommendations/Comments along with case-law will be used as an aid in ascertaining the context and object and purpose as given by VCLT Article 31 VCLT. If the ordinary meaning of the provision does not provide paternity leave, examining the provision in the light of the context and its object and purpose may be significant. For example, paternity leave may be a right since it may be considered as aiding or being necessary in the realization of a provision regarding gender equality.

¹¹⁴ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969 (1155 UNTS 331) Article 32.

¹¹⁵ *Ibid.*, Article 32.

¹¹⁶ A. Aust, *Modern Treaty Law and Practice 2nd edn.* (Cambridge University Press, 2007) pp. 244 and 246

3 The Convention on the Elimination of All Forms of Discrimination against Women - CEDAW

3.1 The Genesis of CEDAW

CEDAW is one of the most "political" of all the universal human rights conventions. The Convention came about in an era where two different battles were going on: the Western ideas of Democracy and Market Economy versus Communism and Centrally Planned Economy; and the religious-ideological confrontation between Western and Islamic ideas regarding religion's role in society. Since the fall of the Soviet Union, the first battle is now of diminished importance, however the other one is still going on, which is indicated by the many far-reaching reservations especially from Islamic countries.¹¹⁷

The history of the Convention is closely connected with the growing political importance of women's issues and the emancipation of women. At the UN, a first step was taken in 1952 when the General Assembly adopted the Convention on Political Rights of Women.¹¹⁸ Following this, the Commission on the Status of Women (CSW), which was created in 1946 by the Economic and Social Council (ECOSOC) to promote women's equality and rights,¹¹⁹ prepared a draft called the Declaration on the Elimination of Discrimination against Women (DEDAW) in March 1966. After the Member States' suggestions had been incorporated DEDAW was adopted by Resolution 2263 (XXII) in November 1967 by the General Assembly. ECOSOC in connection with this recommended Member States, national organizations, and Non-Governmental Organizations (NGOs) to recognize the principles contained in DEDAW, to publicize it in different languages, and to undertake studies on the roles of men and women in their society and in the family. States were also encouraged to institute programmes designed to give effect to DEDAW and to consider new legislation for the same reason. In the late 1960s and in the 1970s, the issues that dominated the discussion were the legal status and legal capacity of married and unmarried

¹¹⁷ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. vii and 2; see more on reservations to CEDAW below.

¹¹⁸ *Convention on Political Rights of Women*, New York, 31 March 1953 (193 UNTS 135).

¹¹⁹ <www.un.org/womenwatch/daw/csw/>, visited on 9 January 2007.

women, the status of children born out of wedlock, the role of women in the media and in development, and prostitution and trade in women.¹²⁰

The women's issues gained momentum and in 1974 and the CSW decided to consider proposals for a new international law instrument to eliminate discrimination against women. Further, the General Assembly decided to proclaim 1975 as the International Women's Year by Resolution 3010 (XXVII). The objectives during this year were to try to ensure that women were fully integrated in development efforts; to promote equality between men and women; and to recognize women's contribution to the development of peaceful relations between states. A World Conference of Women was also held in Mexico in 1975. It discussed a variety of topics concerning women: education, training, health, welfare, research, participation in decision-making, and the prevention of exploitation of women and girls. After the Conference the General Assembly adopted ten resolutions that outlined further action regarding the situation of women ; among the action outlined was the establishment of the International Research and Training institute for the Advancement of Women (INSTRAW), which opened in 1983 in Santo Domingo, the Dominican Republic. In addition, 1976-1985 was proclaimed by the General Assembly proclaimed to be the United Nations Decade for Women: Equality, Development and Peace, and in 1980 a Second World Conference of Women was held in Copenhagen.¹²¹

The CSW set up a working group in 1974 to prepare a convention that would build on the Declaration, and the Secretary-General invited Governments, specialized agencies and NGOs to come up with suggestions of what it should contain. CSW's working group prepared several drafts and various Governments and NGOs commented on them. A draft was submitted to the General Assembly in 1977 and a working group, WG1, was established to finalize the draft. The group worked on the title, the preamble, and Articles 1-9. A second working group, WG2, was put together in 1978 to finish work on some more of the Articles. After they finished their work, the General Assembly considered the draft in Res. 33/177 (1978) and decided to form one more working group, WG3. This working group worked on the final provisions, parts V and VI, and some of the incomplete ones.¹²²

The preparatory work of the Convention, the *travaux préparatoires*, in total resulted in five drafts. The preparatory documents give a feeling of the political climate prevalent at that time. Some changes have since occurred but some background factors are still of current importance. For example, the Convention deals with issues that many countries saw as highly sensitive; such as the role and position of women in the decision-making

¹²⁰ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. 6-8.

¹²¹ *Ibid.*, pp. 8-9.

¹²² *Ibid.*, pp. 9-11.

process, in the society and in the family. A number of the concerns could not be expressed openly, but were still determining factors, and some were hidden in vague concepts and terms or questions. Further, some Countries wanted the Convention worded imprecisely so that it would have a less efficient impact; and some feared that the Convention would have a damaging impact on the cultural and social make-up of their country. Finally, keeping the costs low of implementing the Convention was another priority of some of the negotiating representatives.¹²³

Lastly, in December 1979, the Third Committee of the General Assembly considered the final draft of CEDAW¹²⁴ and on 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly through Resolution 34/180 (1979).¹²⁵ The Secretary-General opened CEDAW for signatures on 1 March 1980, and reported that it would enter into force on the 30th day after the 20th instrument of ratification/accession had been deposited with him. A signing ceremony was arranged at the 1980 World Conference of Women in July, and 52 States signed and two deposited instruments of ratification. CEDAW went into force on 3 September 1981 and it currently has 185 States Parties.^{126 127}

3.2 Reservations of States Parties to CEDAW

States can submit reservations on certain provisions when ratifying or acceding to the Convention as long as such reservations are not incompatible with the Convention's object and purpose.¹²⁸ Article 2, on non-discrimination, and 16, on marriage and family life, are considered core provisions and central to CEDAW.¹²⁹ The Committee has also stated that neither incompatible domestic laws, nor national, religious, cultural, or traditional practices and policies can justify violations of the Convention, especially of the core Articles.¹³⁰ The Committee has also stated that they

¹²³ *Ibid.*, pp. 2-3.

¹²⁴ It was approved with a couple of amendments; *See* Yearbook of the United Nations – 1979 (UN, 1979) p. 889 *et seq.* for amendments and Committee abstentions.

¹²⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 (1249 UNTS 13).

¹²⁶ <www2.ohchr.org/english/bodies/ratification/8.htm>, visited on 12 January 2008.

¹²⁷ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. 9-11.

¹²⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 (1249 UNTS 13) Articles 28(1) and (2).

¹²⁹ UN Doc. A/53/38/Rev.1, Part Two, Chapter I, *Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women* (19th session, 1998), 1 January 1998, para. 6.

¹³⁰ *Ibid.*, paras. 16 and 17.

consider reservations to Article 7, on political and public life,¹³¹ and Article 11(2)(d), on special protection for pregnant women at work that is considered harmful, incompatible with the Convention's object and purpose.¹³² Currently 23 States have made reservations to Article 2, the most common one being that compliance is subject to *Sharia* Law or its legislation.¹³³ Furthermore, 33 States have submitted reservations concerning Article 16, the most common one also being that the application of the provisions are subject to *Sharia* Law; especially concerning rights at dissolution of marriage, regarding children and custody, and choice of family name.¹³⁴ Many States Parties have objected to those States making reservations to Article 2 and 16, and especially general reservations on that

¹³¹ UN Doc. A/59/38 (Part 1), *Report of the Committee on the Elimination of Discrimination against Women, 30th Session (12-30 January 2004) - Kuwait Concluding Comments*, 18 March 2004, para. 61; and UN Doc. A/60/38 (Part 1), *Report of the Committee on the Elimination of Discrimination against Women, 32nd Session (10-28 January 2005) - Israel Concluding Comments*, 18 March 2005, para. 246.

¹³² UN Doc. HRI/MC/2007/5, *Report of the Meeting of the Working Group on Reservations*, 10 January 2007, para. 14; there are however only a handful of countries that have made reservations against those two articles.

¹³³ Reservations to Article 2: Algeria; Bahamas (2(a)); Bahrain; Bangladesh (general reservation; compliance subject to *Sharia* Law); Democratic People's Republic of Korea (2(f)); Egypt (general reservation; compliance subject to *Sharia* Law); Iraq (2(f) and (g)); Lesotho (regarding succession to the throne and succession to chieftainship); Libyan Arab Jamahiriya (regarding inheritance portions of the estate of a deceased person); Mauritania (general reservation; compliance subject to *Sharia* Law); Federated States of Micronesia (2(f), regarding traditional titles); Morocco (regarding succession to the throne and conflicts with *Sharia* Law); New Zealand (2(f), regarding Cook Islands and inheritance of chief titles); Niger (2(d) and (f), in particular regarding succession); Oman (general reservation; compliance subject to *Sharia* Law and its legislation); Pakistan (general reservation; compliance subject to its Constitution); Saudi Arabia (general reservation; compliance subject to *Sharia* Law); Singapore (general reservation; compliance subject to religious laws and personal laws); Spain (regarding succession); Syrian Arab Republic; Tunisia (general reservation; compliance subject to its Constitution); United Arab Emirates (2(f), regarding inheritance); and United Kingdom (regarding succession to the throne and other titles); <www.un.org/womenwatch/daw/cedaw/reservations-country.htm>, visited on 5 January 2008.

¹³⁴ Reservations to Article 16: Algeria; Bahamas (16(1)(a)); Bahrain (general reservation; compliance subject to *Sharia* Law); Egypt (general reservation; compliance subject to *Sharia* Law); France (16(1)(g), concerning choice of family name); India (16(1) and (2)); Iraq; Ireland (16(1)(d) and (f), concerning men's rights not being identical to women's regarding guardianship, adoption and custody of children born out of wedlock); Israel; Jordan (16(1)(c), regarding maintenance upon dissolution of marriage, and (d) and (g)); Kuwait (16(1)(f)); Lebanon (16(1)(c), (d), (f) and (g), regarding choice of family name); Libyan Arab Jamahiriya (16(1)(c) and (d)); Luxembourg (16(1)(g), concerning choice of family name); Malaysia (16(1)(a), (c), (f) and (g), and 16(2)); Maldives; Malta (16(1)(e)); Mauritania (general reservation; compliance subject to *Sharia* Law); Federated States of Micronesia (regarding customs that divide marital tasks or decision-making); Monaco (16(1)(e) and (g)); Morocco; Niger (16(1)(c), (e), (g)); Oman (16(1)(a), (c) and (f)); Republic of Korea (16(1)(g)); Pakistan (general reservation; compliance subject to its Constitution); Saudi Arabia (general reservation; compliance subject to *Sharia* Law); Singapore (general reservation; compliance subject to religious laws and personal laws); Syrian Arab Republic (16(1)(c), (d), (f) and (g), and 16(2)); Switzerland (16(1)(g), regarding choice of family name, and 16(1)(h)); Thailand; Tunisia (16(1)(c), (d), (f), (g) and (h)); United Arab Emirates (general reservation; compliance subject *Sharia* Law); and United Kingdom (16(1)(f), regarding adoption); <www.un.org/womenwatch/daw/cedaw/reservations-country.htm>, visited on 5 January 2008.

the application of the entire Convention is subject to *Sharia* Law or the country's laws.¹³⁵

3.3 The CEDAW Committee

The CEDAW Committee, which is composed of 23 experts serving in individual capacity, was established under Article 17 of the Convention and held its first session in 1982. It examines States Parties' periodic reports, usually submitted every four years, on the implementation of the Convention, and can according to Article 21 make suggestions and issue General Recommendations. 'Recommendations' are usually addressed to all States Parties, and they allow the Committee to elaborate on its views regarding States' obligations, while 'suggestions' usually are directed at United Nations entities. Currently, the Committee has adopted 25 General Recommendations. After the first ten years when the recommendations were shorter and addressed issues such as the content of the report and reservations, the Committee decided to provide more detailed and comprehensive recommendations on specific articles or on specific themes offering clear guidance for States Parties on application of the Convention in a specific situation.¹³⁶ Before the adoption of a General Recommendation, NGOs and other parties are invited to engage in an open discussion on the topic with the Committee.¹³⁷

3.4 Relevant Provisions in CEDAW that may be Interpreted as a Right to Paternity Leave

This section will examine whether a right to paternity leave can be found in the Convention. I will look at whether the *travaux préparatoires* of CEDAW, General Recommendations of the Committee, or any decisions of Individual Complaints under the Optional Protocol can support an argument that it is a right under the Convention, or provide support of the contrary view. CEDAW does not mention paternity leave or parental leave, *per se*, though it provides for maternity leave. This thesis is, as is mentioned in Chapter 1, examining paternity leave as a way to the actual realization of equality. This section will thus examine CEDAW from two angles: one, if there is any one specific right that could be interpreted as a right to paternity leave; or two, if a combination of rights in conjunction with each other would lead to the conclusion that such a right exists or should exist. When discussing a father's right to take leave from work in order to take care of

¹³⁵ <www.un.org/womenwatch/daw/cedaw/reservations-country.htm>, visited on 5 January 2008.

¹³⁶ <www.un.org/womenwatch/daw/cedaw/recommendations/index.html>, visited on 28 October 2007.

¹³⁷ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 301.

his child and to eliminate, among other things, inequality for women; the areas that need examining are: general non-discrimination and equality provisions; employment rights; spousal rights and responsibilities within the family; and rights and responsibilities regarding children.

The CEDAW Committee stated in its General Recommendation No. 25 from 2004 that the Convention “targets discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms”, and that “[i]t aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality”.¹³⁸

3.4.1 The *Travaux Préparatoires*

This section will examine the Preamble, Articles 1-5 on discrimination, policy measures, the guarantee of basic human rights and fundamental freedoms, special measures and sex role stereotyping and prejudice; and Articles 11 and 16 on employment and marriage and family life.

3.4.1.1 The Preamble – Objects and Goals of the Convention

The Preamble of the Convention lists the objectives and goals of its States Parties. The wording of the Preamble corresponds almost fully to the preamble of DEDAW,¹³⁹ and the first three paragraphs of the Preamble states four other major international Conventions that provide for women’s equal enjoyment of rights:

The States Parties to the Present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal

¹³⁸ UN Doc. HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004) para. 14.

¹³⁹ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. 32-33.

rights of men and women to enjoy all economic, social, cultural, civil and political rights,...

A preamble was not included in the first draft that the Philippines presented,¹⁴⁰ however the USSR felt it was necessary to include one in order to emphasize that all countries depend, in their future development and prosperity, on women assuming full part in all spheres of society. In Draft 4, many governments preferred a wording that was general and placed women and men on equal footing. They felt the first drafts over-emphasized the significance of women. It was stressed by the All-African Women's Conference that the Preamble should contain that a country's development is dependant on the "maximum participation of women as well as men in all fields"¹⁴¹. They also suggested, as did the WTO, that the specific mentioning of discrimination, both *de jure* and *de facto*, should be included, which was excluded in the end. Most of the countries that prepared and commented on the drafts for the convention were in favour of a preamble emphasizing the importance of women's rights. However, Benin did not support the specific mentioning of the UN Charter, the Universal Human Rights or the International Covenants.¹⁴²

Paragraphs 12-14 of the Preamble provides for women's equal participation in the society and equality in the family:

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Paragraph 12, on the suggestion of Iran and The German Democratic Republic, "on equal terms" was used instead of "as well as" as Draft 6 read.¹⁴³ On the suggestion of Sweden and the US, "parents" was included in paragraph 13 to stress the importance of both men and women taking part in

¹⁴⁰ UN Doc. E/CN.6/573.

¹⁴¹ UN Doc. E/CN.6/591, p. 7.

¹⁴² L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. 32-34; and UN Doc. E/CN.6/591, pp. 7-9.

¹⁴³ UN Doc. E/CN.6/591/Add.1.

the upbringing of children.¹⁴⁴ UNESCO, Denmark, Finland, The Netherlands, Norway and Sweden wanted to take away the words “the social significance of maternity” and replace this with “the social significance of child-bearing and of the role of both parents in the family and in the rearing of children”.¹⁴⁵ Sweden further suggested that the word “maternity” should be replaced by “parenthood”, which was not accepted.¹⁴⁶ Mexico suggested the amendment “procreation should not be a basis for discrimination but should be a sharing of responsibility between parents”, which was adopted.¹⁴⁷ Sweden proposed an additional paragraph, paragraph 14, which emphasized the need for a change in men’s traditional roles.¹⁴⁸ Paragraph 14 was adopted stating that the traditional roles of both men and women in the society and in the family needed to change.¹⁴⁹

In one of the drafts, a suggestion of a paragraph was “considering that it is necessary to ensure the universal recognition in law and in fact of the principle of equality of men and women, and to put that principle in practice.”¹⁵⁰ The drafts submitted by Benin, Indonesia and the All-African Women’s Conference also included this.¹⁵¹

The final paragraph of the preamble, paragraph 15, stresses that States Parties are determined to adopt measures required to eliminate discrimination “in all its forms and manifestations”.¹⁵²

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,...

3.4.1.2 Article 1 - Discrimination

Article 1 provides what the term “discrimination against women” means in the Convention:

Article 1

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital

¹⁴⁴ UN Doc. E/CN.6/L.716, paras. 14-16.

¹⁴⁵ UN Doc. A/32/218, p. 6 and Annex I, p. 1; and UN Doc. A/C.3/32/WG.1/CRP.2, p. 5.

¹⁴⁶ UN Doc. A/32/218/Add.1, para. 16.

¹⁴⁷ UN Doc. A/C.3/32/L.59, paras. 52-53.

¹⁴⁸ UN Doc. A/C.3/34/14, p. 23.

¹⁴⁹ *Ibid.*

¹⁵⁰ UN Doc. E/CN.6/591, p. 51.

¹⁵¹ *Ibid.* pp. 83, 91 and 100.

¹⁵² L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 41.

status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

During the preparatory discussions, there was a division between those who felt the Convention should only deal with discrimination against women, concerning such things as women's position in the society, role in the family, and maternal functions; and those who felt it should deal with discrimination on the grounds of sex as a whole.¹⁵³

3.4.1.3 Article 2 - Policy Measures

Article 2 has seven paragraphs that deal with the different policy measures States Parties are obliged to undertake. The primary concerns as reflected in the *travaux préparatoires* was that the article rather flexible. It should take into account countries' different social and economic conditions; that legislative measures should not be regarded as the only means to achieve equality; and that the principle of equality of rights should be embodied in States Parties' Constitutions. Iran stated that there were some provisions that were inconsistent with Iranian laws dealing with religion. Sweden stated that true equality between men and women could not be reached by measures that exclusively dealt with women; one would also need to introduce measures that would aim at bringing about changes in the traditional role of men. The Governments involved in the preparatory work supported the idea that elimination of discriminations should be both at the national and at the international level; involve the abolition of existing discriminatory laws, customs, regulations and practices; and provide adequate legal protection of equal rights.¹⁵⁴

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(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;

¹⁵³ *Ibid.*, p. 44.

¹⁵⁴ *Ibid.*, pp. 53-54.

(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.

Hungary proposed that the Convention “must ensure that in all spheres of human rights, women enjoy full equality of rights”. The Philippines proposed “all appropriate means” so it would cover all forms of discriminatory customs and practices without a need for specification. The Philippines also supported a separate Article expressing states’ obligation to take concrete measures to enhance equality in the economic, social and cultural fields.¹⁵⁵ The United Kingdom suggested eliminating in the first sentence of Article 2 “...in all its forms...”, as it felt that certain treatment differences of the sexes are desirable and that it needs to be recognized in the convention.^{156 157}

Under Article 2(a) States Parties undertake “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation”. The Byelorussian SSR¹⁵⁸ proposed that States Parties should be required to insert material provisions to protect equal rights in their national legislation.¹⁵⁹ The Ukrainian SSR proposed that the Convention should mention specific undertakings by States to adopt non-discriminatory measures.¹⁶⁰ Under Article 2(d), Sweden stated that besides legislation, it was also a State’s responsibility to eradicate sex-role prejudice through education and information.¹⁶¹ Under Article 2(f), Singapore noted that the provision did not recognize the existence of Muslim Law. A suggestion from Morocco to add “in their view” in the same subparagraph after the words “customs and practices which” was voted down by 60 votes to 25 with 25 abstentions.¹⁶²

¹⁵⁵ UN Doc. E/CN.6/573, paras. 53, 55 and Annex 1.

¹⁵⁶ *Ibid.*

¹⁵⁷ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 54.

¹⁵⁸ Soviet Socialist Republic.

¹⁵⁹ UN Doc. E/CN.6/573, paras. 49-52.

¹⁶⁰ *Ibid.*

¹⁶¹ UN Doc. E/CN.6/591, paras. 35-36.

¹⁶² UN Doc. A/C.3/34/SR.72, p. 24.

3.4.1.4 Article 3 – Guarantee of Basic Human Rights and Fundamental Freedoms

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Finland thought this Article was redundant when considering Articles 10-14. However, most Governments agreed on that it was not and recognized the importance of it. Pakistan, in referring to Article 3, emphasized the importance of countries aspiring to eliminate discrimination along with education of the public.¹⁶³

3.4.1.5 Article 4 - Special Measures

Article 4 provides that temporary special measures can be undertaken to accelerate equality, but that such measures should not be considered as discriminatory against men.¹⁶⁴

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

The USSR suggested that it should say “[i]n order to achieve *de facto* equality of rights of women with men, the States Parties undertake to give effect to the equality of rights of men and women provided for in legislation by creating the necessary actual conditions and guarantees.”¹⁶⁵ This suggestion did not gain any support.¹⁶⁶ Canada and Denmark pointed out that many forms of protectionist legislation can be used to the disadvantage to women and proposed the deletion of Article 4(2).¹⁶⁷ Under the same subparagraph, Sweden suggested that instead of measures to ‘protect

¹⁶³ UN Doc. E/CN.6/591, paras. 44 and 46 ; and UN Doc. E/CN.6/606, p. 2.

¹⁶⁴ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 (1249 UNTS 13) Article 4.

¹⁶⁵ UN Doc. E/CN.6/AC.1/L.2.

¹⁶⁶ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 69.

¹⁶⁷ *Ibid.*, p. 70.

maternity’; it should provide measures to protect the social functions of reproduction of both men and women. This, the USSR failed to understand since “maternal functions were the lot of women”.¹⁶⁸

3.4.1.6 Article 5 - Sex Role Stereotyping and Prejudice

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all 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;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 5 deals with cultural patterns and stereotyped roles; that children are a common responsibility for both men and women; and that the interest of children is of primordial interest.¹⁶⁹

3.4.1.6.1 “to modify the social and cultural patterns of conduct of men and women...”

Canada supported a similar idea in DEDAW on the importance of “education of public opinion [...] to eradicate practice and prejudice based on the inferiority of women”.¹⁷⁰ Pakistan expressed the view, concerning education of the public, that “all appropriate measures shall be taken to educate public opinion [...] to abolish prejudicial practices, customs and usages”.¹⁷¹ The delegates also settled on mentioning stereotyped roles for both men and women instead of just for women. The final version replaced “educating the public opinion” with the weaker “modify social and cultural patterns of conduct of men and women”. It also used the weaker “elimination of prejudices” instead of the stronger “eradication of prejudice”.¹⁷²

¹⁶⁸ *Ibid.*, p. 73; and UN Doc. E/CN.6/SR.661, paras. 12, and 19-20.

¹⁶⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 (1249 UNTS 13) Article 5.

¹⁷⁰ UN Doc. E/CN.6/573, para. 56.

¹⁷¹ UN Doc. E/CN.6/606, p. 2.

¹⁷² L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 84.

3.4.1.6.2 “maternity as a social function...”

Draft 3 mentioned the “protection of motherhood as a social function”. Norway noted that this was unclear and that it might tie women too closely to the motherhood role.¹⁷³ Cuba said that the question of motherhood was an important one, and stated that it should not serve as a pretext for discrimination.¹⁷⁴ The United States expressed the idea that protection of motherhood should be examined very carefully, and also pointed out that the mother and the father should share family responsibilities.¹⁷⁵ The United States, UNESCO,¹⁷⁶ Kenya and Sweden stated that ‘motherhood’ should be replaced with ‘parenthood’. The United States said that the use of the word motherhood would be discriminatory against men.¹⁷⁷ In an earlier draft The United States suggested “childbearing as a social function”.¹⁷⁸ Mali, Syrian Arab Republic, The United States and the USSR¹⁷⁹ suggested that the paragraph should read ‘maternity’, which was adopted.¹⁸⁰

France wanted to add a text instead stating that attention “should be given to family education of the couple”. India suggested a section with the words “...recognition of the complementary roles of men and women in the responsibility for children, should figure prominently in plans drawn up for this purpose”. Egypt then noted that it seemed like the discussion had turned into whether “the parental function should be viewed in its strictly private aspect or as a social function” and as of yet it had not formed an opinion on this.¹⁸¹

3.4.1.6.3 “...the recognition of the common responsibility of men and women in the upbringing and development of their children”

Regarding Article 5(b), The United States supported the mentioning of that the father should share responsibility of the family.¹⁸² Sweden supported the mentioning of children as a common responsibility because it reflected the important principle that the responsibility for the children should be divided between both parents.¹⁸³ France said that it did not like the proposal that used the word complementary roles of men and women, since this in the past had been used as an argument for keeping women in an inferior situation.¹⁸⁴ France and Belgium suggested that the paragraph should say: “In the view of the importance of motherhood, a social function, the same

¹⁷³ UN Doc. E/CN.6/AC.1/L.12.

¹⁷⁴ UN Doc. E/CN.6/SR.636, paras. 3-11.

¹⁷⁵ *Ibid.*, para. 19.

¹⁷⁶ United Nations Educational, Scientific and Cultural Organization.

¹⁷⁷ UN Doc. A/32/218/Add.1, para. 23.

¹⁷⁸ UN Doc. E/CN.6/AC.1/L.6, p. 3.

¹⁷⁹ Union of Soviet Socialist Republics.

¹⁸⁰ UN Doc. A/C.3/32/WG.1/CRP.6/Add.6.

¹⁸¹ UN Doc. E/CN.6/SR.636, paras. 20-24.

¹⁸² *Ibid.*, paras. 62-64.

¹⁸³ *Ibid.*, paras. 46-47 and 66-70.

¹⁸⁴ *Ibid.*, paras. 46-47 and 53.

attention should be given to the family education of the couple with a view to ensuring the equitable sharing of all tasks between the parents.”¹⁸⁵ The United States suggested the section should read: “it should be recognized that both motherhood and fatherhood are responsible social function”.¹⁸⁶ This suggestion was found unacceptable by Senegal.¹⁸⁷ Sweden supported the suggestion, and said this was important especially in situations of unwed mothers to ensure that the father should share the financial burden of bringing up a child. Sweden suggested another provision that should reflect “the requirement that men should assume and be given the opportunity of exercising their share of the responsibility for the family provision for and care of the children”.¹⁸⁸

3.4.1.6.4 “...the interest of the children is the primordial consideration in all cases”

Morocco suggested the ending of Article 5(b). Further, a discussion took place on the focus of the rights of a child born out of wedlock, in contradistinction to the responsibilities of the parents.¹⁸⁹ Poland suggested a separate convention dealing with equal rights and obligations of mothers and fathers toward their children, as it pointed out that in some countries only the father has parental authority over the children.¹⁹⁰

3.4.1.7 Article 11 - Employment

Article 11(1) provides equal access and opportunities when it comes to employment.¹⁹¹

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational

¹⁸⁵ UN Doc. E/CN.6/SR.636, para. 56.

¹⁸⁶ *Ibid.*, para. 55.

¹⁸⁷ *Ibid.*, paras. 58-61.

¹⁸⁸ UN Doc. E/CN.6/573, paras. 89 and 94.

¹⁸⁹ *Ibid.*

¹⁹⁰ UN Doc. E/CN.6/AC.1/L.2, para. 93.

¹⁹¹ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 (1249 UNTS 13) Article 11.

training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction...

The USSR and the Byelorussian SSR suggested that the convention should cover women's equal right to free choice of occupation and profession.¹⁹² Guyana stressed that legislation limiting the hours during which women could be employed should be eliminated, and that it was important to include in the text that women should receive the same basic wage as men.¹⁹³ A separate convention covering assistance to parents with family responsibilities, was suggested by Finland.¹⁹⁴

Sweden pointed out that "a mention should be made of a requirement for men to be given the same opportunity to assume and exercise their share of the responsibility for the family/children", and further noted that "unless responsibility is shared, it would appear impossible to achieve equality on the labour market and in education".¹⁹⁵ The USSR's Draft 2 specifically mentioned States' responsibility concerning "measures to enable women to combine the fulfilment of family and marital obligations with activity in the labour force".¹⁹⁶ Belgium stated that they wanted to have the Convention written so as to "limit as much as possible those measures which discourage employers from hiring women".¹⁹⁷

The idea of shared responsibility in the home was supported by the International Confederation of Free Trade Unions. However, they felt that such issues fell within the International Labour Organization's (ILO) sphere of responsibility and should be handled by them instead of being placed in the Convention.¹⁹⁸ Japan also felt that the ILO was a more appropriate forum for the discussion of working women's problems.¹⁹⁹ That it was important that the Convention did not request special privileges to women was stressed by Canada, and it further stressed that reference should be

¹⁹² UN Doc. E/CN.6/573, para. 72.

¹⁹³ *Ibid.*, para. 88.

¹⁹⁴ *Ibid.*, paras. 89-90.

¹⁹⁵ *Ibid.*

¹⁹⁶ UN Doc. E/CN.6/AC.1/L.2, pp. 6-7.

¹⁹⁷ UN Doc. E/CN.6/591/Add.1/Corr.1, pp. 3-5.

¹⁹⁸ UN Doc. E/CN.6/SR.613, pp. 10-11.

¹⁹⁹ UN Doc. E/CN.6/SR.614, p. 12.

made to “parents” in general instead of “mothers”.²⁰⁰ The German Democratic Republic stressed that one of the most important assurances of women’s equality was the protection of the interests of mothers and children by measures such as free hospitalization and medical care services for the protection of mothers and children, and maternity leave.²⁰¹

Iraq felt that the mentioning of a right to the same employment opportunities in subparagraph 1(b) would weaken family structures, and that it was incompatible with Iraq’s laws.²⁰² The United States wanted the text to emphasize the need for States to adopt legislation to prevent employment discrimination of women and to ensure equal opportunities for both sexes.²⁰³ In an earlier draft, Draft 4, the phrase “maternal obligations” was mentioned. The representative for The International Federation of University Women felt that such a phrase could imply that women were more obligated to care for children than men.²⁰⁴

Regarding subparagraph 1(f), The United States expressed that special protective legislation for women often worked against them and prevented them from getting higher paid jobs. If there should be protective measures inserted in the Convention they should also be extended to men. The USSR expressed its view that men were not especially disadvantaged when it came to employment and it did not understand why men should be protected in this way in the Convention. The final draft of the Convention settled on the notion that men and women shall have the same right to protective health measures when it comes to working conditions.²⁰⁵

Article 11(2) of the Convention deals with the prevention of discrimination against women on grounds of marriage or maternity. Paragraph (a) provides the prohibition of sanctions and dismissal on the above grounds:

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family

²⁰⁰ UN Doc. E/CN.6/SR.615, pp. 23 and 25.

²⁰¹ UN Doc. E/CN.6/SR.644, paras. 14-18.

²⁰² UN Doc. E/CN.6/591, para. 123.

²⁰³ UN Doc. E/CN.6/SR.644, para. 66.

²⁰⁴ UN Doc. E/CN.6/591, p. 67.

²⁰⁵ UN Doc. E/CN.6/SR.647, paras 7-9, 18, 20-21 and 33-35.

obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them; [...]

3.4.1.7.1 “to introduce maternity leave”

Article 2(a) provides for the prohibition of dismissal due to pregnancy or maternity leave. Hungary, India, Indonesia and Venezuela supported a proposal by the United States on prohibition of dismissal due to maternity or marital status.²⁰⁶ Article 2(b) provides that states shall take appropriate measures to introduce maternity leave. The ILO wanted this paragraph to be cross-referenced to the ILO Maternity Protection Convention No. 103, and stressed that it should be made clear that the cost should be borne by public funds and not by the individual employer. Sweden wanted “maternity leave” replaced with “paid leave for parents”.²⁰⁷ Draft 4 contained a suggestion of the paragraph reading “States Parties undertake progressively to adopt all necessary measures to ensure protection for women workers, and in particular [...] to encourage the granting of paid leave for parents of either sex for purposes of child care”.²⁰⁸ A suggestion of the Denmark expressed that the right to return to a former employer after maternity leave must be qualified, or this provision might block younger women from being employed.²⁰⁹

A discussion started on the general scope and intention of the Convention. Hungary on one side favoured “granting”, or as they said, at the very least the “progressive granting of” maternity leave, since they believed the new universal conventions should not retreat too much from earlier instruments, e.g. ILO conventions. The USSR agreed, however India, Indonesia and The United States felt that “encourage” maternity leave was better since not all countries were in a position to offer paid leave or to require that employers did. The ILO expressed its view that the texts should serve as an example and a model for all countries. France felt that “in order for a convention to lead mankind forward, it should draw attention to the need for specific changes in legislation and behaviour”.²¹⁰ To this India replied, that the convention should lead, not only those who already had favourable conditions, but also those who did not, and suggested that it instead of saying “granting paid leave for maternity”, it should say “progressively introducing paid maternity leave”. Japan felt that “leave” should not be

²⁰⁶ *Ibid.*, paras. 40, 42-45 and 47.

²⁰⁷ UN Doc. E/CN.6/591, pp. 69-70.

²⁰⁸ UN Doc. E/CN.6/574, p. 13.

²⁰⁹ UN Doc. E/CN.6/591, para. 128.

²¹⁰ L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 139.

modified by “paid”. The final version has no mentioning of whom should bear the cost.²¹¹

3.4.1.7.2 “to enable parents to combine family obligations with work responsibilities”

The USSR proposed that some phrases in subparagraph 2(c) should be replaced. This replacement would be aimed at protecting women engaged in “work of a kind that is prejudicial to their social function of reproduction of the population”.²¹² It suggested that “to enable parents” should be replaced with “to enable women”, and “parental obligations” should be replaced with “maternal obligations”. The United States opposed this suggestion and observed that there seemed to be inconsistencies between special protection on one hand and the request for equality of opportunity on the other. Mexico supported the United States stand, but suggested that a separate paragraph deal with work that could be harmful to pregnant women. The negotiations resulted in the enabling of parents to fulfil their obligations and a separate subparagraph that dealt with harmful work during pregnancy, Article 11(2)(d).²¹³

3.4.1.8 Article 16 – Marriage and Family Life

Article 16(1) provides for equality between men and women in marriage.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ...

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;...

Some countries, Austria, Belgium and Poland, mentioned that these issues should be dealt with in a separate convention.²¹⁴ Sweden stated that since family rights and responsibilities were not defined in the international Covenant on Civil and Political Rights, it thought it would be hard to establish international unity in this field.²¹⁵ Pakistan and Egypt expressed

²¹¹ UN Doc. E/CN.6/SR.647, paras. 53, 56-58, 60-61, 67, 72-75 and 81.

²¹² L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, Dordrecht, 1993) p. 142.

²¹³ UN Doc. E/CN.6/SR.647, paras. 58-68, 74, 77 and 81.

²¹⁴ UN Doc. E/CN.6/573, paras. 92-93.

²¹⁵ UN Doc. E/CN.6/573, para. 94.

their view that the provisions would be subject to a State's family laws, which are closely connected with the faith of a country.²¹⁶

3.4.1.8.1 “the same rights and responsibilities during marriage and at its dissolution”

The United Kingdom suggested substituting the word duties with the word responsibilities, which was used in an earlier draft of subparagraph 16(1)(c) and (d), since it thought ‘duties’ was a vague word. They felt the use of the word responsibilities would be more correct “since the duties of men and women during marriage and at its dissolution were not strictly equal”.²¹⁷ This suggestion was adopted.²¹⁸ However, the USSR and Indonesia wanted to keep the original wording. Belgium pointed out that national laws of a discriminatory nature should not be a basis for the Convention. Pakistan wanted to enter reservations when it came to using the word “responsibilities”, and Egypt had problems with the whole sub-paragraph (c), as it conflicted with Egyptian laws.²¹⁹

The Moroccan representative felt that the subparagraph should be amended and should take into account “a fact which was a matter of common sense, namely, that men and women, in order to be truly equal, did not need to be treated the same, which would be contrary to nature”. Morocco further expressed that there was a danger that in dedication to the principle of equality “the privileges accorded to women under the natural law by virtue of their femininity might be lost.”²²⁰ Morocco also suggested that “the same rights and responsibilities” as subparagraph 16(1)(c) reads instead should say “with respect for the rights of women”. Iran expressed that such a wording would not enhance equality as it only provided for women's rights as they were today. The use of the word “respect” instead of “equal rights and responsibilities” was by some countries a weaker statement and the suggestion was rejected. Egypt preferred the Moroccan wording. However, the Moroccan suggestion was rejected with 68 votes to 13, with 24 abstentions.²²¹

3.4.1.8.2 “...same rights and responsibilities as parents...”

The discussion that took place in connection with this paragraph centred on whether rights should be accorded to single mothers and unmarried parents. In the end an amendment suggested by the United Kingdom that read “irrespective of their marital status” was adopted. This provoked a reservation from Egypt.²²²

²¹⁶ UN Doc. E/CN.6/591, para. 156 and footnote 47, and UN Doc. E/CN.6/573, para. 73.

²¹⁷ UN Doc. E/CN.6/573, paras. 204-206.

²¹⁸ *Ibid.*

²¹⁹ UN Doc. E/CN.6/SR.650, paras. 72-75, 77, 83 and 90-92.

²²⁰ UN Doc. A/C.3/34/SR.70, para. 11.

²²¹ UN Doc. A/C.3/33/L.47/Add.2, paras. 204-206.

²²² UN Doc. A/C.3/33/L.47/Add.2, paras. 211 and 213-215.

The Federal Republic of Germany expressed that it was desirable to have a system for the protection of motherhood, and said such a system “cannot be considered as violating equality for women”.²²³ The insertion of “the interest of children shall in all cases be paramount” was suggested and it started a discussion on if the convention at all should deal with children’s rights. This suggestion was in the end adopted.²²⁴

3.4.2 General Recommendations of the CEDAW Committee

General Recommendation No. 3 noted “the existence of stereotyped conceptions of women, owing to socio-cultural factors, that perpetuate discrimination based on sex and hinder the implementation of Article 5 of the Convention”, and urged States Parties to eliminate such prejudices and practices by education and public information.²²⁵ In *General Recommendation No. 13* the Committee encouraged States Parties who have not yet ratified ILO Convention no.100 on Equal Remuneration for Men and Women Workers for Work of Equal Value to do so, and further to do more to overcome gender segregation and ensure the practical application of the principle of equal remuneration for work of equal value.²²⁶

In *General Recommendation No. 19 on Violence against Women*, the Committee points out that “discrimination under the Convention is not restricted to action by or on behalf of Governments (see Articles 2(e), 2(f) and 5)”.²²⁷ States may thus, the Committee continues, be responsible for private acts of violence against women “under general international law and specific human rights covenants, if they fail to act with due diligence to prevent such violations or to investigate and punish”.²²⁸

General Recommendation No. 21 on Equality in Marriage and Family Relations. The Committee wanted to stress women’s basic rights within the family and the importance of compliance in connection with 1994 being designated the International Year of the Family by the General Assembly.²²⁹ They stated that even in societies where *de jure* equality exists, all societies assign roles to women that are regarded as inferior.²³⁰ However, on the positive side, the principle that the best interests of the child shall be a primary consideration, which both Article 5(b) of CEDAW and Article 3 of

²²³ UN Doc. E/CN.6/591, para. 158.

²²⁴ UN Doc. A/C.3/33/WG.1/CRP.9, p. 1.

²²⁵ UN Doc. A/42/38, CEDAW Committee, *General Recommendation No. 3* (6th session, 1987).

²²⁶ UN Doc. A/44/38, CEDAW Committee, *General Recommendation No. 13: Equal Remuneration for Work of Equal Value* (8th session 1989).

²²⁷ UN Doc. A/47/38, CEDAW Committee, *General Recommendation No. 19, Violence against Women* (11th session 1992) para. 9.

²²⁸ *Ibid.*

²²⁹ UN Doc. HRI/GEN/1/Rev. 7, p. 253, CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations* (13th session, 1994) para. 4.

²³⁰ *Ibid.*, para. 20.

CRC provide, is a principle that now has almost universal acceptance.²³¹ Furthermore, most States recognize “the shared responsibility of parents for the care, protection and maintenance of children” as provided in Article 5(b). The Committee stated that “the shared rights and responsibilities enunciated in the Convention should be enforced at law”.²³² The Committee also said that “the responsibilities that women have to bear and raise children affect their right of access to education employment and other activities related to their personal development [and] they impose inequitable burdens of work on women”.²³³

The Committee noted with alarm the number of reservations by States Parties to the whole or part of Article 16, which they claim is in conflict with cultural or religious views of the family or with a countries political or economic status. However, in many countries it has been recognized that for the economic advancement of the country and the general good of the community all adults need to be involved equally in society. In addition, “consistent with Articles 2, 3, and 24 in particular, the Committee requires that all States Parties gradually progress to a stage where, by its resolute discouragement of notions of the inequality of women in the home, each country will withdraw its reservation, in particular to Articles 9, 15 and 16 of the Convention”.^{234 235}

In *General Recommendation No. 23 on political and public life* the Committee points out that the Convention places great importance on the equality of participation in public life and on the equality of opportunity. It is a problem that men still dominate the public sphere with the power to confine and subordinate women within the private sphere. Women have been assigned to the private and domestic sphere with childrearing as their main responsibility.²³⁶ The main factors inhibiting women taking a more active part in public life are “the cultural framework of values and religious beliefs, the lack of services and men’s failure to share the tasks associated with the organization of the household and with the care and raising of children”.²³⁷ If women were relieved of some domestic tasks, this would allow women more time to engage in the life of their communities.²³⁸ Other concerns preventing women from being more active are women’s economic dependence, and the long and inflexible hours of public life. Also, women that have attained a political position are often, due to stereotypical prejudices, confined to issues such as health, children and the environment, and are excluded from issues such as conflict prevention, defence,

²³¹ *Ibid.*, para. 27.

²³² *Ibid.*

²³³ *Ibid.*, para. 29.

²³⁴ *Ibid.*, para. 51.

²³⁵ *Ibid.*, paras. 49-50.

²³⁶ UN Doc. HRI/GEN/1/Rev. 7, p. 263, CEDAW Committee, *General Recommendation No. 23: Political and Public Life* (16th session, 1997) para. 8.

²³⁷ *Ibid.*, para. 10.

²³⁸ *Ibid.*

peacemaking missions, finance and constitutional interpretation and determination.²³⁹

In many societies where women's equal participation have been affirmed in constitutions for decades; women still continue to have a much lower participation rate in politics and thus policies are developed and decisions are made that "reflect only part of [the] human experience and potential."²⁴⁰ The Committee states that "the just and effective organization of society demands the inclusion and participation of all its members".²⁴¹ Economic, social and cultural barriers limit women's participation, and "the concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both".²⁴² In the course of the examination of States Parties' reports, the Committee stated that it noticed that a higher participation of women in public life and decision-making also shows an improved compliance with the Convention.²⁴³ The Recommendations concluded by saying that "women's full participation is essential not only for their empowerment but also for the advancement of society as a whole."²⁴⁴

The Committee discussed temporary special measures in *General Recommendation No. 25*. While discussing the achievement of *de facto* equality the Committee stated that "[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed". States must consider women and men's lives in a contextual way, and measures should be "adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns".²⁴⁵

3.4.3 The Optional Protocol

The Commission on the Status of Women responded to calls both from the World Conference on Human Rights and the Fourth World Conference on Women and elaborated on a complaints mechanism, an optional protocol, to CEDAW.²⁴⁶ On 6 October 1999, The Convention's *Optional Protocol* was adopted by the General Assembly, and it went into force on 22 December

²³⁹ *Ibid.*, paras. 12 and 30.

²⁴⁰ *Ibid.*, para. 13.

²⁴¹ *Ibid.*

²⁴² *Ibid.*, para. 14.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, para. 17.

²⁴⁵ UN Doc. HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004), para. 10.

²⁴⁶ *From Beijing to Beijing+5 – Review and appraisal of the implementation of the Beijing Platform for Action*, Report of the Secretary-General (United Nations, New York, 2001) p. 6.

2000 upon ratification by 10 States Parties.²⁴⁷ Currently the Protocol has 90 parties.²⁴⁸

The optional protocol allows the Committee to receive and consider complaints of violations of rights under the Convention from individuals or groups, paragraph 2, if domestic remedies have been exhausted, or another procedure of international investigation is examining or has examined the complaint, paragraph 4. The Committee can also under the protocol initiate enquiries into situations of grave or systematic violations of women's rights, paragraph 8, for those States Parties that have not declared that they opt-out of this procedure.²⁴⁹

There has so far not been any complaint concerning paternity leave or parental leave for fathers submitted.

3.5 Analysis of the CEDAW Provisions

The Convention does not specifically provide for paternity leave. However, the Convention and its *travaux préparatoires* along with relevant General Recommendations, do provide extensive support for goal of reaching actual gender equality between men and women as well as the goal that the work regarding children and the home should be equally shared. The *travaux préparatoires* provide some support for the idea of involving men in childcare and it was suggested by some countries that also fathers should be offered parental leave. There was however no consensus among the countries on according men paternity leave or parental leave during the preparatory discussions.

The preamble includes the reference to four other major Conventions/Instruments, *i.e.* the UN Charter, the ICCPR, the ICESCR, and the UDHR, that provide for women equally enjoying rights and the inadmissibility of discrimination. The preamble also emphasize the social significance of both parents taking part in the upbringing of the children and that such a responsibility should be shared between men and women and society as a whole. Furthermore, the preamble states that there need to be a change in men and women's traditional roles, both in the family and in society, to achieve full equality. It is important that men and women significantly enter each other's spheres. This along with the changing of roles and stereotypes is one of the main positions held by many representatives throughout the *travaux préparatoires* discussions. During the discussions it was also suggested in the drafts submitted by Benin, Indonesia and the All-African Women's Conference that the preamble

²⁴⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, New York, 6 October 1999 (2131 UNTS 83).

²⁴⁸ <www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>, visited on 12 January 2008.

²⁴⁹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 301.

should include that the universal recognition of the principle of equality of men and women in law and in fact is necessary.

In connection with the preparatory discussions under Article 2 on policy measures to combat discrimination, some delegates stated that true equality cannot come about if equality policies exclusively target women and that the traditional perception of men's roles also needs changing. General Recommendation No. 3 emphasized that stereotyped perceptions of women and men's roles need to be changed. States Parties are under Article 2 obliged to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. The Committee also stated in General Recommendation No. 19 that the obligation to prevent discriminatory actions is not limited to actions by a State, but a State can also be held responsible for not hindering other actors.

Article 5(a) emphasizes the importance of eliminating sex role stereotyping and prejudices. Discussions were also held under Article 5(b) concerning the common responsibility for men and women in the upbringing of their children. Several countries stated that it was important to get men more involved in this, and that prejudicial practices involving women and men's roles should be abandoned.

In Article 11, it is provided for equal pay and equal opportunities in employment for men and women. Article 11(2)(b) calls on States Parties to introduce maternity leave. In the preparatory discussions, the talk focused on women and their situation. Some countries representatives emphatically argued for the importance of men to be given the same opportunity to assume responsibility regarding their children. The idea of enabling men to share in the care for their children was suggested; however, it did not at time gain any great response. The provision also emphasize that *parents* should be given support to be able to combine work with family responsibilities.

Article 16 provides for equality in the family and the delegates of the *travaux préparatoires* were of very different opinions of what this provision should say. Women's rights in the family was a very sensitive area. This Article is still one of the more controversial in the Convention, which is reflected in the number of reservations to the Article. However an overwhelming majority, 152 out of 185 States Parties has not made a reservation against it.²⁵⁰ The Committee has stated that there the uneven burden on women concerning the care of the home needs to be corrected. It is also provided that men and women have the same rights and responsibilities as parents and the interest of children shall be paramount in all cases. In General Recommendation No. 21 the Committee stated that to consider the children's best interests is a principle of almost universal acceptance. The Committee considers this Article and Article 2 to be of utmost importance and a reservation against any of them goes against the object and purpose of the Convention.

²⁵⁰ See Chapter 3.2 above.

There has not been any case concerning parental leave or paternity leave in the case-law of the Committee's decisions on individual complaints under the *Optional Protocol*. The Committee has furthermore neither decided on a where a complaint has been submitted by a man.

The ordinary meaning of the provisions have been considered, and the *travaux préparatoires* along with the General Comments have been used as an aid to discern the context as well as the object and purpose of the provisions. There is no provision in the Convention that explicitly state that paternity or parental leave should be provided, however there are Articles providing for States to take measures to discrimination against women, eliminate stereotyped gender roles as well as equal opportunities in employment. Implicit in the context and in the object and purpose of the whole Convention is the actual realization of gender equality and the elimination of discrimination against women. It is several times stated in the *travaux préparatoires* that gender equality cannot be realized until men and women equally take part in work within the family and in society at large. It is possible that an argument that men should be accorded paternity leave under Articles 5(b) and/or 11(2)(b) in conjunction with Article 2 would be accepted.

4 Other International Instruments on Gender Equality

As we have seen in the preceding Chapter, there are some provisions in CEDAW that discuss the issue of shared responsibility in the home. They also suggest that if men took over some of the burden to keep a household, women would have more possibilities to pursue an education and a professional or political career.

This Chapter will examine other international conventions, instruments, agreements, statements, *etc.* that impact women's rights in the pursuit of gender equality, and specifically investigate the possibility of paternity leave. This Chapter is divided into five parts: the first part examines international human rights instruments; part two examines the outcome of conferences and other documents in connection with the United Nations, with an introduction of entities within the United Nations working with women's rights; part three then examines the International Labour Organization; and lastly, part four touches briefly touch on the European Union and the Council of Europe as two other international organizations, albeit regional, which also have had women's issues on their respective agendas for a long time; and lastly part five gives an analysis of the Chapter.

4.1 United Nations Instruments on Human Rights

This part will examine relevant international human rights instruments with provisions regarding gender equality in general; along with work-related, family-related, or children-related provisions. The following instruments, which are considered universal due to them being upon to worldwide membership,²⁵¹ will be studied: *The Charter of the United Nations*; *the Universal Declaration of Human Rights (UDHR)*; *the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR)*; *the Convention on the Rights of the Child*; and lastly *the Convention on the Rights of Persons with Disabilities*. Other core United Nations Conventions such as for example, the one on the protection of the rights of migrant workers and their families,²⁵² the one on

²⁵¹ H. J. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context - Law, Politics, Morals 3rd edn.* (Oxford University Press, 2008) p. 133.

²⁵² *Conventions on the Protection of the Rights of All Migrant Workers and Members of Their Families*, New York, 18 December 1990.

the elimination of racial discrimination²⁵³, and the one on the protection from enforced disappearance,²⁵⁴ do not contain any provision specifically dealing with equality between men and women.²⁵⁵

4.1.1 The Charter of the United Nations

The *Charter of the United Nations* (the UN Charter) was signed in San Francisco on 26 June 1945 and entered into force on 24 October 1945.²⁵⁶ The United Nations currently has 192 members.²⁵⁷ The *UN Charter* lays down some basic principles regarding human rights and equality between men and women. In the preamble it states that the Peoples of the United Nations are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women [...]”.²⁵⁸ Article 1(3) states that the purpose of the United Nations is “[t]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to [...] sex”.

In addition, Article 55(c) states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” with the view of creating conditions of stability and well-being for all.²⁵⁹ Article 56 reads that Member States to take action for the achievement of the purposes mentioned in Article 55.²⁶⁰

4.1.2 The Universal Declaration of Human Rights

The *Universal Declaration of Human Rights* (UDHR) was adopted on 10 December 1948.²⁶¹ It was written as a “common standard of achievement for all peoples and all nations”²⁶², and has since been a yardstick by which

²⁵³ *International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 7 March 1966 (660 UNTS 195).

²⁵⁴ *International Convention for the Protection of All Persons from Enforced Disappearance*, New York, 20 December 2006 (not yet in force).

²⁵⁵ The Human Rights Council has recently (18 June 2007) established a complaints procedure (as provided by UN Doc. A/RES/60/251, 3 April 2006) to address consistent patterns of gross violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances; see <www2.ohchr.org/english/bodies/chr/complaints.htm>, visited on 13 January 2008.

²⁵⁶ *Charter of the United Nations*, San Francisco, 26 June 1945 (1 UNTS XVI).

²⁵⁷ <www.un.org/Overview/growth.htm>, visited on 12 January 2007.

²⁵⁸ Charter of the United Nations, San Francisco, 26 June 1945 (1 UNTS XVI) Preamble, para. 2.

²⁵⁹ *Ibid.*, Article 55(c).

²⁶⁰ *Ibid.*, Article 56.

²⁶¹ *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217 A (III).

²⁶² *Ibid.*, Preamble.

to measure compliance with human rights.²⁶³ In 1952 it was decided to divide the provisions of the Declaration between two new treaties, one with civil and political rights, the *International Covenant on Civil and Political Rights*, and one with economic, social and cultural rights, the *International Covenant on Economic, Social and Cultural Rights*.²⁶⁴

Article 2 of the *Universal Declaration of Human Rights* lays out the basic principle of equality and non-discrimination when it states that everyone is entitled to all the rights set forth in the Declaration and that no distinction shall be made in the realisation of these rights. Equality before the law without any discrimination is guaranteed in Article 7, and Article 23(2) provides for equal pay for equal work without discrimination.²⁶⁵

4.1.3 The International Covenant on Civil and Political Rights – Articles 2, 3, 23, 25 and 26

The *International Covenant on Civil and Political Rights* (ICCPR), which currently has 160 State Parties,²⁶⁶ was adopted on 16 December 1966 and entered into force on 23 March 1976.²⁶⁷ The Human Rights Committee (HRC) was established under the ICCPR as a body of independent experts to monitor States Parties implementation of the Covenant.²⁶⁸

The Human Rights Committee may, according to Article 40(4) of the ICCPR, issue such General Comments as it considers appropriate. The Committee is the pre-eminent interpreter of the ICCPR and the General Comments issued by the Committee are a way for it to announce its interpretation of different provisions of the Covenant on thematic issues. The General Comments are not binding to States Parties, although States Parties usually give them attention.^{269 270}

The Committee can also consider inter-state complaints and individual complaints from persons connected to those State Parties that have also

²⁶³ *Ibid.*

²⁶⁴ H. J. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context - Law, Politics, Morals 3rd edn.* (Oxford University Press, 2008) p. 136.

²⁶⁵ *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217 A (III), Articles 2, 7 and 23(2).

²⁶⁶ <www2.ohchr.org/english/bodies/ratification/4.htm>, visited on 12 January 2008.

²⁶⁷ *International Covenant on Civil and Political Rights*, New York, 16 December 1966 (999 UNTS 171).

²⁶⁸ <www.ohchr.org/english/bodies/hrc/index.htm>, visited on 28 October 2007.

²⁶⁹ P. Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality* (Liber Amicorum Georges, Abi-Saab, 2001) p. 763.

²⁷⁰ H. J. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context - Law, Politics, Morals 3rd edn.* (Oxford University Press, 2008) p. 845.

signed the first Optional Protocol.²⁷¹ The Protocol currently has 110 States Parties.²⁷² Inter-state complaints, provided for in Article 41, reflect the dual understanding of human rights treaties. The Convention is not merely a contract between a State and people subject to its jurisdiction; but all other States have an interest in the compliance of obligations by other States Parties.²⁷³

If the Committee finds a violation of an individual complaint, the State Party is according to Article 2(3) obligated to ensure the individual an effective remedy. There is also a possibility for a dissenting Committee member to attach a dissenting opinion to a decision. Even if the decision is on a specific complaint, other States and courts can use the decision to find out what the Covenant would require. The same effect is intended with General Comments. If States Parties are complying with the Committees views; it is evidence of good faith towards its legally binding Covenant obligations.²⁷⁴

The Human Rights Committee has issued *General Comment No. 18 on Non-discrimination*, where it stated that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.²⁷⁵ Article 2(1) obligates each State to respect and ensure each person within its territory or jurisdiction all the rights in the Covenant without any discrimination. The Committee stated that the term ‘discrimination’ shall be understood to mean “any distinction, exclusion, restriction or preference which is based on any ground such as [...] sex [...] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”²⁷⁶ Article 26 enshrines three related concepts regarding equality:²⁷⁷ it entitles everyone to equality before the law and that the legislator shall guarantee equal and effective protection of the law against discrimination.²⁷⁸ The Committee stated that in its view not only does Article 26 duplicate Article 2(1) but it also provides in itself an

²⁷¹ *Optional Protocol on Civil and Political Rights*, New York, 16 December 1966 (999 UNTS 171); and <www.ohchr.org/english/bodies/petitions/index.htm>, visited on 12 January 2008.

²⁷² <www2.ohchr.org/english/bodies/ratification/5.htm>, visited on 12 January 2008.

²⁷³ Note however, that this procedure has never been used; see <www2.ohchr.org/english/bodies/petitions/index.htm>, visited on 12 January 2007.

²⁷⁴ Fact Sheet No. 15 (Rev.1), *Human Rights, Civil and Political Rights: The Human Rights Committee*, Office of the United Nations High Commissioner for Human Rights, United Nations, Geneva, pp. 18-20.

²⁷⁵ UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989.

²⁷⁶ *Ibid.*, para. 7.

²⁷⁷ T. Opsahl, ‘Equality in Human Rights Law with Particular Reference to Art. 26 of the International Covenant of Civil and Political Rights’, in M. Nowak, D. Steurer and F. Ermacora (eds.), *Fortschritt im Bewusstsein der Grund- und Menschenrechte: Festschrift für Felix Ermacora* (N.P. Engel Publisher, Kehl am Rhein, 1988) p. 52

²⁷⁸ UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 7.

autonomous right: "it prohibits discrimination in law or in fact in any field regulated and protected by public authorities". Article 26 deals with States Parties obligations regarding their legislation and the application thereof, and that their legislation cannot be discriminatory.²⁷⁹ Article 26 has a triple content, it guarantees equality before the law and equal protection of the law and it imposes duties to protect from discrimination. This means according to the Committee that "the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant".²⁸⁰ Furthermore, the Committee points out that while it is important to prevent discrimination in law for States Parties, it is also important to prevent discrimination in fact. Both public authorities, the community and private persons or bodies can have discriminatory practices.²⁸¹ States Parties are sometimes required by the principle of equality to take affirmative action in order to eliminate or diminish a discriminative situation, or to achieve a legitimate purpose under the Covenant.²⁸²

The first *Optional Protocol of the ICCPR* has in several occasions been used by women to challenge sex discrimination.²⁸³ One example of this is *S. W. M. Broeks v. The Netherlands*²⁸⁴, where a woman sued the Netherlands for violating her right to equality before the law and equal protection under the law under Article 26 of the ICCPR. In the Netherlands in 1984 in order to claim unemployment benefits, a married woman, not separated from her husband, had to prove she was the 'breadwinner', *i.e.* earning over a certain proportion of the family's total income. However, no such requirements were in place for married men. Mrs. Broeks complained to the Human Rights Committee, which found that the laws differentiated for reasons of sex and found no reasonable grounds for this. The Committee found that she was a victim of a violation of Article 26 based on sex even though the discrimination, social security benefits, was not covered by the Covenant. It was the view of the Committee "that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example, [CERD], [CEDAW], or as in the present case, [ICESCR]."²⁸⁵ They also stated that "although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the

²⁷⁹ W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, Antwerpen, 2005) pp. 13-18.

²⁸⁰ International Covenant on Civil and Political Rights, New York, 16 December 1966, (999 UNTS 17); and UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 12.

²⁸¹ UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 9.

²⁸² *Ibid.*, paras. 10 and 13.

²⁸³ <www.un.org/womenwatch/daw/cedaw/protocol/cases.htm>, visited on 7 January 2007.

²⁸⁴ UN Doc. CCPR/C/OP/2 at p.196 (1990), *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, 9 April 1987; another case covered the same matter and resulted in the same conclusion, UN Doc. A/42/40 at p. 160 (1987), *F.H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, 9 April 1987.

²⁸⁵ UN Doc. CCPR/C/OP/2 at p. 196 (1990), *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, , 9 April 1987, para. 12.1.

matters that may be provided for by legislation. Thus, it does not, for example require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant."²⁸⁶ They also stated that if a differentiation was based on reasonable and objective criteria it would not amount to prohibited discrimination within the meaning of Article 26.²⁸⁷

Article 26 thus ensures equal protection under the law and that everyone is protected against any discrimination through law.²⁸⁸ Essentially the identical right to equality can be found in UDHR Article 7. A general prohibition of discrimination directed at the legislature is ensured under this Article.²⁸⁹ The Committee has also stated "[t]he right to equality before the law and freedom from discrimination, protected by Article 26, requires States Parties to act against discrimination by public and private agencies in all fields."²⁹⁰ This case demonstrates that Article 26 of the ICCPR can give protection from discrimination even if the discrimination is not related to a civil or political right. Article 26 provides an independent right rather than Article 2, which only prohibits discrimination of the rights specified under the Convention. Article 26 has the possibility to be widely used to oppose discrimination.^{291 292}

Article 3 states that States Parties undertake to ensure the equal rights of men and women to the enjoyment of civil and political rights set forth in the Covenant. The Human Rights Committee issued in 2000 *General Comment No. 28 on Equality of Rights between Men and Women (Article 3)*.²⁹³ The Committee stated it updated a previous comment from 1981 due to experience it had gathered in the last 20 years "to take into account the important impact of this Article on the enjoyment by women of the human rights protected under the Covenant".²⁹⁴ The Committee has stated that the full effect of the Covenant is impaired if a person is denied the full and equal enjoyment of any right. Articles 2 and 3 of the Convention provide that states should take all necessary steps to ensure that men and women equally enjoy the rights in the Covenant. Such steps are the removal of obstacles, education of the public and domestic legislation. States Parties are required to adopt not only laws but also provide other kinds of measures to

²⁸⁶ *Ibid.*, para. 12.4.

²⁸⁷ *Ibid.*, paras. 1, 8.2, 12.4, 13 and 14.

²⁸⁸ *International Covenant on Civil and Political Rights*, New York, 16 December 1966 (999 UNTS 171).

²⁸⁹ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Publisher, Kehl am Rhein, 1993) p. 461.

²⁹⁰ UN Doc. HRI/GEN/1/Rev. 7, p. 178, HRC, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000, para. 31.

²⁹¹ <www.un.org/womenwatch/daw/cedaw/protocol/cases.htm>, visited on 7 January 2007.

²⁹² M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Publisher, Kehl am Rhein, 1993) pp. 465 and 473.

²⁹³ UN Doc. HRI/GEN/1/Rev. 7, p. 178, HRC, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000.

²⁹⁴ *Ibid.*, para. 1.

give effect to the equality provision.²⁹⁵ States should provide both protective measures and positive measures, as to ensure the effective and equal empowerment of women. Further, the Committee stated that the inequality of the enjoyment of rights is deeply embedded in traditional, historical, cultural and religious attitudes in the world. States Parties should ensure that such attitudes are not used to justify inequality. States Parties look at each right protected under the Convention and the factors that prevent women from enjoying a particular one.²⁹⁶

Article 23(4) states that State Parties “shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, in marriage and at its dissolution.”²⁹⁷ The Committee states in *General Comment No. 28* that “equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family”.²⁹⁸ The Committee points out in *General Comment No. 18* that States Parties, when it comes to some provisions like Article 23(4), are required to take measures to guarantee the equality of rights for the people concerned. Such measures can be legislative, administrative or other.²⁹⁹ *General Comment No. 19 on Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23)* states that spouses equal rights during marriage “extends to all matters arising from their relationship, such as choice of residence, running the household, education of the children and administration of assets.”³⁰⁰ The Committee also stated that if a State Party regards other forms of cohabitation as a family, they should also be accorded protection under the Article 23.³⁰¹

When the right for women to participate in public affairs, as provided for in Article 25, is not fully equal, States Parties should according to the Committee take effective and positive measures, including affirmative action, to ensure women’s equal participation in public office and in public affairs.³⁰²

²⁹⁵ UN Doc. HRI/GEN/1/Rev. 7, p. 127, HRC, *General Comment No. 04: Equality between the Sexes (Article 3)*, 30 July 1981, para. 2.

²⁹⁶ UN Doc. HRI/GEN/1/Rev. 7, p. 178, HRC, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000, paras. 2-4.

²⁹⁷ *International Covenant on Civil and Political Rights*, New York, 16 December 1966 (999 UNTS 171).

²⁹⁸ UN Doc. HRI/GEN/1/Rev. 7, p. 178, HRC, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000, para. 25.

²⁹⁹ UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 5.

³⁰⁰ UN Doc. HRI/GEN/1/Rev. 7, p. 149, HRC *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23)*, 27 July 1990, para. 8.

³⁰¹ *Ibid.*, para. 2.

³⁰² UN Doc. HRI/GEN/1/Rev. 7, p. 178, HRC, *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, 29 March 2000, para. 29.

4.1.4 The International Covenant on Economic, Social and Cultural Rights - Articles 2, 3, 6, 7, 9 and 10

The International Covenant on Economic, Social and Cultural Rights (ICESCR), which currently has 157 States Parties,³⁰³ was adopted on 16 December 1966 and entered into force on 3 January 1976.³⁰⁴ The United Nations Economic and Social Council (ECOSOC) created a Committee on Economic, Social and Cultural Rights who monitors States Parties' compliance with the Covenant.³⁰⁵ As done by other Committees, it also issues General Comments to clarify the intent, meaning and content of the Covenant as a way for the Committee to call for renewed attention to specific provisions and to agree on an interpretation of certain provisions.³⁰⁶ The Committee cannot consider individual complaints; however, a draft Optional Protocol is under consideration.³⁰⁷

According to Articles 2(1) and (2), States Parties undertake to guarantee the rights set forth in the Covenant, within their economic and technical abilities, without discrimination. Article 3 obliges States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.

The Committee elaborated on its views on Article 3 in *General Comment No. 16 on the Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3)*.³⁰⁸ The Committee stated that "the equal rights of men and women to the enjoyment all human rights is a fundamental principle recognized under international law and enshrined in the main international human rights instruments".³⁰⁹ Article 3, as well as the identical provision in ICCPR, is based on Article 1(3) of the UN Charter and Article 2 of the UDHR. ICESCR's Article 2(2) on non-discrimination based on, *inter alia*, sex, and Article 3 on the equal enjoyment of rights of the Covenant, should be read together as mutually reinforcing.³¹⁰ To be able to enjoy economic, social and cultural rights it is fundamental to eliminate discrimination.³¹¹ *General Comment No. 3 on the Nature of States Parties Obligations (Article 2, para. 1)* declares that States are obligated to ensure the core obligations in Article 6, which are, *inter alia*, the obligation to

³⁰³ <www2.ohchr.org/english/bodies/ratification/3.htm>, visited on 12 January 2008.

³⁰⁴ *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966 (993 UNTS 3).

³⁰⁵ H. J. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context - Law, Politics, Morals 3rd edn.* (Oxford University Press, 2008) p. 277.

³⁰⁶ <www2.ohchr.org/english/bodies/cescr/index.htm>, visited on 4 December 2007.

³⁰⁷ *Ibid.*

³⁰⁸ UN Doc. E/C.12/2005/4, CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3)*, 11 August 2005.

³⁰⁹ *Ibid.*, para. 1.

³¹⁰ *Ibid.*, para. 2.

³¹¹ *Ibid.*, para. 3.

ensure non-discrimination and equal protection of employment.³¹² The Committee has also stated that women should be guaranteed both *de jure* and *de facto* non-discrimination and equality.³¹³ Simply enacting laws and adopting gender-neutral policies does not necessarily achieve substantive equality.³¹⁴ States Parties should also take into account existing economic, social and cultural inequalities that particularly affect women.³¹⁵

Furthermore, the Committee stated in *General Comment No. 16* that Article 3 applies to all the substantive rights, Articles 6 to 15, in the Covenant. States Parties should for example, ensure that women both in national law and in practice have equal access to all jobs in all occupations and at all levels, Article 6(1).³¹⁶

In *General Comment No. 18 on the Right to Work (Article 6)* the Committee elaborated on this right, which is provided for in Articles 6, 7 and 8.³¹⁷ States Parties' should take "deliberate, concrete and targeted" steps towards the full realization of Article 6.³¹⁸ Regarding women and the right to work, the Committee emphasized the need for a comprehensive system of protection to fight gender discrimination and ensure equal treatment regarding work and equal pay for work of equal value.³¹⁹

Article 3 in relation to Article 7 (a) requires, among other things, that States Parties identify and eliminate the underlying causes of pay differences.³²⁰ The Committee also stated that "pregnancies must not constitute an obstacle to employment and should not constitute a justification for loss of employment".³²¹ States Parties should also work to "reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members."³²²

Article 9 provides for social security and equal access to social services. The Committee stated in *General Comment No. 16* that implementing Article 3

³¹² HRI/GEN/1/Rev. 7, p. 15, CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Article 2, para.1)*, 1990, para. 5; and UN Doc. E/C.12/GC/18, CESCR, *General Comment No. 18: The Right to Work (Article 6)*, 24 November 2005, para. 31.

³¹³ UN Doc. E/C.12/2005/4, CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3)*, 11 August 2005, para. 7.

³¹⁴ *Ibid.*, paras. 7-8.

³¹⁵ *Ibid.*, paras. 5, 8 and 14.

³¹⁶ *Ibid.*, para. 23.

³¹⁷ UN Doc. E/C.12/GC/18, CESCR, *General Comment No. 18: The Right to Work (Article 6)*, 24 November 2005.

³¹⁸ *Ibid.*, para. 19.

³¹⁹ *Ibid.*, paras. 13 and 23.

³²⁰ UN Doc. E/C.12/2005/4, CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3)*, 11 August 2005, para. 24.

³²¹ *Ibid.*, para. 13.

³²² *Ibid.*, para. 24.

in relation to Article 9 requires States Parties to guarantee “adequate maternity leave for women, paternity leave for men and parental leave for both men and women”.³²³

Lastly, the Committee stated that implementing Article 3 together with Article 10(2), which provides for the protection of the family, working mothers should be “accorded paid leave or leave with adequate social security benefits” during a reasonable period before and after childbirth.³²⁴

4.1.5 The Convention on the Rights of the Child

The *Convention on the Rights of the Child* (CRC) was signed and opened for signatures on 20 November 1989 and went into force on September 2 1990.³²⁵ Currently the Convention has 193 States Parties.³²⁶ A number of countries that have chosen to not ratify the two major Covenants mentioned above are parties to the Convention, which makes the CRC the Convention with the largest number of Parties. The Committee of the Rights of the Child monitors Member States’ implementation, and it is a body made up of independent experts. So far, no optional protocol exists that would let the Committee consider individual complaints.³²⁷

Article 3 is fundamental to the whole Convention and states that a child’s best interest shall be the primary consideration in all actions concerning children.³²⁸ Further, Article 9(3) provides that children have a right to have contact with both their parents unless it is detrimental to them. Additionally, according to Article 18(1) States Parties shall ensure the recognition of the principle that both parents share the responsibility in the upbringing of their children. For this purpose Article 18 (2)-(3) provides that States shall try to assist parents in their responsibilities and provide child-care assistance for working parents.^{329 330}

A child’s education shall, among other things, be directed to the development of respect for human rights, Article 29(1)(b). According to Article 29(1)(d), the education of the child shall be directed towards preparing the child for a responsible life in the spirit of understanding and,

³²³ *Ibid.*, para. 26.

³²⁴ *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966 (993 UNTS 3) Article 10(2).

³²⁵ *Convention on the Rights of the Child*, New York, 20 November 1989 (1577 UNTS 3).

³²⁶ <www2.ohchr.org/english/bodies/ratification/11.htm>, visited on 12 January 2008.

³²⁷ <www.ohchr.org/english/bodies/crc/index.htm>, visited on 12 December 2007.

³²⁸ N. Cantwell, ‘The Origins, Development and Significance of the United Nations Convention on the Rights of the Child’, in S. Detrick, (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux préparatoires”* (Martinus Nijhoff, Dordrecht, 1992) p. 28.

³²⁹ Child-care is, as mentioned above, also supported in CEDAW Article 11(2) and in ICESCR Article 7(a).

³³⁰ *Convention on the Rights of the Child*, New York, 20 November 1989 (1577 UNTS 3) Articles 3(1), 9(3) and 18.

inter alia, equality of the sexes. The Committee of the Rights of the Child stated in its *General Comment No. 1 on the Aims of Education in Article 29(1)* that children should learn about human rights; both during their education and by seeing human rights implemented in practice. The Committee called upon States Parties to take all necessary steps to incorporate human rights principles in their general education, and they should revise e.g. textbooks, other materials and school policies. The school environment must thus also reflect, they stated, *inter alia*, equality of the sexes.³³¹

4.1.6 The Convention on the Rights of Persons with Disabilities

The *Convention on the Rights of Persons with Disabilities* (CRPD) was adopted on 13 December 2006 and will come into force after 20 ratifications.³³² Currently the Convention has 118 signatories and 7 States parties.³³³ It also has an Optional Protocol from the same date that allows a Committee to receive complaints from individuals.³³⁴ The Protocol will come into force after 10 ratifications and it currently has 66 signatories and 3 States Parties.³³⁵ One of the Convention's guiding principles is the equality between men and women, Article 3 (g).³³⁶ The Convention further provides equal rights and equal protection under the law, Article 5, and that States Parties shall take all appropriate measures to ensure that women with disabilities are not subject to multiple discrimination, Article 6.³³⁷

4.2 The Work for Women's Rights in the United Nations

Within the United Nations the work for women's rights is extensive. The entities working with promoting gender equality and the empowerment of women are spread all over the UN system. This part will give a brief introduction to such different entities before examining the outcome of the conferences and documents that some of the entities have been involved in. There is a UN reform under way trying to streamline 'the gender

³³¹ CRC/GC/2001/1, CRC, *General Comment No. 1: The Aims of Education, Article 29(1)*, 17 April 2001, paras. 15 and 17-19.

³³² *Convention on the Rights of Persons with Disabilities*, New York, 13 December 2006.

³³³ <www2.ohchr.org/english/bodies/ratification/15.htm>, visited on 12 January 2008.

³³⁴ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, New York, 13 December 2006.

³³⁵ <www2.ohchr.org/english/bodies/ratification/15a.htm>, visited on 12 January 2008.

³³⁶ *Convention on the Rights of Persons with Disabilities*, New York, 13 December 2006, Article 3(g).

³³⁷ *Ibid.*, Articles 5 and 6; and *The Role of Men and Boys in Achieving Gender Equality*, Report of the Expert Group Meeting organized by DAW in collaboration with UNDP, ILO and UNAIDS, Brasilia, Brazil, 21-24 October 2003.

architecture' in the UN, however the following are the current UN entities involved in women's rights: the Commission on the Status of Women (CSW); the Division on the Advancement of Women (DAW); Office of the Special Advisor on Gender Issues (OSAGI); the United Nations Development Fund for Women (UNIFEM); the International Research and Training Institute for the Advancement of Women (INSTRAW); the Inter-Agency Network of Women and Gender Equality (IANWGE); the United Nations Population Fund (UNFPA); and the United Nations Office for the Coordination of Humanitarian Affairs (OCHA).

CSW has 45 members and started operating in 1947 with the object to promote equal rights for men and women. It is a policymaking body dedicated to the advancement of women and gender equality in the political, economical, social and civil areas. The Commission agrees on conclusions on different issues that it submits to relevant intergovernmental bodies and reviews progress of previous session's conclusions.³³⁸ CSW has a complaints procedure in place. The complaint must identify a consistent pattern of violations against women in a particular country or identify a problem facing women in several countries. There is no individual relief for individuals whose rights have been violated, however the procedure is a way to provide information to the UN.³³⁹

The predecessor to DAW, the Section on the Status of Women, was created in 1946 to fulfil the UN Charter's equality vision. DAW advocates the improvement of women's status and the achievement of women's equality with men. It also works closely with Governments and the civil society. It aims to promote global standards and to raise the awareness in national and international policy-making. Further, it also works on policy formulation and implementation related to the Beijing Platform for Action and Beijing +5 work related to the CEDAW.³⁴⁰

After the first *United Nations World Conference on Women in 1975* in Mexico, two international institutions specifically devoted to the advancement of women were established: UNIFEM, which works closely with the United Nations Development Programme (UNDP) on capacity-building; and INSTRAW which engages in research and training activities and compiles sex-aggregated data. Together with DAW they are the main institutions in the United Nations particularly devoted to women's advancement globally.³⁴¹

OSAGI was created in 1997 as a high-level post for a special advisor on gender issues. This Office deals with follow-up and strengthening of the

³³⁸ <www.un.org/womenwatch/daw/csw/>, visited on 10 October 2007.

³³⁹ <www.stopvaw.org/Complaint_Mechanism_-_Commission_on_the_Status_of_Women.html>, visited on 8 December 2007.

³⁴⁰ *Ibid.*

³⁴¹ *From Beijing to Beijing+5 – Review and Appraisal of the Implementation of the Beijing Platform for Action*, Report of the Secretary-General (United Nations, New York, 2001) pp. 254-255.

effective implementation of the *Millennium Declaration; the Platform for Action of the Fourth World Conference on Women in Beijing 1995; and the Outcome Document of the special sessions of the General Assembly on Beijing+5*.³⁴² It aims at developing new strategies to advance gender equality, which is e.g. done by advising the Secretary-General on ways to draw attention to gender issues in the UN's work. It also promotes gender mainstreaming throughout United Nations' activities, which was called for in the Beijing Platform for Action.³⁴³ Gender mainstreaming is a strategy to assess implications for men and women from all angles before any action with the ultimate goal of gender equality.³⁴⁴ OSAGI is in charge of the Focal Point for Women, which is an office that monitors the status of women in the UN Secretariat, with the aim of women having an equal opportunity at higher-level jobs at the UN. OSAGI also chairs IANWGE, which is a network of offices, specialized agencies, funds and programmes that promotes gender equality throughout the UN system. IANWGE supports and monitors the implementation of gender-related recommendations emanating from the General Assembly and the Beijing Declaration and Platform for Action, as well as the outcome of Beijing+5.³⁴⁵

There are lastly, two more UN entities that have women's equality as a specific goal in their work. One is UNFPA, which works with health, reducing poverty and providing equal opportunities for men, women and children, and with ensuring reproductive health and safe deliveries. The other one is OCHA, which works to correct inequality that hinder women from exercising their rights to be active partners in emergency response, rehabilitation and development.³⁴⁶

4.2.1 UN Conferences and Meetings on the Role of Men and Boys in Achieving Gender Equality

This part will examine the UN conferences and meetings that have dealt with men and boy's responsibilities in achieving equality.

4.2.1.1 The Beijing Declaration and the Platform for Action

Mexico 1975 was the site for the first *UN World Conference on Women* and it was followed by the UN Decade for Women: Equality, Development and Peace (1976-1985). The second and third World Conferences were held in

³⁴² More on these documents below.

³⁴³ UN Doc. A/52/3, *Report of the Economic and Social Council for 1997*, 18 September 1997.

³⁴⁴ <www.un.org/womenwatch/osagi/gendermainstreaming.htm>, visited on 7 August 2006.

³⁴⁵ <www.un.org/womenwatch/osagi/aboutosagi.htm>, visited on 14 October 2007; and <www.un.org/womenwatch/ianwge/>, visited on 7 August 2006.

³⁴⁶ <www.unfpa.org/about/index.htm>; and <<http://ochaonline.un.org/AboutOCHA/GenderEquality/FAQs/tabid/1195/Default.aspx>>, both visited on 8 January 2008.

Copenhagen in 1980 and Nairobi in 1985. The largest one, the *Fourth World Conference on Women* was held in Beijing in 1995 and resulted in the Beijing Declaration and the Platform for Action. The successive global conferences have stimulated research as well as efforts to promote women's advancement and increased the awareness of the importance of gender equality both on the international and national level.³⁴⁷

During the Beijing Conference, discussions of strategies to reach equality were held. The 189 participating countries adopted in consensus the *Beijing Declaration and the Platform for Action*, an agenda for women's empowerment, and together they constitute an agenda for fundamental change in 12 critical areas of concern. They are the result of a dialogue between and within Governments, international organizations and civil society and it builds on commitments and agreements made during the UN Decade for Women and in different global summits and conferences. The *Beijing Declaration* declares, *inter alia*, in paragraph 15 that they are convinced that "[e]qual rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy".³⁴⁸ The Declaration stated further in paragraph 25 that men should be encouraged "to participate fully in all actions towards equality".³⁴⁹ The General Assembly endorsed the *Beijing Declaration and the Platform for Action* and established a three-tiered mechanism, the Assembly, ECOSOC and the Commission on the Status of Women, to play the primary role in the follow-up, policy-making and implementation.³⁵⁰

The *Platform for Action* highlights a number of strategic objectives for action. Primary responsibility for implementing those objectives is assigned to Governments, while international organizations and civil society are invited to contribute to the effective achievement of the goals. An important shift, from an exclusive focus on women to a focus on both women and men and their relationship as an approach to equality, is showing in the *Platform for Action*. Women share concerns that can only be addressed "through partnership with men towards the common goal of gender equality".³⁵¹ The relationship between women and men, especially issues relating to reproduction, sexuality and negative gender stereotyping were given special attention in the Platform, which calls for the promotion of public debate on

³⁴⁷ *From Beijing to Beijing+5 – Review and Appraisal of the Implementation of the Beijing Platform for Action*, Report of the Secretary-General (United Nations, New York, 2001) pp. 4 and 172; and UN Doc. A/CONF.144/20, *Fourth World Conference on Women*, Beijing, China, 4-15 September 1995, 17 October 1995, Annex II, Platform for Action, para. 1.

³⁴⁸ *Ibid.*, Annex I, The Beijing Declaration, para. 15.

³⁴⁹ *Ibid.*, Annex I, The Beijing Declaration, para. 25.

³⁵⁰ *From Beijing to Beijing+5 – Review and Appraisal of the Implementation of the Beijing Platform for Action*, Report of the Secretary-General (United Nations, New York, 2001) pp. 4-5.

³⁵¹ UN Doc. A/CONF.144/20, *Fourth World Conference on Women*, Beijing, China, 4-15 September 1995, 17 October 1995, Annex II, Platform for Action, para. 3.

new roles of women and men. For example, paragraph 180 (b) calls on Governments to “raise awareness on gender equality and non-stereotyped gender roles of women and men within the family”.³⁵² Government should also take action to promote harmonization of work and family responsibilities for women and men through, *inter alia*, developing “policies in education to change attitudes that reinforce the division of labour based on gender in order to promote the concept of shared family responsibility for work in the home, particularly in relation to children and elder care”.³⁵³ Men and women’s access to paternity leave is also discussed in paragraph 179(c) of the *Platform for Action* which states that Governments should take actions to:³⁵⁴

“[e]nsure, through legislation, incentives and/or encouragement, opportunities for women and men to take job-protected parental leave and to have parental benefits; promote the equal sharing of responsibilities for the family by men and women, including through appropriate legislation, incentives and/or encouragement, how to develop incentives for governments to provide childcare; and how to develop campaigns for equal sharing of domestic responsibilities.”³⁵⁵

Under one of the critical areas of concern: inequality in economic structures and policies, in all forms of productive activities and in access to resources;³⁵⁶ the Platform provides that Governments should take actions to “eliminate discriminatory practices by employers on the basis of women’s reproductive roles and functions, including refusal of employment and dismissal”.³⁵⁷

4.2.1.2 40th Session of the CSW – Reinforcing the Beijing Declaration and the Platform for Action

The *Beijing Declaration and the Platform for Action* contributed to a growing emphasis in the international debate on men as potential and actual contributors to gender equality. Men were encouraged to equally share childcare and household work and actions were encouraged on the harmonization of work and family responsibilities.³⁵⁸ The General Assembly gave the Commission on the Status of Women (CSW) the mandate to regularly do a follow-up of the *Beijing Conference and the Platform for Action* and review the critical areas of concern.³⁵⁹

³⁵² *Ibid.*, Annex II, Platform for Action, para. 180(b).

³⁵³ *Ibid.*, Annex II, Platform for Action, para. 179(d).

³⁵⁴ *Ibid.*, Annex II, Platform for Action, paras. 3, 179, 180(b), 192(e), 243, 267 and 268.

³⁵⁵ *Ibid.*, Annex II, Platform for Action, para. 179(c).

³⁵⁶ *Ibid.*, Annex II, Platform for Action, para. 44.

³⁵⁷ *Ibid.*, Annex II, Platform for Action, para. 178(d).

³⁵⁸ UN Doc. E/CN.6/2004/9, *Report of the Secretary-General – Thematic Issue before the Commission: The Role of Men and Boys in Achieving Gender Equality*, 22 December 2003, para. 2.

³⁵⁹ <www.un.org/womenwatch/daw/csw/>, visited on 10 October 2007.

The first strategies and plans that were drawn up at national level for the implementation of the *Platform* emphasized that the sharing of family responsibilities and their reconciliation with professional life was a priority objective. The *Platforms'* recommendations were reinforced at the 40th session of the CSW who stated in its agreed conclusions that “[f]amily responsibilities rest equally with men and with women”, and that “[g]reater participation of men in family responsibilities, including domestic work and child and dependant care, would contribute to the welfare of children, women and men themselves”.³⁶⁰ The Commission also stated that to reach this goal a change of outlooks would be required and Governments should encourage this by using education and promoting better access for men to activities that so far had been regarded as women’s activities. Governments need to use legislation and/or other suitable measures to “rebalance the sharing of family responsibilities between men and women”.³⁶¹ The Commission suggested some actions to bring about the sharing of family responsibilities and to reduce the burden for women. Such actions were the promoting of measures to prohibit all direct and indirect discrimination; the promoting of laws on maternity leave; the promoting of legislative measures or other incentives to enable men and women to take parental leave; the protecting of men and women against dismissal when taking parental leave; the promoting of measures, such as flex-time, to enable men and women to reconcile work and family; the promoting of non-discriminatory methods of evaluating work; and the promoting of the elimination of the gender pay gap.³⁶²

4.2.1.3 The Millennium Development Goals

On 8 September 2000, the General Assembly adopted the *Millennium Declaration*.³⁶³ Derived from the Declaration are the eight Millennium Development Goals, which set targets to be reached by 2015 in eight areas.³⁶⁴ One of the goals is to promote gender equality and the empowerment of women. Gender disparity in education should be eliminated; the first step is first primary and secondary education, and then at all levels.³⁶⁵ The ILO when commenting on the Development Goals states that gender equality and eliminating all forms of discrimination at work are crucial in defeating poverty, which is one of the other Millennium Development Goals.³⁶⁶ They work to advance the understanding of the essential link between women’s equality and the reduction of poverty.

³⁶⁰ UN Doc. E/1996/26, *Agreed Conclusions 1996/3 - Commission on the Status of Women, Report on the 40th Session (11-22 March 1996)*, Official Records of the Economic and Social Council, 1996, Supplement No. 6, Chapter I(c)(1), para. 5.

³⁶¹ *Ibid.*, para. 10.

³⁶² *Ibid.*, paras. 4, 5 and 12 (a)-(e).

³⁶³ UN Doc. A/55/2, *United Nations Millennium Declaration*, 8 September 2000.

³⁶⁴ <www.un.org/millenniumgoals/background.htm>, visited on 8 December 2007.

³⁶⁵ <www.unmillenniumproject.org/goals/gti.htm#goal3>, visited on 8 December 2007.

³⁶⁶ *Ibid.*

4.2.1.4 The 23rd Special Session of the General Assembly - Beijing+5

The General Assembly assessed the progress so far in the implementation of the *Beijing Declaration and the Platform for Action* at its twenty-third special session in 2000, the so-called Beijing +5. The *outcome document*³⁶⁷ identified achievements and proposed actions to overcome obstacles. The General Assembly emphasized in the political declaration of the session “that men must involve themselves and take joint responsibility with women for the promotion of gender equality”³⁶⁸. It also stated that it considered the objective of the Platform for Action, empowerment of all women, to be in full conformity with the UN Charter’s purposes and principles and International Law.³⁶⁹

The *outcome document* states, *inter alia*, that one achievement is “an increased awareness of the need to reconcile employment and family responsibilities”, as well as an increased awareness “of the positive effect of such measures as maternity and paternity leave and also parental leave, and child and family care services and benefits”.³⁷⁰ Another achievement was a greater acceptance of the importance of women participating fully in decision-making at all levels and in all forums in society. Some countries had introduced affirmative action, developed training programmes for women and introduced measures for men and women to reconcile family and work responsibilities. However, women were still highly underrepresented in decision-making bodies in all areas, as well as the in the highest levels of the corporate world.³⁷¹

Obstacles mentioned are e.g. that women still, in general, have difficulties in advancing professionally due to a lack of policies taking into account maternity and family responsibilities. It is pointed out, that the focus on gender equality has helped to encourage the discussion of a reassessment of gender roles and responsibilities. However, women’s full potential in life, concerning education and career is limited without a change of stereotypical and traditional roles that hold women back and action is required to redress this. Another obstacle shown was that persistent gender stereotyping continued to result in a lack of sufficient encouragement for men to take an equal share in domestic tasks and responsibilities. A more “balanced participation of men and women of remunerated and unremunerated work”³⁷² would relieve women of a disproportionate burden of unremunerated work and caregiving. To overcome obstacles action is needed in legislation, policies, and in particular in education. Finally, the

³⁶⁷ UN doc. A/RES/S-23/3, *Twenty-third Special Session of the United Nations General Assembly, “Women 2000: Gender Equality, Development and Peace for the Twenty-first Century”*, New York, 5-9 June 2000, 16 November 2000, Annex, Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action.

³⁶⁸ *Ibid.*, para. 6.

³⁶⁹ *Ibid.*, paras. 1-3.

³⁷⁰ *Ibid.*, para. 20.

³⁷¹ *Ibid.*, para. 22.

³⁷² *Ibid.*, para. 47.

outcome document stated that to achieve the goal of full partnership between women and men in both the private and public spheres, what needs to be addressed is the enabling of both men and women “to reconcile and share equally work responsibilities and family responsibilities”.^{373 374}

Since the problem of men and women’s unequal share of domestic responsibilities touches on many issues besides equality such as poverty and children’s rights, United Nations conferences and other meetings dealing with those issues have also touched on this issue. The *World summit for Social Development in 1995*, the *Twenty-fourth special session of the General Assembly in 2000*, as well the *Commission for Social Development* have all also reiterated the unequal share of domestic responsibilities and the importance of altering this.³⁷⁵ The *Twenty-seventh special session of the General Assembly on Children in 2002*, stated that they would “promote the shared responsibility of both parents in education and in the raising of children, and will make every effort to ensure that fathers have opportunities to participate in their children’s lives”.³⁷⁶

4.2.1.5 The Secretary-General’s 2003 Report on the Role of Men and Boys

The role of men and boys have been addressed at the *International Conference on Population and Development in Cairo 1994*; at the *World Summit for Social Development in Copenhagen 1995*; at the *Twenty-sixth special session of the General Assembly on HIV/AIDS in 2001*; and at the *Twenty-seventh special session of the General Assembly on children in 2002*.³⁷⁷

In June 2002, a workshop on gender equality and men was held in Oxford.³⁷⁸ In October 2003 DAW in collaboration with ILO, UNAIDS and UNDP, convened an expert group meeting in Brasilia to contribute to the further understanding of the role of men and boys in achieving equality. The *report of the Secretary-General on the Role of Men and Boys in Achieving Gender Equality* echoes conclusions that were reached at both of these meetings³⁷⁹:

³⁷³ *Ibid.*, para. 60.

³⁷⁴ *Ibid.*, paras. 20-23 and 60.

³⁷⁵ UN Doc. A/CONF.166/9, *Report of the World Summit for Social Development*, Copenhagen, 6-12 March 1995, 16 April 1995; UN Doc. A/RES/S-24/2, *Twenty-fourth Special Session of the United Nations General Assembly on Further Initiatives for Social Development*, Geneva, 26 June-1 July 2000, 15 December 2000, Annex; and 35th, 36th and 38th sessions of the Commission for Social Development.

³⁷⁶ UN Doc. A/RES/S-27/2, *Twenty-seventh Special Session of the United Nations General Assembly on Children*, New York, 8-10 May 2002, 11 October 2002, Annex, para. 24.

³⁷⁷ *Ibid.*, para. 6.

³⁷⁸ *Gender is Everyone’s Business: Programming with Men to Achieve Gender Equality*; Workshop report, Oxford, UK, 10-12 June 2002.

³⁷⁹ *The Role of Men and Boys in Achieving Gender Equality*, Report of the Expert Group Meeting organized by DAW in collaboration with UNDP, ILO and UNAIDS, Brasilia, Brazil, 21-24 October 2003.

The Secretary-General states in his report that “[a]chieving gender equality is recognized as a societal responsibility that concerns and should fully engage men as well as women”.³⁸⁰ He also states that men and boys pay a high cost in their quality of life in the way that current gender relations are defined and practiced, and would have a lot to gain from increased gender equality. Many men do feel oppressed by societal and cultural expectations to be ambitious and competitive and resent that they thus have to spend a lot of time away from their children as they are growing up.³⁸¹ Less rigid gender stereotyping may result in men’s and boys’ better mental health and psychological well-being, as well as increased options in life.³⁸²

The Secretary-General points out the importance in the work towards gender equality of identifying the constraints men face in an unequal society. Men’s understanding should increase as well as what they stand to gain as individuals and as a group, as well as what society as a whole stands to gain.³⁸³ It is further highlighted that higher equitable sharing of domestic responsibilities is “critical for ensuring the participation of women in the political processes and increased access to education and training, as well as employment and income-generating opportunities.”³⁸⁴ While women’s employment rate has increased in many countries, men’s share of the responsibility of caring for the home and the children has not increased proportionately. To clear the way for an expansion of the role of men to include caring for children, policies and practices that provide for shared care need to be encouraged, and such institutional and cultural barriers that make it difficult for men to engage as fathers, need to be removed. The report states that countries need to create an environment that enables women and men to share domestic responsibilities. To reach this actions such as closing the gender gap and ensuring both women and men have the possibility of using parental leave, part-time employment and flexible working hours are required. Wage differences can also have a significant influence on who undertakes care responsibilities, and closing the gender pay gap is therefore critical.³⁸⁵ Lastly, the Secretary-General stated that some countries that have parental leave have reserved a certain amount of

³⁸⁰ UN Doc. E/CN.6/2004/9, *Report of the Secretary-General – Thematic Issue before the Commission: The Role of Men and Boys in Achieving Gender Equality*, 22 December 2003, para. 12.

³⁸¹ S. C. White, ‘Making Men an Issue: Gender Planning for “The Other Half”’, in M. McDonald (ed.), *Gender Planning in Development Agencies: Meeting the Challenge* (Oxfam GB, Oxford, 1994) p. 108.

³⁸² R. W. Connell, *The Role of Men and Boys in Achieving Gender Equality*, Working paper presented at the expert group meeting on the role of men and boys in achieving gender equality, organized by DAW in collaboration with UNDP, ILO and UNAIDS, Brasilia, Brazil, 21-24 October 2003.

³⁸³ UN Doc. E/CN.6/2004/9, *Report of the Secretary-General – Thematic issue before the Commission: The Role of Men and Boys in Achieving Gender Equality*, 22 December 2003, para. 15.

³⁸⁴ *Ibid.*, para. 28.

³⁸⁵ *Ibid.*, para. 32; and *The Men and Women: Who Looks After the Children?* Report on a series of three seminars hosted by the Equal Opportunities Commission, the Fawcett Society and Fathers Direct, House of Commons, United Kingdom (2002).

the leave for the father's exclusive use in order to encourage greater involvement by men in the care of their children.^{386 387}

4.2.1.6 48th Session of the CSW on the Role of Men and Boys in Achieving Gender Equality

The Commission on the Status of Women held its 48th session in 2004 in where 'the role of men and boys in achieving gender equality' was considered.³⁸⁸ The Commission urged the key stakeholders; governments, UN organizations and the civil society to promote action to increase men's and boy's contribution to gender equality especially in the areas of education, health services, training, media and work. There has also been a growing body of research articles published and websites devoted to this. In the international debate over last few years, men are more and more viewed as potential and actual contributors to gender equality.³⁸⁹

The Commission stated that it recognizes in its agreed conclusions that "everyone benefits from gender equality and that the negative impacts of gender inequality are borne by society as a whole".³⁹⁰ Therefore it emphasizes that "men and boys, through taking responsibility themselves and working jointly in partnership with women and girls, are essential to achieving the goals of gender equality, development and peace".³⁹¹ The Commission also urged Governments and other UN and private entities to "enhance awareness and knowledge among men and women on their roles as parents [...] and the importance of sharing family responsibilities".³⁹² As well as to urged them to encourage acceleration towards equality by "changing harmful traditional perceptions of and attitudes regarding male and female roles in order to achieve the full and equal participation of women and men in the society".³⁹³ Governments were finally asked, *inter alia*, to adopt legislation and/or policies to combat the gender pay gap; to promote reconciliation of work and family responsibilities; to introduce or

³⁸⁶ L. Jalmert, *The Role of Men and Boys in Achieving Gender Equality: Some Swedish and Scandinavian Experiences*, Paper presented at the expert group meeting on the role of men and boys in achieving gender equality, Brasilia 21-24 October 2003.

³⁸⁷ UN Doc. E/CN.6/2004/9, *Report of the Secretary-General – Thematic issue before the Commission: The Role of Men and Boys in Achieving Gender Equality*, December 2003, paras. 12, 14, 28, 31 and 32.

³⁸⁸ UN Doc. E/2004/27-E/CN.6/2004/14, *Commission on the Status of Women, Report on the 48th Session (1-12 March 2004) - Agreed Conclusions of the Commission on the Status of Women on the Role of Men and Boys in Achieving Gender Equality*, Official Records of the Economic and Social Council, 2004, Supplement No. 7, Chapter I(a)(III).

³⁸⁹ S. Ruxton (ed.), *Gender Equality and Men - Learning from Practice* (Oxfam GB, Oxford, 2004) p. vii.

³⁹⁰ UN Doc. E/2004/27-E/CN.6/2004/14, *Commission on the Status of Women, Report on the 48th Session (1-12 March 2004) - Agreed Conclusions of the Commission on the Status of Women on the Role of Men and Boys in Achieving Gender Equality*, Official Records of the Economic and Social Council, 2004, Supplement No. 7, Chapter I(a)(III), para. 3.

³⁹¹ *Ibid.*

³⁹² *Ibid.*, para. 6(c).

³⁹³ *Ibid.*, para. 6(f).

expand parental leave, and to introduce flexible working arrangements such as voluntary part-time work, tele-working, and other home-based work.³⁹⁴

4.2.1.7 2005 Conference on the 10th Anniversary of the Beijing Declaration

In March 2005, on the occasion of the tenth anniversary of the Beijing Conference, the 49th session of the Commission on the Status of Women reviewed the outcome of the Conference and the twenty-third special session of the General Assembly. In a Declaration, it emphasized the importance of achieving the full and effective implementation of the above-mentioned sessions and documents in order to achieve agreed international development goals, and goals of the *Millennium Declaration*, and though progress has been achieved there are still challenges and obstacles.^{395 396}

In a resolution of the session they again stated the importance of shared responsibility and called upon States to recognize, develop and promote policies in favour of parental leave, reconciliation of work and home responsibilities and encourage men to equally share with women household and childcare responsibilities.³⁹⁷ The report of the Secretary-General in preparation of the session, issued in December 2004, reported on men's and boys' involvement in achieving equality and concluded that this issue was still in its early stages. However, it stated, people's general awareness had been raised and some countries had reported on paternity leave programmes put in place.³⁹⁸ The Commission also stated that they consider both the implementation of the Beijing Declaration and the Platform for Action, and Member States obligations under CEDAW as "mutually reinforcing in achieving gender equality and the empowerment for women".³⁹⁹

³⁹⁴ *Ibid.*, para. 6(m).

³⁹⁵ UN Doc. E/2005/27-E/CN.6/2005/11, *Commission on the Status of Women, Report on the 49th Session (28 February-11 and 22 March 2005) - Declaration of the Commission on the Status of Women on the Occasion of the Tenth Anniversary of the Fourth World Conference on Women*, Official Records of the Economic and Social Council, 2005, Supplement No. 7, paras. 1-3.

³⁹⁶ The General Assembly reaffirmed its commitment to the goals of the Beijing Conference and the importance of continuing the effort of achieving equality.

³⁹⁷ UN Doc. E/2005/27-E/CN.6/2005/11, *Commission on the Status of Women, Report on the 49th Session (28 February-11 and 22 March 2005) - Resolution 49/8, Economic Advancement of Women*, Official Records of the Economic and Social Council, 2005, Supplement No. 7, para. 14.

³⁹⁸ UN Doc. E/CN.6/2005/2, *Report of the Secretary-General - Review of the Implementation of the Beijing Platform for Action and the Outcome Documents of the Special Session of the General Assembly Entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century"*, 6 December 2004, para. 668.

³⁹⁹ *Ibid.*, para. 4.

4.3 Relevant International Labour Standards

The International Labour Organization (ILO) was created in 1919 and became a specialized agency under the UN in 1946 with the aim to improve the protection of workers by elaborating on international labour standards. It is composed of a tripartite structure of Governments, employers and workers, this means that the delegation to the ILO Conference of each member state consists of two government representatives, one representative of the employers and one of the workers. The ILO Conference can elaborate and examine labour standards by adopting Conventions that are considered legally binding for those States having ratified them, or Recommendations, considered non-binding guidelines.⁴⁰⁰

One of the ILO's primary objectives since its creation has been the achievement of equality between men and women.⁴⁰¹ It envisions not only equality as a basic human right but as central to the global aim of decent work for all women and men.⁴⁰² It works towards gender equality by systematically analysing and addressing specific needs of men and women and by using targeted interventions in development efforts.⁴⁰³ Its gender equality agenda encompasses promoting rights; strengthening the social dialogue; better employment and income opportunities for women and men; and greater social protection.⁴⁰⁴

Gender equality is seen as a key element for economic growth and the ILO bases its mandate to promote gender equality in work on four key equality Conventions with varying ratification figures:⁴⁰⁵ the *Equal Remuneration Convention* with 164 States Parties;⁴⁰⁶ the *Convention on Discrimination (Employment and Occupation)* with 166 States Parties;⁴⁰⁷ The *Convention on Workers with Family Responsibilities* with 39 States Parties;⁴⁰⁸ and the

⁴⁰⁰ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) pp. 312-313.

⁴⁰¹ <www.ilo.org/global/Themes/Equality_and_Discrimination/GenderEquality/lang--en/index.htm>, visited on 7 December 2007.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ <www.ilo.org/public/english/gender.htm>, visited on 8 December 2007.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *C100 Equal Remuneration Convention, 1951*, 29 June 1951, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C100>; the Convention currently has 164 States Parties, <www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100>; both visited on 10 December 2007.

⁴⁰⁷ *C111 Discrimination (Employment and Occupation) Convention, 1958*, 25 June 1958, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C111>; the Convention currently has 166 States Parties, <www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111>; both visited on 10 December 2007.

⁴⁰⁸ *C156 Workers with Family Responsibilities Convention, 1981*, 23 June 1981, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C156>; the Convention currently has 39 States Parties, <www.ilo.org/ilolex/cgi-lex/ratifce.pl?C156>; both visited on 10 December 2007.

Maternity Protection Convention with 13 States Parties.⁴⁰⁹ ILO's Governing Body has designated eight Conventions as 'fundamental', which they consider are fundamental principles and rights at work; the *Convention on Equal Remuneration* and the *Convention on Discrimination (Employment and Occupation)* are two of those.

Convention No. 100 on Equal Remuneration from 1951 provides that Member States should promote and as far as possible ensure equal pay for work of equal value between men and women.⁴¹⁰ States Parties should try to ensure that there is no discrimination between men and women on rates of remuneration and that differences between workers shall correspond to objective appraisals.⁴¹¹

Convention No. 111 on Discrimination (Employment and Occupation) from 1958 provides that Member States shall declare and pursue a national policy designed to promote equality of opportunity and treatment in employment and occupation, with a view to eliminate any discrimination based on, *inter alia*, sex.⁴¹² However, the Convention also provides the possibility to determine that some special measures designed to meet particular requirement of persons shall not be considered discrimination. Such reasons include, for example, that a person due to sex, family responsibilities or social or cultural status require special assistance or protection.⁴¹³

Convention No. 156 on Workers with Family Responsibilities from 1981 provides that workers with family responsibilities should not be subject to discrimination and it provides, *inter alia*, for the development of child-care facilities and family services.⁴¹⁴ It recognizes "the need to create effective equality of opportunity and treatment [...] between men and women workers with family responsibilities".⁴¹⁵ The Convention also, *inter alia*, refers to the fourteenth paragraph of the Preamble of CEDAW, which provides the need to change men and women's traditional roles.⁴¹⁶ The *Recommendation on Workers with Family Responsibilities* provides that either parent, within

⁴⁰⁹ *C183 Maternity Protection Convention, 2000*, 15 June 2000, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C183>; the Convention currently has 13 States Parties, <www.ilo.org/ilolex/cgi-lex/ratifice.pl?C183>; both visited on 10 December 2007.

⁴¹⁰ *C100 Equal Remuneration Convention, 1951*, 29 June 1951, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C100>, visited on 10 December 2007, Article 2(1).

⁴¹¹ *Ibid.*, Articles 1(b) and 3(1).

⁴¹² *C111 Discrimination (Employment and Occupation) Convention, 1958*, 25 June 1958, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C111>, visited on 10 December 2007, Article 2.

⁴¹³ *Ibid.*, Article 5(2).

⁴¹⁴ *C156 Workers with Family Responsibilities Convention, 1981*, 23 June 1981 Article 3(1) and 5(b), <www.ilo.org/ilolex/cgi-lex/convde.pl?C156>, visited on 10 December 2007.

⁴¹⁵ *Ibid.*, Preamble, para. 8.

⁴¹⁶ *Ibid.*, Preamble, para. 7.

a time immediately following maternity leave, should be able to take a leave of absence as parental leave without losing their employment status.⁴¹⁷

The Maternity Protection Convention No. 183 from 2000⁴¹⁸ applies to employed women.⁴¹⁹ A maternity protection standard of a minimum of 12 weeks maternity leave, with or without pay, was set by a Convention adopted in 1919.⁴²⁰ The *Maternity Protection Convention* states that the women workers' situation is the shared responsibility of Governments and society.⁴²¹ Among other things, it provides for a minimum of 14 weeks of maternity leave with cash benefits provided through compulsory social insurance or public funds, preventing an individual employer being liable for such costs.⁴²² The Convention protects from dismissal during maternity leave, and provides that measures should be adopted to ensure that maternity does not constitute a source of discrimination in employment.⁴²³ The ILO also states that protecting nursing mothers, or expectant mothers, from bad health and job discrimination is a precondition for achieving actual gender equality of opportunity and treatment.⁴²⁴ In connection with the Convention, the *Maternity Protection Recommendation* was adopted which, *inter alia*, provides for the employed father to be entitled, in the case of death or sickness of the mother, to take leave to take care of the child equivalent to what is left of the maternity leave.⁴²⁵ In addition, it provides for the employed mother or employed father to be entitled to parental leave after the expiry of the maternity leave.⁴²⁶

The *Declaration on Fundamental Principles and Rights at Work* states that the elimination of discrimination in respect of employment and occupations is a fundamental right.⁴²⁷ In 2004, the International Labour Conference issued *Resolution Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection* called on Governments, social partners and

⁴¹⁷ *R165 Workers with Family Responsibilities Recommendation, 1981*, Geneva, 23 June 1981, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?R165>, visited on 10 December 2007, Article 22(1).

⁴¹⁸ *C183 Maternity Protection Convention, 2000*, 15 June 2000, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C183>, visited on 10 December 2007.

⁴¹⁹ It substituted a Convention from 1952 which substituted one from 1919.

⁴²⁰ <www.ilo.org/public/english/gender.htm>, visited on 20 July 2006.

⁴²¹ *C183 Maternity Protection Convention, 2000*, 15 June 2000, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?C183>, visited on 10 December 2007, Preamble, para. 4.

⁴²² *Ibid.*, Articles 4(1), 6(1) and (8).

⁴²³ *Ibid.*, Articles 9(1) and 8(1).

⁴²⁴ <www.ilo.org/global/Themes/Equality_and_Discrimination/Maternityprotection/lang-en/index.htm>, visited on 7 December 2007.

⁴²⁵ *R191 Maternity Protection Recommendation*, Geneva, 15 June 2000, the International Labour Organization, accessible at <www.ilo.org/ilolex/cgi-lex/convde.pl?R191>, visited on 10 December 2007, Articles 10(1) and (2).

⁴²⁶ *Ibid.*, Article 10(3).

⁴²⁷ *Declaration on Fundamental Principles and Rights at Work*, Geneva, 18 June 1998, the International Labour Organization, accessible at <www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT>, visited on 9 December 2007, Article 2(d).

ILO to commit themselves to eliminate all forms of gender discrimination in the labour market and to promote gender equality.⁴²⁸ The Resolution further states that gender equality, is a cross-cutting element in the work of the ILO and covers all its strategic objectives.⁴²⁹ Governments and social partners should according to the Resolution, *inter alia*, work with eliminating pay differences based on gender and promote measures to reconcile family-life and work.⁴³⁰

An ILO report from 2007 stated that in the last few years the number of countries has increased that have policies where fathers are encouraged to take care-related leave. Both developed and un-developed countries have worked for making it easier for men to take parental leave. However, the rate of fathers that do not use this possibility is still high in many countries.⁴³¹ Two key family-friendly measures for enhancing equality in the workforce are according to the report: making parental leave after the initial maternity leave just after the birth, non-transferable and available to both men and women; and promoting that men and women should share family responsibilities more equally.⁴³² Individual parental leave has been instrumental in encouraging fathers to take parental leave, however the numbers are still low. Two reasons may be the gender pay-gap, that the family may lose more income by having the father on leave; and that it is not as culturally accepted for fathers to be caregivers.⁴³³

4.4 A European Perspective

This part will examine the European Union and the Council of Europe. The European Union (EU), as a regional inter-governmental organization, is actually beyond the scope of this essay. However, it is a region with 27 countries in which equality has been an issue on the agenda for many years. It has come the farthest in gender equality for a regional organization, Therefore, as an illustration of policies of gender equality outside the UN family, a brief account of the gender policies in the EU will serve as an example of how a regional international organization has brought equality forward. Further, the Council of Europe is a regional organization with 47 Member States. It has an extensive case-law connected to the European

⁴²⁸ *Resolution Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection*, Geneva, 15 June 2004, the International Labour Organization, accessible at <www.ilo.org/dyn/gender/docs/RES/397/F768386426/ILC%20Resolution%20on%20gender,%20pay%20and%20maternity.pdf>, visited on 9 December 2007, Article 1(a).

⁴²⁹ *Ibid.*, para 5.

⁴³⁰ Articles 1(a)(v) and (vii).

⁴³¹ *Equality at Work: Tackling the Challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session 2007, Report I (B), the International Labour Organization, accessible at <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf>, visited on 10 December 2007, p. xii.

⁴³² *Ibid.*, p. 78, box 3.12.

⁴³³ *Ibid.*, p. 81.

Human Rights Convention regarding equality and a short overview will follow of its work on the subject.

4.4.1 The European Union and the Work for Gender Equality

International institutions such as the European Union (EU) play an increasingly important role in policy developments that were once within the realm of national politics.⁴³⁴ The EU has fully developed institutions with the authority to initiate, formulate, implement and monitor policy compliance of the member states. For the Member States, EU Law is binding and takes precedence over national law. By means of the European Court of Justice, the EU holds states accountable for implementing legislation.⁴³⁵ A Directive is according to Article 249 of the *EC Treaty* binding for Member States as to the result achieved.⁴³⁶ Recommendations has according to the same Article no binding force.⁴³⁷

The EU's policy regarding gender equality includes legislation, mainstreaming and positive actions to achieve equality. The EU works to eliminate inequalities and promote gender equality in all aspects of policies and practices throughout the Union. There are two units within the European Commission that deal with equality; one deals with strategy and actions programmes,⁴³⁸ and one deals with legal questions and equal treatment.⁴³⁹ An important part of the work of both of the units is raising the awareness of people.⁴⁴⁰

⁴³⁴ Ellina, Chrystalla A., *Promoting Women's Rights – The Politics of Gender in the European Union* (Routledge, New York, 2003) p. xiii.

⁴³⁵ *Ibid.*, pp. xvii and xiii.

⁴³⁶ The EC Treaty - *Treaty Establishing the European Economic Community, Signed on 25 March 1957, Rome, as Amended by the Treaty on European Union, Signed on 7 February 1992, Maastricht, as Renumbered and Amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997* - Consolidated Versions on European Union and of the Treaty Establishing the European Community - Official Journal of the European Union, C 321E of 29 December 2006, Article 249.

⁴³⁷ *Ibid.*

⁴³⁸ Equal Opportunities for Women and Men: Strategy and Programme Unit; a unit under the Employment, Social Affairs & Equal Opportunities Directorate-General of the European Commission.

⁴³⁹ Equality of treatment between Women and Men: Legal Questions; a unit under the Employment, Social Affairs & Equal Opportunities Directorate-General of the European Commission.

⁴⁴⁰ See more <www.ec.europa.eu/employment_social/gender_equality/index_en.html>, and <www.ec.europa.eu/employment_social/gender_equality/framework/2_en.html#1>, both visited on 14 December 2007.

Article 2 of the *EC Treaty*⁴⁴¹ provides that the European Community shall promote equality between women and men. Article 3 (2) states that in all the Community's activities it shall aim to eliminate inequalities and promote equality between men and women. The *EC Treaty* provides three legal bases for EU legislation on equal treatment of men and women: Articles 13 (1), 136 and 137, and 141. Article 13 (1) provides that action should be taken to combat discrimination based on, *inter alia*, sex. Articles 136 and 137 state that the achievement of equal treatment at work and equal work opportunities should be promoted by supporting or complementing Member States activities in the field, adopting measures or by issuing directives, which are mandatory minimum implementation requirements for Member States.⁴⁴² Article 141 (1) provides that each Member State shall ensure that the principle regarding equal pay for work of equal value is applied for male and female workers.⁴⁴³ Labour law in the EU is based on the Community Charter of Fundamental Social Rights for Workers, which established major principles to model labour law on; e.g. equal treatment for men and women.⁴⁴⁴

The Commission issued a proposal for a Directive on parental leave in 1983 but it took until 1996 to obtain agreement on a Directive. *Council Directive 96/34 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC* discusses ways for men and women to reconcile work and family life.⁴⁴⁵ It grants workers a minimum of three months parental leave to workers, be they men or women.⁴⁴⁶ The Directive states that men should be encouraged to take an equal share of family responsibilities, and that such means as awareness programmes could be used to encourage men to take their parental leave.⁴⁴⁷ It further states that parental leave is an individual right that in principle is non-transferable.⁴⁴⁸ That the right is an individual one was confirmed in *Commission of the European Communities v. Grand Duchy of Luxembourg*.⁴⁴⁹ Furthermore, this was also reinforced in the *Discrimination Directive 2006/54* and that the right was non-transferable.⁴⁵⁰

⁴⁴¹ The EC Treaty - *Treaty Establishing the European Economic Community, Signed on 25 March 1957, Rome, as Amended by the Treaty on European Union, Signed on 7 February 1992, Maastricht, as Renumbered and Amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997* - Consolidated Versions on European Union and of the Treaty Establishing the European Community - Official Journal of the European Union, C 321E of 29 December 2006.

⁴⁴² *Ibid.*, Articles 136, 137(1)(i) and (2)(b) and 141(3).

⁴⁴³ *Ibid.*, Articles 141(1) and (3).

⁴⁴⁴ <<http://europa.eu/scadplus/leg/en/cha/c10107.htm>>, visited on 15 December 2007.

⁴⁴⁵ *Council Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC*, 3 June 1996, OJ L 145.

⁴⁴⁶ *Ibid.*, Annex, II, Clause 2.1.

⁴⁴⁷ *Ibid.*, Annex, I, para. 8.

⁴⁴⁸ *Ibid.*, Annex, II, Clause 2.2.

⁴⁴⁹ Case C-519/03, *Commission of the European Communities v. Grand Duchy of Luxembourg* [2005] ECR I-3067, Celex No. 62003J0519.

⁴⁵⁰ The Discrimination Directive - *Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal*

According to the *Discrimination Directive 2006/54*, Member States should work with resolving gender discrimination in the labour market.⁴⁵¹ Equality between men and women is a fundamental principle under the Articles 2 and 3(2) of the *EC Treaty* and the case-law of the European Court of Justice, which proclaim that equality is a task and an aim of the EU.⁴⁵² Member States should address segregation in the labour market and wage differences by introducing measures that “enable *both men and women* to combine family and work commitments more easily”.⁴⁵³ Such measures are e.g. flexible working time arrangements, appropriate parental leave arrangements that enable each parent to make use of them, as well as child-care that is both accessible and affordable, and care for dependant persons.⁴⁵⁴ Member States should not restrict their actions in achieving equality in matters of employment to legislative ones but they should also promote the raising of public awareness and the changing of public attitudes.⁴⁵⁵

Case law of the European Court of Justice regarding parental leave and maternity leave was a troublesome area in EU equality law in the 80s and 90s.⁴⁵⁶ Many of the Courts decisions have been criticised by scholars as at best being inconsistent, and in some cases of perpetuating and reinforcing a culture of a single male breadwinner and the double burden faced by women in the family and at work.⁴⁵⁷ The Court has in several cases given the impression of a belief that women are considered the primary caregiver.⁴⁵⁸ One of the more controversial cases was *Ulrich Hofmann v. Barmer Ersatzkasse*, where the Court held that Article 2(3) of the *Equal Treatment Directive 76/207*⁴⁵⁹ did not grant fathers the right to the parental leave allowance that mothers were granted.⁴⁶⁰ Following a protective period of eight weeks after delivery, mothers were then entitled to another four months of paid maternity leave; those months of leave was what *Hofmann* asked for.⁴⁶¹ He argued that those extra four months were designed exclusively for taking care of the child and not to protect the mother’s

Treatment of Men and Women in Matters of Employment and Occupation (recast), 5 July 2006, OJ L 204, para. 26.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*, para. 2.

⁴⁵³ *Ibid.*, para. 11; Emphasis done by author.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*, para 38.

⁴⁵⁶ L. Carlson, *Searching for Equality, Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* (Iustus Förlag, Uppsala, 2007) p. 63.

⁴⁵⁷ S. O’Leary, *Employment Law at the European Court of Justice- Judicial Structures, Policies and Processes* (Hart Publishing Ltd., Oxford, 2002) p. 186.

⁴⁵⁸ See e.g. P. Foubert, *The Legal Protection of the Pregnant Worker in the European Community - Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America* (Kluwer Law, The Hague, 2002) pp. 129-144.

⁴⁵⁹ The Equal Treatment Directive - *Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions*, 9 February 1976, OJ L 39.

⁴⁶⁰ Case C-184/83, *Ulrich Hofmann v. Barmer Ersatzkasse* [1984] ECR-3047, Celex No. 61983J0184.

⁴⁶¹ *Ibid.*, para. 9.

health.⁴⁶² The Court stated that Article 2 (3) was designed to protect mothers after giving birth and to protect the relationships developing between the mother and child. The protection afforded did not extend to fathers.⁴⁶³ The Court stated that the Directive was “not designed to alter the division of responsibility between parents”.⁴⁶⁴

The problems faced by father’s in the Court is hopefully history when the 1976 *Equal Treatment Directive 76/207* was replaced in 2002 with the *Equal Treatment Directive 2002/73*.⁴⁶⁵ The new directive specifically stated that:

“The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by [UDHR], [CEDAW], the International Convention on the Elimination of all Forms of Racial Discrimination and [ICCPR], and [ICESCR] and by the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.”⁴⁶⁶

In 2000, the Council and the Ministers for Employment and Social Policy issued a *Resolution on the Balanced Participation of Women and Men in Family and Working Life*. In there they state that “the principle of equality between men and women in relation to employment and labour implies equal sharing between working fathers and mothers, in particular of time off work to look after children or dependants”.⁴⁶⁷ Both women’s disadvantage regarding conditions and access to the labour market, and men’s disadvantage regarding participation in family life need to be changed to achieve equality. The disadvantage is the result of social practices assuming that men are primarily responsible for paid work and women for unpaid work in the family.⁴⁶⁸ To have women and men equally participating in the family and in the labour market is an advantage to both women and men and an essential aspect of the development of society.⁴⁶⁹ They also state in the Resolution that “[b]oth men and women, without discrimination on the grounds of sex, have a right to reconcile family and working life”.⁴⁷⁰ In addition, the Resolution states that in the light of Article 141(3) of the EC-Treaty, rights relating to paternity, maternity or to the reconciling of

⁴⁶² *Ibid.*, para. 5.

⁴⁶³ *Ibid.*, para. 25.

⁴⁶⁴ *Ibid.*, para. 24.

⁴⁶⁵ The Equal Treatment Directive - *Directive 2002/73/EC of the European Parliament and of the Council Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions*, 23 September 2002, OJ L 269.

⁴⁶⁶ *Ibid.*, para. 2.

⁴⁶⁷ *Resolution of the Council and of the Ministers for Employment and Social Policy, Meeting Within the Council, on the Balanced Participation of Women and Men in Family and Working Life*, 29 June 2000, OJ C 218, para. 3.

⁴⁶⁸ *Ibid.*, para. 2.

⁴⁶⁹ *Ibid.*, para. 4.

⁴⁷⁰ *Ibid.*, para. 5.

working and family life are important rights to protect for both female and male workers.⁴⁷¹

In the Resolution Member States were encouraged, as a basic condition for the realization of *de facto* equality, to develop strategies and reinforce their promotion of balanced participation of women and men in working and family life.⁴⁷² The States were also, *inter alia*, encouraged to examine their legal system to “grant working men an individual and untransferable right to paternity leave, subsequent upon the birth or adoption of a child”.⁴⁷³ They also encouraged Member States to support the development of school programmes to encourage “an awareness of the needs related to reconciling working and family life as a precondition for the equality of men and women”.⁴⁷⁴

A new institute soon in operation is the European Institute for Gender Equality, which will give technical support to enhancing gender equality to Member States and EU institutions.⁴⁷⁵

4.4.2 The Council of Europe

The Council of Europe was founded in 1949 with the aim to develop throughout Europe democratic principles based on the *European Convention on Human Rights* (ECHR)⁴⁷⁶.⁴⁷⁷ It currently has 47 Member States.⁴⁷⁸ Since 1979 the Council of Europe has been promoting European co-operation in the achievement of actual gender equality.⁴⁷⁹ Article 14 of ECHR prohibits any distinction based on sex, among other grounds, regarding any of the rights under the Convention. There is e.g. no freedom of discrimination per se under the ECHR; Article 14 of the ECHR on the right to non-discrimination is not an independent right, and has to be raised in conjunction with a violation of another Article.⁴⁸⁰ However, in those 15 States that are party to *Protocol No. 12* to the Convention, a case concerning discrimination does not have to be tied to a right under the Convention, but can concern any right secured by law or provided by any public authority in those States.⁴⁸¹ The Protocol provides that “[t]he enjoyment of any right set

⁴⁷¹ *Ibid.*, para. 10.

⁴⁷² *Ibid.*, para. 2(a).

⁴⁷³ *Ibid.*, para. 2(b)(i).

⁴⁷⁴ *Ibid.*, para. 2(b)(vii).

⁴⁷⁵ <http://ec.europa.eu/employment_social/gender_equality/gender_institute/index_en.html>, visited on 15 December 2007.

⁴⁷⁶ The European Convention for Human Rights - *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, CETS No. 005.

⁴⁷⁷ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 319.

⁴⁷⁸ <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=12/29/2007&CL=ENG>>, visited on 29 December 2007.

⁴⁷⁹ <www.coe.int/T/e/human_rights/equality/>, visited on 3 January 2008.

⁴⁸⁰ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 319.

⁴⁸¹ *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 2 November 2000, CETS No. 177; into force on 1 April 2005; see ratifications on <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM>>

forth by law shall be secured without discrimination on any ground such as [...] sex”, and “[n]o one shall be discriminated against by any public authority [on the same grounds]”.⁴⁸² *Protocol No. 7* added to the Convention the principle of equality between spouses regarding their rights and responsibilities in marriage.⁴⁸³ In its Member States the Council of Europe promotes the full participation of women and men in society by defining common principles and standards. They aim to incorporate a gender equality perspective in all its policies and at all levels and states that new approaches, strategies and methods are needed to reach the goal of gender equality and correct the imbalance that exists between men and women.⁴⁸⁴

The current Charter, the *European Social Charter (revised)*, revised an earlier Social Charter from 1961. In those States that are party to the Charter, it provides such additional rights as protection of employed women by ensuring leave in connection with having a child and equal remuneration for men and women for work of equal value.⁴⁸⁵ The Charter also has a specific non-discrimination clause, including sex as one of the grounds, for the rights set forth in it.⁴⁸⁶ Article 27 ensures the right to equality for workers with family responsibilities and, *inter alia*, provides “for either parent to obtain, during a period after maternity leave, parental leave to take care of a child”.⁴⁸⁷ The Additional Protocol of 1988 also includes the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.⁴⁸⁸ Implementation of the Charter is by means of a Committee of Independent Experts that every two years receives a report from States Parties on their application of the Charter.⁴⁸⁹

The Committee of Ministers to Member States agreed on a *Recommendation on reconciling work and family life*, which was adopted by

=7&DF=1/11/2008&CL=ENG>, visited on 11 January 2007; and R. K. M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2007) p. 179.

⁴⁸² *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 2 November 2000, CETS No. 177, Articles 1(1) and (2).

⁴⁸³ *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11*, Strasbourg, 22 November 1984, CETS No. 117, Article 5; it currently has 40 Member States *see* <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=8&DF=12/29/2007&CL=ENG>>, visited on 29 December 2007.

⁴⁸⁴ <www.coe.int/t/e/human%5Frights/equality/02.%5FGender%5Fmainstreaming/>, visited on 30 December 2007.

⁴⁸⁵ *European Social Charter (revised)*, Strasbourg, 3 May 1996, CETS No. 163, Articles 4(3) and 8; it currently has 21 Member States *see* <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=163&CM=7&DF=26/10/2005&CL=ENG>>, visited on 29 December 2007.

⁴⁸⁶ *European Social Charter (revised)*, Strasbourg, 3 May 1996, CETS No. 163 Part V, Article E.

⁴⁸⁷ *Ibid.*, Article 27(2).

⁴⁸⁸ *Additional Protocol to the European Social Charter*, 5 May 1988, CETS No. 128, Part II, Article 1; it currently has 13 Member States, Part II, Article 1.

⁴⁸⁹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 334.

the Council of Europe.⁴⁹⁰ In there they recognized that women were taking a disproportional share of family responsibilities and that the “discrimination against women in the labour market is encouraged by insufficient sharing of family responsibilities”.⁴⁹¹ Furthermore, “the potential benefits to be gained in the promotion of a working society that uses the skills of all its members to the full” should be taken into consideration.⁴⁹² The reconciliation of work and family life promotes “self-fulfilment in public, professional, social and family life”, and it is a “precondition for a meaningful quality of life and for the full exercise of fundamental human rights in the economic and social sphere”.⁴⁹³ Governments of Member States were recommended to take action to achieve the goal of equal opportunities and equal treatment.⁴⁹⁴ In addition, the Recommendation sought that:

“The fathers of newly born children should also be allowed a short period of leave to be with their families. In addition, both the father and the mother should have the right to take parental leave during a period to be determined by the national authorities without losing either their employment or any related rights provided for in social protection or employment regulations. The possibility should exist for such parental leave to be taken part-time and to be shared between parents.”⁴⁹⁵

They further state that to achieve a more equal sharing between men and women of family responsibilities measures should be taken to reduce the wage differentials between men and women.⁴⁹⁶

In an earlier Recommendation, the Committee of Ministers placed emphasis on the role of fathers and stated that:

“The Family must be a place where equality, including legal equality, between women and men is especially promoted by sharing responsibility for running the home and looking after the children, and, more specifically, by ensuring that mother and father take turns and complement each other in carrying out their respective roles.”⁴⁹⁷

The XXVIIth session of the Conference of European Ministers Responsible for Family Affairs discussed, *inter alia*, the role of men and boys. They stated that a key role could be played by governments who could introduce measures exclusively aimed at men by which men would be able to play a real part in family life, which they also stated is one condition of genuine

⁴⁹⁰ *Recommendation of the Committee of Ministers to Member States on Reconciling Work and Family Life*, Rec(96)5E, 19 June 1996.

⁴⁹¹ *Ibid.*, p. 32, para. 6, section 2.

⁴⁹² *Ibid.*, p. 32, para. 8.

⁴⁹³ *Ibid.*, p. 32, para. 13.

⁴⁹⁴ *Ibid.*, p. 33, paras. I and II.

⁴⁹⁵ *Ibid.*, p. 34, Appendix, para. 13.

⁴⁹⁶ *Ibid.*, p. 34, Appendix, para. 16.

⁴⁹⁷ *Recommendation of the Committee of Ministers on Coherent and Integrated Family Policies*, Rec(94)14E, 22 November 1994, Appendix, Principle 4.

equality.⁴⁹⁸ Further, an effective way to get fathers to participate is to reserve leave for them. The Portuguese Minister there stated that “fathers have to realize that looking after children is not only a duty but also a right”.⁴⁹⁹

The ECHR imposes, like other international treaties, obligations upon its Member States.⁵⁰⁰ There has been one case in the European Court of Human Rights concerning whether parental leave is a right under the ECHR. A father who was staying home to take care of his child claimed he was discriminated against when he was refused the granting of parental leave allowance on the grounds that it was only available to mothers. The Court ruled against the father and concluded in its judgement, seven votes to two, that there at the time of the claim, in 1989, existed no common standard in the field in States Parties to the ECHR. Since a majority of States Parties had not provided for parental leave allowance to be paid to fathers Austria had not exceeded the margin of appreciation allowed. Austria, however, decided long before the judgment to extend the parental leave allowance to fathers to children born from 1 January 1990, which was about 10 months after the child in the case at hand was born. The Court seems to have taken the change of who to grant allowance into consideration.⁵⁰¹ The two dissenting judges stated that the different treatment regarding parental leave allowance for mothers and fathers is not compatible with Article 14 on non-discrimination and Article 8 on respect for family life. The dissenting judges agreed with the majority when they stated:

“the advancement of the equality of the sexes is today a major goal in the member states of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention.”⁵⁰²

However, the dissenting judges did not agree with the majority’s conclusion that such weighty reasons for keeping the difference between men and women existed, and further stated:

“It is in reality the traditional distribution of family responsibilities between mothers and fathers that gave rise to the Austrian legislation under which only mothers were entitled to parental leave allowance. The discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother; if she continues her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled if she stayed at home. It is correct that States are under no obligation to pay

⁴⁹⁸ *Reconciling Working and Family Life*, XXVIIth session of the Conference of European Ministers Responsible for Family Affairs, Portoroz (Slovenia), Final Communiqué Reports, Council of Europe, Strasbourg, June 2001.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 322.

⁵⁰¹ *Petrovic v. Austria*, 27 March 1998, ECHR, Judgment, *European Court of Human Rights - Reports of Judgments and Decisions 1998-II*, p. 579, paras. 8, 20, 38, 39, 41 and 43.

⁵⁰² *Ibid.*, para. 37.

any parental leave allowance, but if they do so, traditional practices and roles in family life alone do not justify a difference in treatment of men and women.”⁵⁰³

4.5 Analysis of the Other International Instruments on Gender Equality

There is clear evidence of equality between men and women being of importance in the United Nations. The Member States have given the area priority and year after year they have allocated resources for various work in the many entities in the UN that works for the advancement of women’s rights. The many entities perform extensive work in the promotion of gender equality throughout the world.

4.5.1 UN Conventions

Both the Charter of the United Nations and the UDHR state that a basic principle in international law is men and women’s equal enjoyment of rights. One of the purposes of the United Nations is according to Articles 1(3) and 55(c) of the Charter to promote and encourage respect for human rights and fundamental freedoms for all without distinction to sex with the view to create conditions of stability and well-being for all. UDHR also provides for the important principle regarding employment rights of equal pay for equal work, which the ILO has emphasized in its work.

The two Covenants, the ICCPR and the ICESCR, go a bit further and specify the rights the States Parties are obligated to guarantee in the civil, political, economic, social and cultural spheres. Both of these Conventions have an almost worldwide following of 160 States Parties to ICCPR, and 157 States Parties to ICESCR. Article 2 of both ICCPR and ICESCR obligates States Parties to respect and ensure the enjoyment all the rights under the respective Convention without any discrimination. Article 3 of both of them explicitly states that men and women shall have equal rights to the enjoyment of all the rights in each Convention.

Article 26 of the ICCPR provides for the right to equality between men and women and that the law shall guarantee equal and effective protection against discrimination before the law. The Human Rights Committee has stated that the Article should be interpreted as guaranteeing non-discrimination regarding any legislative action or any public policy. It is thus even possible for persons, within the territory and under the jurisdiction of any of the 110 States Parties to the first Optional Protocol of the ICCPR, to file an individual complaint under Article 26 claiming gender discrimination of a right even if that particular one is not guaranteed under the Convention. The Committee states that the protection accorded under

⁵⁰³ *Ibid.*, Joint Dissenting Opinion of Judges Bernhardt and Spielmann, paras. 3 and 4.

ICCPR would still apply even if the matter concerns a right covered in other international instruments and gives ICESCR and CEDAW as examples. The Committee also points out that this Article does not oblige States *per se* to have a law regarding a particular matter, however if there is a law in place it should not be discriminatory, unless the differentiation is based on a reasonable and objective criteria. This Article is directed at the legislature and the judgement has the effect of according an individual complaints procedure regarding *gender discrimination* even for those international instruments that do not have their own; such as the ICESCR and CRC. Article 26 also requires that States Parties should act against public and private agencies in all fields. Whether paternity or parental leave can be accorded under any of the provision in ICCPR, ICESCR or CRC will now be examined.

ICCPR Article 23(4) provides that husband and wife should participate equally in responsibility within the family, and this means according to the Committee that States Parties are required to take legislative, administrative or other actions. This right could possibly be used to demand legislative measures or other policies that could ensure equal responsibility in the family. One could interpret this to mean that such measures should be imposed that would ensure that the husband and wife are given the opportunity to equally care for their children. One such measure might be ensuring paternity leave for a few months for fathers as well as mothers, to set the basis for equal household responsibility. It seems to be implied by the Committee that this provision also ensures rights for unmarried couples according. The reason for the need of equal rights and responsibilities for men and women are based on the need for this when sharing a household and raising children, which equally should apply to cohabiting couples. Furthermore, State Parties should take action to ensure that the right to participate in public affairs is accorded to men and women equally by Article 25.

The ICESCR is concerned with issues closely related with the right to paternity leave. There are provisions concerning the right to equal pay and the right to work, as well as provision regarding social security. All the substantive rights provided for in the Covenant should be ensured for women both *de jure* and *de facto*. Under Article 6 the Committee has stated that deliberate, concrete and targeted steps need to be taken to ensure the full realization of Article 6 of the right to work. Under Article 7(a) the Committee has stated that States Parties should promote policies for child-care and under Article 9, the Committee actually stated that equal access to social security means among other things that States should guarantee “adequate maternity leave for women, paternity leave for men and parental leave for both men and women”.⁵⁰⁴

⁵⁰⁴ UN Doc. E/C.12/2005/4, CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3)*, 11 August 2005, para. 26.

There are several provisions in ICESCR that in conjunction with Article 3 can accord a right to paternity leave. All of the above Articles touch the area of combining work and family life. It does not seem farfetched that an individual complaint could be brought under Articles 7(a) or 9 to the attention of the Human Rights Committee if the discrimination regarded a provision in law or a public policy.

The same procedure should be able to be used regarding discrimination between a child's parents that has negative effect on the child. Article 3 states that the best interest of the child shall be the primary consideration in all actions under the Convention concerning children. It is generally so that it is in the best interest of the child to have both parents close and caring for the child. A public policy or law that has the effect of hindering this by for example not extending leave to the father might be possible to bring to the attention of the Human Rights Committee. Such a suit could for example, be brought under Article 9(3), which provides that a child has a right to both his/her parents, and 18(1) and (3), which provide that both parents are responsible in the upbringing of a child, and that States shall provide child-care facilities to assist working parents. Furthermore, the Convention also concerns itself with the equality of the sexes which should be taught in school, Article 29(1).

The CRPD does not have any provisions regarding parental leave. However, it states that one of the guiding principles under the Convention is equality between men and women.

4.5.2 UN Conferences and Meetings

The role of men and boys in achieving equality has been a theme in the documents introduced, and the issues has gained importance over the period presented. The role of men and boys was first addressed at the International Population and Development Conference in Cairo in 1994. The main start was however the Beijing Declaration and Platform for Action from 1995.

It stated that an equal sharing of responsibilities for the family is critical for men and women's well-being as well as for democracy. It also supported attention being brought to non-stereotyped gender roles especially regarding the family. It also called for a public debate on new roles for men and women, and emphasized that States should promote the concept of shared family responsibilities especially regarding domestic work and care for children. Governments were also encouraged to convince men to take job-protected parental leave.

In the 40th session of the CSW in 1996, the Commission reiterated the importance of legislative measures or other incentives to enable men and women to take parental leave. They also gave suggestions on measures to reconcile family and work, such as flexitime and part-time possibilities, and promoted the elimination of the gender pay gap. The outcome document of

the Beijing+5 noted an increased awareness of such measures as maternity, paternity and parental leave. A full partnership is needed to achieve equality. Several other conferences on such issue as children and poverty also reiterated the importance of altering the unequal share of domestic responsibilities.

The Secretary-General's report on the role of men and boys from 2003 emphasized the importance of men's involvement in the work for gender equality. A number of meetings over the last ten years have addressed the role of men and boys, and the issue has gained momentum. The Secretary-General has stated that both men and women pay a high price of living in an unequal society. He states that the issue of shared care of the home and children need to be promoted and the cultural and institutional barriers make it difficult for men to engage as fathers. He also stated that closing the gender gap is important as well as ensuring the availability of parental leave for both men and women. The same was reiterated at the 48th session of the CSW in 2004. In a Declaration of the tenth anniversary of the Beijing Declaration, the document again emphasized the importance of men equally sharing household and childcare responsibilities.

These documents provide clear evidence that gender equality is considered to be very important for both men and women and essential in overcoming poverty as stated in the Millennium Development Goals. They further consider employment rights, such as equal opportunity to work, equal pay for work of equal value, equal possibility for promotion, and flexible work arrangements, as also being very important in giving men and women equal opportunities at home and at work. It is also stressed that paternity leave or parental leave for men and women is essential. For the realization of gender equality and reduction of poverty men and women need to equally share work at home and care for the children.

4.5.3 The ILO

The ILO Conventions provide for a number of conditions in the employment areas that are important for the realization of equality. Some of the issues they discuss are caused by inequality; unequal pay and discrimination in employment. Both of the Conventions dealing with that subject matter try to ensure that women are on an equal footing with men. For example, discrimination may prevent women from being hired, getting promoted and entering a certain profession, which can among other reasons provide for the gender pay gap.

The Convention on family responsibilities from 1981 provides for the development of child-care facilities and the importance of changing traditional roles. It also provides for either parent to take a leave of absence to care for the child immediately after maternity leave. The Convention on maternity protection from 2000 provides for 14 weeks of maternity leave.

The Recommendation on maternity leave can also entitle one to parental leave after the expiry of the maternity leave.

4.5.4 The EU and the Council of Europe

The situation regarding gender equality in Europe has rapidly improved and many countries offer maternity, paternity and parental leave. The EU has used legislation, mainstreaming and positive actions to achieve equality. It has used different approaches within its Labour Laws to enhance gender equality. However, in the 80s and 90s the European Court of Justice was criticized for reinforcing gender stereotypes by their judgments. A directive from 1996 on parental leave obligates Member States to grant a minimum of three months individual non-transferable parental leave to male or female workers. A resolution on the balanced life of men and women expressed the importance of equal sharing.

The new protocol to the ECHR recently provided for an independent right to non-discrimination that does not have to be tied to the Convention, which might have the same effect as Article 26 of the ICCPR. The Committee of Ministers stated in a recommendation from 1994 that men should share the responsibility of the home. The European Ministers discussed the role of men and boys in 2001 and stated that measures should be aimed exclusively at men to encourage them to take a real part in family life.

There seems to be an awareness of the measures needed, such as encouraging men and women to share the care for children and the home. However, true gender equality is still only beginning in most countries.

5 International Law and Gender Equality

5.1 Non-discrimination and Equality, and CEDAW

One of the fundamental building blocks of the UN is equality between men and women. Since its foundation, rapid progress has been made in according women rights which before were only accorded to men. At first, the protectionist approach used by *e.g.* the ILO in according women special protection due to motherhood contributed to women being discriminated in employment. Women's rights as mothers improved at the expense of the right to work. The main barrier to women's equality has though been cultural barriers that are very difficult to overcome. With the *Vienna Declaration and Programme of Action* came a move from protective discrimination to the recognition of full equality between men and women.⁵⁰⁵

The *Vienna Declaration and Platform of Action*, adopted at the World Conference on Human Rights in 1993 concluded that international human rights are "universal, indivisible and interdependent and interrelated".⁵⁰⁶ The *Vienna Declaration* asked for increased coordination on human rights within the United Nations system.⁵⁰⁷ An analysis of a provision in one instrument should include a comparison with related human rights provisions in other instruments. Laws should not be seen as isolated enclaves, but are part of a legal system with an internal coherence.⁵⁰⁸

There is a clear link between the concepts of equality and non-discrimination. The goal of equality is usually reached through a prohibition of discriminatory actions, which are usually legislative or policy actions. However, the fact that there is *de jure* equality does not always mean that there is *de facto* equality. To achieve non-discrimination, both *de jure* and *de facto* equality are required to be established.⁵⁰⁹ Women are in many instances not only subject to direct discrimination but also to indirect

⁵⁰⁵R. K. M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2007) p.177.

⁵⁰⁶ UN Doc. A/CONF.157/24 (Part I) at p. 20, *Vienna Declaration and Platform of Action*, World Conference on Human Rights, Vienna, 14 - 25 June 1993, 13 October 1993, section I, para. 5.

⁵⁰⁷ *Ibid.*, section II, para. 1.

⁵⁰⁸ M. Kirilova Eriksson, 'Family Rights and the United Nations Covenant on Economic, Social and Cultural Rights: Article 10(1)', in A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Antwerpen, 2002) p. 118.

⁵⁰⁹ M. N. Shaw, *International Law 5th edn.* (Cambridge University Press, 2003) p. 268.

discrimination. The latter may occur when laws, policies and programmes are seemingly gender-neutral, however their actual effect may have a detrimental impact on women. A law may inadvertently be modelled on a male lifestyles and fail to take into account aspects of women's lives that may differ from those of men.⁵¹⁰ Furthermore, there may in many instances be a lack of understanding of the systematic nature of women's subordination: a failure to recognize the need to characterize such subordination as a human rights violation; and States failing to condemn discrimination against women.^{511 512}

States are not responsible *per se* for acts of private individuals or companies, they are however responsible for failing to act to try to hinder such persons from discriminating against women according to obligations under treaties or customary law. States should undertake means to eliminate, reduce or mitigate private acts of discrimination.⁵¹³

CEDAW went beyond the Human Rights Conventions concluded before it and tried to address systematic discrimination against women. The need to confront also social causes to women's inequality is acknowledged by the addressing of "all forms" of discrimination against women.⁵¹⁴ The CEDAW Committee has in its work taken a wide interpretation of women's rights instead of a more limited approach dealing only with discrimination against women and it is also of the opinion that a purely legal approach is not sufficient to achieve *de facto* equality, substantive equality.⁵¹⁵

A general interpretative framework for all of the Conventions' substantive rights is Articles 1 to 5 and 24. These Article indicates three central obligations for States Parties: firstly, to ensure that women are not subject to direct or indirect discrimination in law, and are protected against discrimination in the public as well as in the private sphere; secondly, to use concrete and effective policies and programmes to improve women's *de*

⁵¹⁰ HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004) footnote 1.

⁵¹¹ R. J. Cook, 'Women's International Human Rights Law: The Way Forward', in R. J. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994) p. 3.

⁵¹² R. K. M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2007) pp.175-177.

⁵¹³ R. J. Cook, 'State Accountability under the Convention on the Elimination of All Forms of Discrimination against Women', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) p. 237; and HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004) para. 4.

⁵¹⁴ R. J. Cook, 'Women's International Human Rights Law: The Way Forward', in R. J. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994) p. 11.

⁵¹⁵ W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, Antwerpen, 2005) p. 156; and HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004) para. 8.

facto position, and thirdly to address gender-stereotyping and prevailing gender relations.⁵¹⁶

The CSW has also stated that the implementation of the Beijing Declaration and the fulfilment of obligations under CEDAW are mutually reinforcing in achieving gender equality and the empowerment of women.⁵¹⁷ The Beijing Declaration also reaffirmed that the human rights of women “are an inalienable integral and indivisible part of universal human rights”.⁵¹⁸

Human rights treaty bodies other than the CEDAW Committee assess women’s rights under the terms of their respective Covenant or Convention. Broad attention as to the current situation of women has been given in the frameworks of non-discrimination and guarantees of equal enjoyment of rights in these treaties. However, while the treaty bodies now recognize human rights situations that are specific to women, and are developing an awareness of the gender nature of human rights, there is still an insufficient understanding of the importance of gender when defining the substantive nature of rights.⁵¹⁹

However, there is still a lack of enforcement and implementation of non-discrimination standards. Although gender-based inequalities are recognized both nationally and internationally, as for example equal pay for equal work, they have not been given as high priority as their non-gender based equivalents.⁵²⁰

5.2 The Principle of Non-Discrimination as to Sex and Customary Law

One of the most basic concepts in international as well as national law is the principle of equality. The premise that all people are born free and equal is the very base on which the universality of human rights stands. It refers to the perception, lying at the root of the UDHR, of the inherent equal worth of

⁵¹⁶ HRI/GEN/1/Rev. 7, p. 282, CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, Temporary Special Measures* (30th session, 2004) paras. 6-7.

⁵¹⁷ UN Doc. E/2005/27-E/CN.6/2005/11, *Commission on the Status of Women, Report on the 49th Session (28 February-11 and 22 March 2005) - Declaration of the Commission on the Status of Women on the Occasion of the Tenth Anniversary of the Fourth World Conference on Women*, Official Records of the Economic and Social Council, 2005, Supplement No. 7, para. 4.

⁵¹⁸ UN Doc. A/CONF.144/20, *Fourth World Conference on Women*, Beijing, China, 4-15 September 1995, 17 October 1995, Annex I, The Beijing Declaration, para. 14.

⁵¹⁹ UN Doc. HRI/MC/1998/6, *Report of the Secretary-General - Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies*, 3 September 1998.

⁵²⁰ *From Beijing to Beijing+5 – Review and Appraisal of the Implementation of the Beijing Platform for Action*, Report of the Secretary-General (United Nations, New York, 2001) p. 121.

all human beings.⁵²¹ The prohibition of discrimination on the grounds of sex or gender is incorporated in almost all of the major human rights instruments.⁵²² Some instruments provide a general prohibition of discrimination, and others provide a prohibition on discrimination in the enjoyment of the rights protected under each Convention.⁵²³

There is an ongoing debate as to the status of the principle of equality between the sexes as well as aims and strategies for implementing the principle.⁵²⁴ The principle of racial non-discrimination has *jus cogens* status and it is debated whether the principle of non-discrimination as to sex and religion might and should have the same status or customary law status.⁵²⁵ ⁵²⁶ Some consider the principle to be an independent treaty-based right, as for example ICCPR Article 26, and ECHR Article 14 together with Protocol 12 provide. There are some scholars that see non-discrimination as to sex as “a strong candidate for inclusion among the norms of customary international law”.⁵²⁷ ⁵²⁸

States Parties to ICCPR and ICESCR have undertaken to guarantee all within their territory and jurisdiction the rights under the Conventions without distinction to, among other grounds, sex. The Human Rights Committee has concluded in one of their General Comments, as is stated in Chapter 4.1.3, that non-discrimination is a basic and general human rights principle.⁵²⁹

⁵²¹ T. Loenen, ‘Rethinking Sex Equality as a Human Right’, *Netherlands Quarterly of Human Rights*, Vol. 12, No. 3, 1994, p. 253.

⁵²² See UDHR, Article 2; ICCPR, Article 2(1); ICESCR, Article 2(2); ECHR, Article 14; *American Convention on Human Rights*, Article 1; *African Charter on Human and Peoples’ Rights*, Article 2; *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*, Article 20(2); *Arab Charter on Human Rights*, Article 3.

⁵²³ R. K. M. Smith, *Textbook on International Human Rights* (Oxford University Press, 2007) p. 174.

⁵²⁴ S. Kouvo, *Making Just Rights? Mainstreaming Women’s Human Rights and a Gender Perspective* (Iustus Förlag AB, Uppsala, 2004) pp. 38-39; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) p. 22.

⁵²⁵ I. Brownlie, *Principles of Public International Law* 6th edn. (Oxford University Press, 2003) p. 489 note 28.

⁵²⁶ R. J. Cook and C. Chinkin, ‘The Gender of *Jus Cogens*’, in B.B. Lockwood (ed.), *Women’s Rights – A Human Rights Quarterly Reader* (Johns Hopkins University Press, Baltimore, 2006) p. 92.

⁵²⁷ D. J. Sullivan, ‘Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution’, *New York University Journal of International Law and Politics* 24 (1992) p. 798.

⁵²⁸ T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) p. 22; M. N. Shaw, *International Law* 5th edn. (Cambridge University Press, 2003) p. 267; and A. A. An-Na’im, ‘State Responsibility under International Human Rights Law to Change Religious and Customary Laws’, in R. J. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994) p. 168.

⁵²⁹ UN Doc. HRI/GEN/1/Rev. 7, p. 146, HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 1.

The primary and most obvious significance of considering a norm to be customary law is that it binds all States not just States Parties of a specific treaty in where the norm might be included. A second significant effect of a norm being customary law is that a reservation to that provision in a Convention cannot affect a State Party's obligations. In addition, another important consequence is that regional or human rights organs in some cases can use customary law in their judgments. Normally these organs can only apply the norms stated in their respective constituent instrument, however the terms of reference sometimes encompass customary law. This is for example the case for the Commission of the African Charter on Human and Peoples' Rights who may draw on international norms.⁵³⁰ Another example is that HRC may draw on that States Parties to the ICCPR may derogate in case of public emergency from some of their obligations; however, such actions may not be "inconsistent with their other obligations under international law".^{531 532} In addition, the cumulative weight of regional human rights courts and treaty-based bodies case-law can also influence and consolidate the development of customary law.⁵³³

Also, some scholars argue that even States that have not signed or ratified human rights treaties nonetheless have human rights obligations on the ground all Members have accepted the human rights obligations set out in Article 55(c) and 56 by ratifying the UN Charter and subsequent human rights conventions are merely seen as elaborating those obligations.⁵³⁴

⁵³⁰ *African Charter on Human and Peoples' Rights*, Banjul, 27 June 1981 (21 ILM 58) Article 61.

⁵³¹ *International Covenant on Civil and Political Rights*, New York, 16 December 1966 (999 UNTS 171) Article 4(1).

⁵³² T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) pp. 3, 7 and 80-81.

⁵³³ *Ibid.*, p. 89.

⁵³⁴ *Ibid.*, pp. 81-85.

6 Concluding Analysis

This Chapter will combine the conclusions drawn in Chapters 3 and 4 and take the issue a step further. During the last couple of decades, a number of declarations, recommendations and statements have been adopted/written on the enhancement of women's rights in the world. The United Nations has expanded its work to further women's rights with the adoption of CEDAW, and with conferences such as the Beijing Conference; and the ILO has adopted a number of Conventions to further women's labour rights. Furthermore, a lot of work concerning gender equality has been done in the Member States of the Council of Europe and the EU.

The material covered in Chapters 3 and 4 demonstrate that there is a push in the international community to quicken the goal of equality. Studies show that the countries with the highest developed equality and with the highest percentage of women in the workforce also have the highest GDP per capita in the world. To give women equal rights seem also to bring men prosperity.

6.1 Everybody is Equal

That men and women should be treated equally is a fundamental principle that is repeated in the main human rights conventions. The two worlds, family life and working life, are joined closely together and inevitably affect each other. A society will always have a private sphere, where children are raised and cared for along with other family member, and a public sphere where political decisions are made and people gain a living through different kinds of work. Along with the ability to work and earn money can come independence, the building of one's self-esteem and a feeling of self-worth. It is in this thesis argued for the need for men and women to have equal part in both the private and the public sphere to reach actual gender equality. There is currently an imbalance of men and women's work. Significantly fewer women are employed and working outside the home and there are inevitably also significantly fewer women in politics and in managerial positions in the workforce in most countries. A society where men and women have equal rights and are treated equally also needs equal numbers of men and women taking part in *all* decisions in the public realm. Women's burden of taking care of children, the elderly and the home need to be alleviated to give them time and energy to pursue aspirations in the public world. Men need to take on their share of the responsibility and increase their work in the home. One way of starting a change of society's opinions of gender roles, is involving fathers in the care of their infants. The largest difference between men and women that stand in the way for gender equality is women's role as the primary caregiver for her children. This ties women to the home more than it ties men. If the father would spend the same time as the mother taking care of their child and the home, women and men would be on a more equal footing in society.

6.2 Women and Gender Equality

Deriving from the basic principle of equal rights for men and women, as provided for in UDHR and the UN Charter, are specific rights provided for in the Human Rights instruments. The instruments in Chapters 3 and 4 have been examined from two angles: parenthood and employment rights. Regarding parenthood, specifically equal rights and responsibilities regarding children and leave, paid or unpaid, to take care of one's child have been investigated. Employment rights, such as equal pay for equal work and other relevant rights, have been examined due to the close connection gender equality has with rights at work.

The instruments, documents and conferences, which have been covered in the Chapters just mentioned, have tried different approaches to correct the inequality that exists today. Most Conventions have provisions concerning the prohibition of discrimination, and CEDAW as a whole deals with discrimination against women. The pursuit of gender equality should be for both *de jure* and *de facto* equality, and many Conventions and other documents specifically point out that legal provisions prohibiting discrimination in a country is not enough. Other actions need to be pursued to achieve *de facto* equality.

Another way to correct inequality has been to give women specific rights. For example, women have been granted maternity leave, sometimes with pay and with the right to return to work after the leave, Article 11 of CEDAW. Affirmative action is also a possibility according to CEDAW Article 4.

6.3 Reasons for Discrimination against Women

One of the main hindrances, as stated above, to women's realization of equality is parenthood. Assumptions of women's responsibilities along with their actual responsibilities at home have an effect on their employment situation. Employers are more hesitant to hire women due to the possibility of them being more absent or less flexible with working late. For the same reasons, women are not put in managerial positions. In general, women are further paid less for the same work or have lower positions than men, simply due to being female. Hence, if one of the parents should stay home and take care of the children, this would normally be the woman since she earns, if working, generally less than the man does.

A way to alleviate women's burden of parenthood and its consequences is to assign half of the work in the home to the father. To do this women and men need to re-evaluate how they view their roles. One way a country can signal

to men that taking care of one's children is acceptable, is to provide the right to take paternity leave. This would also give father and child a chance to bond with each other.

With a right for men to claim paternity leave and men actually using the same amount as women, the reasons to discriminate against women in employment would hopefully disappear. No discrimination in employment might lead to more women working outside the home in general, which might lead to more women taking up public office, while this might lead to laws and practices that discriminate against women might be changed.

6.4 Gender Equality as Customary International Law

The right to actual gender equality through the right to paternity leave has been considered in parallel throughout the thesis. The right to actual gender equality is a right that could be considered as being customary law. For a customary rule to have come into existence State practice must be followed by an *opinio juris*, a conviction by the State performing the action that the behaviour is obligatory, as provided by ICJ Statute Article 38(1)(b).

The outcome of World Conferences, General Assembly Resolutions and other United Nations documents covered in Chapter 4.3 may be considered as a source of 'State Practice'. If the State practice as shown in the documents have been going on for a certain duration in time, as well as having being constant and uniform; the documents examined may be used to ascertain whether a customary international law has evolved. The issue of prohibition of discrimination as to sex has gained momentum during the last ten to fifteen years, however, it has been in the agenda of the UN, the ILO and the EU and Council of Europe for several decades. However, there has been an increase in the number of documents emphasizing non-discrimination and equality in the last ten years.

Documents from the UN, the ILO as well as from the EU and the Council of Europe have been examined in order to ascertain if there exists a state practice regarding gender equality. State practice is not limited to 'action' but can consist of for example, speeches or taking part in conferences from which State's views can be ascertained. A large number of documents agreed upon among States under UN Conferences, emphasize the importance of women attaining equality and express concern in areas where women do not have the same rights as men. Resolutions adopted by the General Assembly as well as case-law can also be evidence of State Practice. The HRC case-law concerning Article 26 and that it can be used to combat any discrimination in law or policy is also evidence of the principles importance.

An overwhelming majority of the world's countries seems to believe that discrimination against women is wrong and should not be tolerated. The right to no differentiation on the basis of sex is contained in almost all of the major human rights conventions. On the basis of the material in Chapter 3 and 4 there is a large group of countries that have participated in numerous declarations and outcome documents on enhancing women's rights, and from the text those countries seem to consider non-discrimination as to sex this as being obligatory. There may thus be evidence of an *opinio juris*. In the literature, the issue is still under debate, however in my opinion one can make a good case on the right to non-discrimination on the basis of sex, and thus also gender equality, as being customary international law.

However, although most countries support the advancement of women, there are a group of countries, mostly in North Africa and the Middle East, that do not agree with according women equal rights in all matters as can be seen from the reservations to CEDAW.⁵³⁵ Especially, the area of the right to equality in the family is one of some controversy. The state practice concerning gender equality is thus not entirely uniform.

However, it may be possible to consider that a regional customary law exists. There is strong evidence as shown above in Chapter 4.4 of that the region encompassing the EU or the Council of Europe consider non-discrimination as to sex as a fundamental basis and most likely a customary law. It may be fair to conclude that discrimination based on sex might be contrary to customary law. In addition to the evidence of State Practice just shown Article 55 and 56 of the UN Charter; CEDAW, UDHR, Article 2 and 7; ICCPR, Article 2(1) and 3 ; ICESCR, Article 2(2) ; ECHR, Article 14 and Protocol 12; American Convention on Human Rights, Article 1; African Charter on Human and Peoples' Rights, Article 2; the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Article 20(2); and the Arab Charter on Human Rights may together be enough evidence to conclude that it is customary law.

If gender equality is considered to be customary law, it will be binding on all States no matter if a particular State has not signed a particular Convention containing the principle, which will enable persons under the jurisdiction of such a country to have the right to non-discrimination as to sex even if his/her particular country has not signed any of the Conventions above.

6.5 The Right to Paternity Leave

The right to paternity leave is on the move, however, there are not as many statements regarding this right particularly; most documents simply state that men and women should have equal responsibility in the home.

⁵³⁵ See Chapter 3.2 above.

However, as shown in Chapters 3 and 4, there is a possibility to claim a right to paternity leave in international law.

CEDAW's complaints procedure under its Optional Protocol can be used to claim the right to paternity leave. A request to be granted paternity leave as a way to the realization of gender equality under *e.g.* Article 5 (b) or 11(2)(b) in conjunction with Article 2 may be submitted. There is no specific right in CEDAW providing for paternity leave. The best chance to claim such a leave would be under Article 5, 11 or 16. To date there has not been any individual complaints under the CEDAW Optional Protocol regarding paternity leave or parental leave.

There is no reason for it being difficult for a father to claim the right at issue under CEDAW even if all the complaints so far have come from women. No provision in CEDAW regarding that a complaint must be submitted by a woman exists, and a father's discrimination concerning paternity leave, it could be argued, affects the mother who is discriminated against by not providing paternity leave. However, until such a case is tried it is uncertain how the CEDAW Committee would react to a such a claim from a father.

The other option is to submit a claim under Article 26 of the ICCPR can be used if a law or policy discriminate against men and by not offering paternity leave or parental leave to men but offer this to women. An individual complaint can be submitted to the Human Rights Committee claiming discrimination. The possibility to submit an individual complaint is a possibility for people under the jurisdiction of States, which are part of the Optional Protocol to the ICCPR. Based on the jurisprudence of the HRC it seems very likely that they would rule in favour of a complaint of a father. It is also possible to submit a complaint regarding provisions in other Conventions, which may be relevant if a person under the jurisdiction of a specific country has not signed an optional protocol of CEDAW or want to argue that rights under ICESCR or CRC have been violated. For example, it may be in the best interest of a child, CRC Article 3, to be able to bond equally with both its parents. Furthermore, it should be noted that Member States should abide by their obligations in all the Conventions they are part of no matter if they have signed an Optional Protocol.

In addition, there is an additional possibility for those persons under the jurisdiction of EU Member States or the Council of Europe Member States to instigate proceedings against their country if denied the right to paternity leave in the ECJ or ECHR.

6.6 Conclusion

There seem to be a consensus that the only way to the actual realization of gender equality is involving men the tasks women now are performing: care for children, elderly and the home. It has been argued that gender equality can be seen as possibly being customary law or at least as a being a regional

customary law, binding on all States. Furthermore, the right to paternity leave can, in conclusion, also be said to exist and may be found in many places as Chapters 3 and 4 have discussed. It is possible to claim the right for those people who are under the jurisdiction and territory of States that have ratified the Optional Protocols of either of the ICCPR or CEDAW. For persons under the jurisdiction of a State that has not signed any of the Conventions, there is the possibility that gender equality being may be considered customary law, at least regionally; and an argument could be constructed in a national court of the need for paternity leave for the realization of gender equality.

It has been argued in this thesis that to achieve actual gender equality, men should be able to, encouraged to and even required to take care of their small children and the home for a couple of months. This with the idea that such an experience would enhance the bond and well-being of both the child and the father, and that traditional gender division of the work in the family as well as sex stereotyping of men and women's roles would eventually be abolished. With women and men taking equal share in the work in the home, hopefully as many women as men will have the opportunity to pursue a career and gain some independence, as well as take part in and influence politics with the goal of achieving an equal society.

Supplement

Below is a Swedish campaign stressing the positive returns from fatherhood intended for prospective parents.⁵³⁶

Advantages of Active Fatherhood

- You need to know your own child. The deepest contact between parent and child is developed during the child's first months of life, when it is little and helpless. You cannot have that time back again.
- You will train your fathering instinct. Through taking care of the baby alone, you become attentive to its needs, you get to know its signals and develop a close relationship with your child. It increases your self-confidence as a parent.
- You will gain your child's confidence....If you show you are able to take care of the child, the child will go to you later with its worries and its joys.
- You get to watch your child develop and not just hear about it second hand. Everyday something new and fantastic happens.
- You will become closer to your child's mother. You can share experiences and responsibilities with each other.
- You will develop your social competence. Being with a child places completely different demands on you than being with an adult.
- You will develop new skills because you are obliged to solve problems which you perhaps did not know existed.
- You will have fun. To take care of small children is very demanding but also gives a great deal back to you. You will come to feel appreciated loved as never before.
- You will never regret that you took this unique opportunity to gain a deep, close and meaningful relationship with you child from the beginning.

(From Haas and Hwang 1999 translation of The Swedish Social Insurance Agency (Försäkringskassan) 1997)

⁵³⁶ Försäkringskassan 1997:3, translation by L. Haas and P. Hwang, 'Parental Leave in Sweden', in P. Moss and F. Deven (eds.), *Parental Leave: Progress or Pitfall? Research and Policy Issues in Europe* (IDI/CBGS Publications, Brussels, 1999) p. 51

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