

## Beyond the courtroom

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# Beyond the Courtroom: Accountability for Grave and Systemic Human Rights Violations

Meghan Campbell\*

## Abstract

Achieving accountability for grave and systemic human rights abuses is not simple or straightforward. Questions arise on whether individualised, court-based forums can adequately tackle the norms, institutions and systems that underpin endemic injustices. There are many exciting accountability innovations happening around the world. An overlooked innovation is the inquiry procedure under the UN treaty bodies. This procedure, in theory, holds significant potential, as it is exclusively directed towards investigating and remedying ‘grave and systemic’ human rights issues. Although, several treaty bodies can conduct inquiries, the CEDAW Committee is the only treaty body to have built up a body of jurisprudence. At this early stage in the history of the inquiry procedure, this article asks: what contribution have the inquiries from the OP-CEDAW made to reconceptualising accountability for systemic violations of human rights? To answer this question, the article begins by mapping the prominent blockages to accountability in traditional, individualised court-based accountability forums. It then proceeds to evaluate whether the inquiries under the OP-CEDAW can overcome these blockages. There are multiple strengths to pursuing accountability for grave and systemic abuses through the inquiry procedure. The institutional design, particularly the active role provided for civil society organisations (CSOs) and the CEDAW Committee, means that human rights abuses do not go unchallenged because of costs or technical legal rules. The intense focus on one specific grave and systemic issue sheds light on the embedded and interwoven structures and attitudes that underpin endemic human rights

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violations. In turn, this gives the CEDAW Committee a strong basis on which to propose targeted recommendations to prevent further violations. The article concludes by identifying areas for reflection and future reform as the UN treaty bodies continue to conduct inquiry procedures.

**Keywords:** Inquiry Procedure; UN Treaty Bodies; Grave and Systemic Human Rights; Structural Remedies; CEDAW

## 1. *Introduction*

There are questions about whether traditional, individualised, adversarial forums can grapple with grave and systemic human rights violations.<sup>1</sup> Even more fundamentally, there are concerns that human rights as a framework cannot address endemic injustices.<sup>2</sup> Past failures, however, should not lead to cynicism or to abandoning efforts to use the law to uphold human rights. The unhappiness with conventional adversarial forums needs to be a call to reimagine how accountability mechanisms can take account of gross and widespread human rights abuses. There are many exciting innovations: positive duties to eliminate discrimination;<sup>3</sup> public interest litigation;<sup>4</sup> court supervision of remedial orders<sup>5</sup> and truth and reconciliation commissions.<sup>6</sup> Taken together, these efforts aim to modify current models and create new accountability forums that can address systemic human rights violations and ‘facilitate structural and institutional change.’<sup>7</sup> Although these measures have been critiqued,<sup>8</sup> there is a continued striving to refine accountability platforms so that they can strike at the root of human rights

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<sup>1</sup> Kent Roach, ‘Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response’ (2016) 66(1) *University of Toronto Law Journal* 3, 35-6.

<sup>2</sup> Gunther Teubner, ‘Societal Constitutionalism Beyond the Nation State’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 338.

<sup>3</sup> Section 149, Equality Act 2010 (UK).

<sup>4</sup> Jason Brickhill and Yana Van Leeve, ‘From the Courtroom to the Classroom: Litigation Education Rights in South Africa’ in Sandra Fredman, Meghan Campbell and Helen Taylor (eds), *Human Rights and Equality in Education* (Policy Press 2018).

<sup>5</sup> *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) (South Africa).

<sup>6</sup> Truth and Reconciliation Commission, The Report <<http://www.justice.gov.za/trc/report/>> accessed 9 January 2018.

<sup>7</sup> Sandra Fredman, ‘Making Equality Effective: The Role of Proactive Measures’ (2010) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2.

<sup>8</sup> Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The Story So far’ 35(3) (2015) *Oxford Journal of Legal Studies* 453; Matt James, ‘A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission’ (2012) *The International Journal of Transitional Justice* 1.

## Beyond the Courtroom

abuses. One such mechanism is the inquiry procedure into grave and systemic human rights violations available under a select number of UN human rights treaties. This article focuses on the inquiry procedures conducted under the UN Convention on the Elimination of All Forms of Discrimination Against Women<sup>9</sup> (CEDAW) and assesses how this overlooked mechanism offers accountability for grave and systemic violations of human rights.

Through its various mechanisms, the UN human rights treaty body system is creatively responding to the accountability challenges for human rights. Little serious attention has been paid to the inquiry procedure.<sup>10</sup> In theory, it holds significant potential as it is specifically targeted towards ‘grave and systemic’ human rights issues.<sup>11</sup> The CEDAW Committee is the only treaty body which has built up a body of jurisprudence under the inquiry procedure. To date, the two other treaty bodies have conducted inquiries. The Committee on the Rights of Persons with Disabilities<sup>12</sup> which has only conducted two inquiries, in the UK (impacts of welfare reform) and Spain (segregation in education)<sup>13</sup> and the Committee on the Rights of the Child has released one report in Chile (residential protection).<sup>14</sup> The remaining treaty bodies empowered to conduct inquiries—the Committee on Enforced Disappearances, the Committee on the Convention Against Torture and the Committee on Economic, Social and Cultural Rights—have not yet conducted any.<sup>15</sup> At this early stage in the history of the inquiry procedure, it is pertinent to ask: what contribution have the inquiries from the CEDAW Committee made to reconceptualising accountability for systemic violations of human rights?

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<sup>9</sup> (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>10</sup> An exception is Catherine O'Rourke, ‘Bridging the Enforcement Gap: Evaluating the Inquiry Procedure of the CEDAW Optional Protocol’ (2018) 27 *American University Journal of Gender, Social Policy and Journal* 1.

<sup>11</sup> Article 8 of the Optional Protocol to CEDAW (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

<sup>12</sup> Article 6 of the Optional Protocol to The Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006, A/RES/61/106).

<sup>13</sup> CRPD Committee, ‘Report of the inquiry concerning the UK of CRPD Committee under article 6 of OP-CRPD’ (2017) CRPD/C/15/4; CRPD Committee, ‘Report of the inquiry concerning Spain of the CRPD Committee under article 6 of OP-CRPD’ (2018) CRPD/C/20/3.

<sup>14</sup> Committee on the Rights of the Child, ‘Informe de la investigación relacionada en Chile en virtud del artículo 13 OP-CRC relativo a un procedimiento de comunicaciones’ (2018) CRC/C/CHL/INQ/1 (available only in Spanish).

<sup>15</sup> Article 20 of The Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Article 33 of The Convention for the Protection of All Persons from Enforced Disappearances (adopted 12 January 2007 UNGA Res 61/177); Article 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (5 March 2009 A/RES/63/117).

To answer this question, Section I begins by critically assessing why individualised, court-based models of accountability have struggled to address grave and systemic abuses of human rights. Section II transitions to the international plane; it canvasses the role of international human rights law in achieving accountability and contextualises the inquiry procedure under the Optional Protocol to CEDAW (OP-CEDAW). Section III investigates whether the inquiry procedures undertaken by the CEDAW Committee can overcome the obstacles identified in Section I. This careful reading of the inquiry reports reveals that the greatest strength of this accountability mechanism is a targeted assessment of a specific human rights issue. This intense focus results in a fine-grained analysis that: (i) grasps the underlying causes, cultural norms and oppressive structures that perpetuate severe and widespread human rights abuses and (ii) provides a basis for proposing recommendations that are designed to prevent future violations. As the CEDAW Committee and the other treaty bodies continue to develop the inquiry procedure, this article concludes by flagging areas for future consideration so that accountability forums speak to the realities of structural abuses.

## *2. The Limits of Individualised Court-Based Accountability*

One of the most prominent forums in which to claim accountability for human rights violations is domestic courts. Court-based models of adjudication, especially in common law systems, are based on an individualised and adversarial conception of justice. At the outset, it is important to acknowledge there are diversities and exceptions within this model. As one example, public interest litigators in South Africa, Brazil, the US and India are using the traditional court process to secure systemic remedies beyond reparation for the individual.<sup>16</sup> Although there are differences in the nature and scope of public interest litigation across different jurisdictions and human rights contexts, the common aim is to reform laws and institutions to achieve transformative aims.<sup>17</sup> However, in

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<sup>16</sup> Oxford Human Rights Hub, 'Learning Lessons from Litigators: Realising the Right to Education Through Public Interest Lawyering' <<http://ohrh.law.ox.ac.uk/media/browse/video/>> accessed 19 March 2019.

<sup>17</sup> Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago University Press 1998); Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (OUP 2001); Ann Skelton, 'Strategic Litigation Impacts: Equal Access to Quality Education' (Open Society Foundations

## Beyond the Courtroom

the traditional paradigm, the individual instigates the claim and presents evidence to the court of the perpetrator's blameworthiness. If the court concludes there has been a violation of the law, it orders some form of punishment to the perpetrator or reparations to the victim.<sup>18</sup> This account of the traditional approach is both over-simplified and highly stylized, but is still a useful analytical device for assessing why individualised, court-based models can often fail to comprehensively address entrenched human rights abuses. While acknowledging the differences between civil and criminal law proceedings, for the purposes of this section, 'individualised, court-based models' includes criminal proceedings. This type of legal action is instigated by the state, but it is a highly individualised process. Furthermore, criminal courts are common adjudicative forums for gender-based violence, a pernicious form of structural abuse that features prominently in the inquiries of the CEDAW Committee.

This section uses this stylized model to diagnosis the key blockages that exist in the ability of individualised, court-based forums to account for grave and systemic human rights violations. This is not designed to be an exhaustive assessment but rather seeks to map prominent factors that prevent claims from reaching the court and, for the claims that proceed, to pinpoint features within the justice system that work against systemic accountability. This forms the basis for the evaluation of the inquiry procedure's ability to overcome these blockages in Section III.

### *A. Crossing the Threshold*

The initial stumbling block is that grave and systemic human rights issues are not coming before courts. There is an intricate web of factors that explains this invisibility. As a starting point, individuals may lack *knowledge* of their rights and do not bring their claims to the attention of courts.<sup>19</sup>

*Statutes of limitation* can bar claims regardless of their merit. This comes to the fore prominently in relation to historic sexual and physical assaults. Victims may require time to understand the nature of the offence. Legally imposed time limits can prevent these individuals from accessing justice. Numerous women have accused comedian Bill Cosby of sexual assault, but due to statutes of limitations only one claim proceeded to

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2017) <<https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-education-20170322.pdf>> accessed 29 January 2019.

<sup>18</sup>Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282-84.

<sup>19</sup>CEDAW Committee 'General Recommendation No. 33 on women's access to justice' (2015) CEDAW/C/GC/33 [32].

court.<sup>20</sup> During the ‘Sixties Scoop’ in the 1960-70s, the Canadian government escalated its policy of removing Indigenous children from their families and into residential schools. In these schools, Indigenous children were physically and sexually abused. In the 1990s and 2000s, individuals tried to pursue claims against the state, the Catholic and Protestant church (who had operated many of these schools) and specific perpetrators, but many of their claims were time barred.<sup>21</sup> The procedural aspects of individualised, court-based models can operate so as to prevent victims of serious and widespread human rights abuses from obtaining accountability.

There may be *gaps* in legal protection making it impossible to use the law to obtain accountability for structural human rights issues. The UN Special Rapporteur on extreme poverty and human rights observes that the ‘laws tend to reflect and reinforce the privileges and interests of the powerful’ and may not ‘recognize or prioritize [structural] abuses.’<sup>22</sup> Not all jurisdictions criminalise marital rape or have legislation on workplace harassment.<sup>23</sup> The informal labour market is routinely excluded from legal protection<sup>24</sup> and informal workers rarely seek accountability in individualised, court-based forums.<sup>25</sup> Domestic human rights instruments may not protect rights to education, housing, health or standard of living making it almost impossible to obtain accountability in traditional legal forums for severe and entrenched violations in these fields of life.

Individual, court-based models are premised on identifying a *specific victim* and *perpetrator*. This requirement can exclude certain types of grave and systemic human rights claims. For instance, when challenging the failure to revise textbooks that negatively portray women, it is difficult to ‘identify particular victims over and above other women.’<sup>26</sup> At the same time, violations of human rights may not originate in the failure of one

<sup>20</sup> Kyle Kim et al, ‘Bill Cosby: A 50 Year Chronicle of Accusations and Accomplishments’ (17 July 2017) The Los Angeles Times <<http://www.latimes.com/entertainment/la-et-bill-cosby-timeline-htmlstory.html>> accessed 6 March 2018.

<sup>21</sup> *Blackwater v Pliny* [2005] 3 SCR 3 [2]-[4] (Canadian Supreme Court).

<sup>22</sup> UN Special Rapporteur on extreme poverty and human rights, ‘Access to Justice (2012) A/67/278 [28].

<sup>23</sup> World Bank, ‘Women, Business and the Law’ (World Bank, 2016) 22-3.

<sup>24</sup> Working Group on Discrimination Against Women, ‘Discrimination Against Women in Economic and Social Life’ (2013) A/HRC/26/39 [55]-[56]; Pahlmhidzai Bamu-Chipunza, ‘Extending Occupational Health and Safety Law to Informal Street Vendors in South Africa’ (2018) U of OxHRHJ 61.

<sup>25</sup> CEDAW Committee, ‘General Recommendation No. 26 on migrant women workers’ (2008) CEDAW/C/GC/26 [21].

<sup>26</sup> Andrew Byrnes and Jane Connors, ‘Enforcing the Human Rights of Women: A Complaints Procedure for the Women’s Convention?’ (1995-1996) 21 *Brooklyn Journal of International Law* 679, 705.

## Beyond the Courtroom

person but be the result of a complex chain of failures making it both difficult and pointless to name a specific perpetrator.<sup>27</sup>

If individuals pursue claims for grave and systemic violations of human rights in traditional adjudicative forums, this can place an enormous burden on their shoulders. The totality of these *costs* can act as a powerful disincentive to obtaining accountability. Court proceedings are notoriously slow, and individuals may have to wait a considerable amount of time to have their claims adjudicated.<sup>28</sup> There is an array of financial costs in bringing forward a human rights claim. These can range from filing fees to the costs of lawyers (particularly salient in an era of dwindling legal aid budgets) to the costs of collecting evidence. Proving entrenched human rights violations can be expensive as the individual often has to compile evidence to demonstrate the scale and magnitude of the claim.<sup>29</sup> There is no guarantee that the individual will be able to recover these costs from the perpetrator. If the court orders costs, the individual must still front the costs of litigation before being reimbursed by the defendant after the litigation has concluded.

There are also social costs. Individuals claiming violations of their human rights often face stigma, repercussions and professional and personal ostracism.<sup>30</sup> Bringing a claim can have negative knock-on effects. Mandatory charging policies for gender-based violence increase the risk of state control via migration or child custody law in women's lives, particularly for women with intersectional identities.<sup>31</sup> If the allegation of gender-based violence proceeds it can require the individual to present intimate details of their lives to the adjudicator for public scrutiny.<sup>32</sup> The criminal law's emphasis on disclosure and cross-examination can leave individuals feeling re-victimized.<sup>33</sup> Private rights of action for gender-based violence are, in theory, able to empower the individual as they have more control over the process, but there is evidence that individuals are reluctant

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<sup>27</sup> *Essop v Home Office* [2017] UKSC 27 [9]; Sandra Fredman, 'Breaking the Mould: Equality as a Proactive Duty' (2011) 60 *American Journal of Comparative Law* 263.

<sup>28</sup> *R v Jordan* (2016) 1 SCR 631 (Canadian Supreme Court).

<sup>29</sup> The European Court of Human Rights warned against requiring statistics in indirect discrimination cases; see *DH v Czech Republic* (Application No 57325/00).

<sup>30</sup> 'General Recommendation No. 33' (n 19) [9], [25(a)(ii)].

<sup>31</sup> Linda Mills, *Insult to Injury: Rethinking Our Response to Intimate Abuse* (PUP 2013); Donna Coker, 'Race, Poverty and the Crime-Centered Response to Domestic Violence' (2004) 10 (11) *Violence Against Women* 1331, 1333.

<sup>32</sup> Fiona E Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (2011) 15(1) *Edinburgh Law Review* 33.

<sup>33</sup> Jacqueline M Wheatcroft et al, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) *International Journal of Evidence-Based Research, Policy and Practice* 265.



to re-engage with an abuser.<sup>34</sup> The totality of these financial and social costs can simply be too great, meaning that individuals decide not to pursue a claim.

Practical hurdles and procedural rules can make it difficult for individuals to come together to overcome these burdens as a group. Domestic workers who work in private homes are isolated from each other, making it hard to organise and pursue collective action.<sup>35</sup> Class actions rules can be narrowly drawn, circumscribing the ability of individuals jointly to pursue structural human rights abuses.<sup>36</sup> The rules of standing can limit CSOs' role in legal processes or the rules on cost orders can create strong disincentives to their participation.<sup>37</sup>

## *B. Within the Courtroom*

Combined, these obstacles can result in an ad-hoc array of grave and systemic issues coming before individualised, court-based forums. If a claim can overcome the hurdles detailed above and make it on the court docket, there is a further range of factors that can create blockages in achieving accountability.

The traditional justice system may be riddled with *myths, stereotypes* and *biased assumptions*. The rules of evidence can be discriminatory. In some states, women need to corroborate their testimony 'requiring them to discharge a higher burden of proof than men in order to establish an offense.'<sup>38</sup> Prosecutors and judges, rather than being neutral arbitrators, can perpetuate dangerous stereotypes. A judge in Quebec, Canada, said a seventeen-year-old girl may have been a bit flattered by sexual harassment;<sup>39</sup> another judge in Canada asked why an Indigenous woman just didn't keep her knees together during a sexual assault.<sup>40</sup> In the UK,

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<sup>34</sup> Julie Goldschie, 'Elusive Equality in Domestic and Sexual Violence Law Reform' (2007) 34 Florida State University Law Review 731.

<sup>35</sup> International Labour Organization, 'Domestic Workers Around the World' (ILO, 2013) 50.

<sup>36</sup> David Marcus, 'The Public Interest Class Action' (2015) 104 Georgetown Law Journal 789-95.

<sup>37</sup> See proposed reforms in the UK: Ministry of Justice 'Judicial Review: Proposals for Further Reforms' (2013) CM 8703 22-7; and Sections 88 to 90 of the Criminal Justice and Courts Act 2015 (UK) on cost orders.

<sup>38</sup> 'General Recommendation No. 33' (n 19) [25(a)(iii)].

<sup>39</sup> CBC News, 'Justice Minister Denounces Judge's Comments on Teen Sexual Assault Victim's Weight' (25 October 2011) CBC <<http://www.cbc.ca/news/canada/montreal/quebec-court-judge-sexual-assault-victim-1.4370997>> accessed 9 January 2018.

<sup>40</sup> Sean Fine, 'Judges in "knees together" trial resigns after council recommends he be fired' (9 March 2017) The Globe and Mail <<https://www.theglobeandmail.com/news/national/judicial-council-recommends-justice-robin-camp-be-fired/article34249312/>> accessed 9 January 2018.

there is similar evidence that, despite legal protections against the use of rape myths, prosecutors and judges are not objecting to them being relied upon in sexual assault trials.<sup>41</sup> The Lammy Report found that Black, Asian and Minority Ethnic women in the UK are more likely to be found guilty by magistrates than white women.<sup>42</sup> The US Supreme Court recently overturned a death sentence as there was evidence that the jury convicted the accused based on racist stereotypes.<sup>43</sup> These are a handful of illustrations of a deeply engrained problem. Decision-makers may misunderstand the law and are often insensitive to the reality of human rights abuses.

There are two further inter-related challenges to using individualised, court-based adjudicative forums to redress grave and systemic human rights abuses. First, the legal proceedings may have a *different aim*. The goal of proceedings is not to evaluate systemic human rights issues. The Supreme Court of Canada noted that courts are ‘adjudicators of the *particular claim* that is before it’ not a public inquiry investigating the systemic issues raised by the claim.<sup>44</sup> This is most pronounced in using criminal law to redress human rights abuses, such as gender-based violence, as it is a highly individualised and decontextualized process.<sup>45</sup> The purpose of the criminal trial is to determine the guilt of the individual accused. It is not the role of the court to engage in assessing or remedying how patriarchal norms and structures contribute to gender-based violence or to evaluate the failures of the police in investigating violence against women. Criminal law pays little regard to the complex relationship between violence, gender, race, socio-economic class and migration status in maintaining women’s subordination.<sup>46</sup> This lack of attention can result in the perpetuation of structural human rights abuses. There is evidence that criminal law can reproduce racial injustices;<sup>47</sup> rob women of their voice and ignore their different needs;<sup>48</sup> and penalise women, disproportionately

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<sup>41</sup> Jennifer Temkin et al, ‘Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study’ (2018) 13(2) *Feminist Criminology* 205.

<sup>42</sup> ‘The Lammy Review: An independent review into the treatment of Black, Asian and Minority Ethnic Individuals in the Criminal Justice System’ (2017) 32 (UK) <<https://www.gov.uk/government/publications/lammy-review-final-report>> accessed 6 March 2018.

<sup>43</sup> *Pena-Rodriguez v Colorado*, US 580\_\_ (2017) (US Supreme Court).

<sup>44</sup> *Moore v British Columbia (Education)* [2012] 3 SCR 360 (Canadian Supreme Court) (emphasis added) [63], [64].

<sup>45</sup> Karen Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’ (2015) *Cornell Law Review* 1070.

<sup>46</sup> Aya Gruber, ‘A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform’ (2012) 15 *Journal of Gender, Race and Justice* 583.

<sup>47</sup> Bennett Capers, ‘The Unintentional Rapist’ (2010) *Washington University Law Review* 1345.

<sup>48</sup> Mills (n 31).

those with intersectional identities, who do not cooperate with prosecutorial demands.<sup>49</sup> By their institutional design, courts are often unable to grapple with the underlying structural human rights issues that connect each individual claim. This is not to argue that individualised court proceedings should be abandoned. When used in a reflective manner they can serve an important function. Rather, accountability needs to be harmoniously multi-faceted.

Second, can an individual claim be *fully emblematic* of structural human rights issues?<sup>50</sup> It may be readily apparent, or become apparent as the claim unfolds, that the individual's human rights issue is connected to gross, deeply embedded and widespread violations.<sup>51</sup> But, can one claim reveal the full picture of structures, institutions, systems, history, beliefs and attitudes that explain the individual human rights violation?<sup>52</sup> Are there inevitable blind-spots in using an individual claim to redress larger human rights issues?<sup>53</sup> The insights from intersectionality theory serve as a caution. Intersectionality warns of the danger of equating, for example, all women's experiences with the experience of white, middle-class, able-bodied, heterosexual women who live in the developed world.<sup>54</sup> Different identities will impact upon and shape the nature of human rights claims. Examining structures through the lens of an individualised experience raises questions on the ability of the court to see, and take account of, how differently situated individuals experience human rights violations. The aim here is not to answer this tough question but simply to flag that individualized accountability forums may not grasp the full picture.

A final complication is that remedies from individualised, court-based forums are traditionally *backward-looking* and *individualised*. The classical understanding is that 'justice can only be done for individuals before the court and not for larger groups.'<sup>55</sup> It is usually achieved through immediate monetary remedial compensation or, in the case of criminal law, an individualised sentence.<sup>56</sup> A consequence of the court ordered corrective, individualised remedy may be to reform 'large public

<sup>49</sup> Meghan Condon, 'Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence' (2010) 17 Georgetown Journal on Poverty, Law and Policy 487.

<sup>50</sup> Sarah Joseph and Melissa Castan, *ICCPR: Cases, Materials and Commentary* 2<sup>nd</sup> ed (OUP 2013) 817-18.

<sup>51</sup> Byrnes and Connor (n 26) 750-52.

<sup>52</sup> Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex' (1989) University of Chicago Legal Forum 139.

<sup>53</sup> Kent Roach, 'The Challenges of Crafting Remedies for Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 48.

<sup>54</sup> *ibid*; Julie Goldscheid and Rene Kathawala, 'State Civil Rights Remedies for Gender Violence: A Tool for Accountability' (2018) 87 University of Cincinnati Law Review 171, 199-200.

## Beyond the Courtroom

bureaucracies...new legislation or governmental programs' or shift cultural attitudes, but that is not the central goal of the remedy.<sup>55</sup> Remedies are limited due to concerns about the role and expertise of courts. There is a fear that courts do not have the requisite knowledge to order widespread structural reform, especially when it has budgetary implications.<sup>56</sup> Furthermore, there is often no single solution to grave and systemic human rights violations. There are a range of remedies. It is argued that courts do not have the democratic mandate to make that remedial choice.<sup>57</sup> Out of fears of micro-managing the government and overstepping their role in the separation of powers, remedies are narrowly tailored.<sup>58</sup> Without remedies targeted at the grave and systemic abuses, courts can fail to make rights real. There is widespread acknowledgement of this problem. Courts all over the world, at the domestic and regional level, are responding to it and pushing against the classic conception of remedies.<sup>59</sup> There are debates on whether courts are able effectively to achieve structural change,<sup>60</sup> but the ability of courts to grapple with systemic abuses is forestalled when the traditional remedial process does not even begin to examine the larger context raised by an individualised claim.

Not every factor detailed in this section may arise in every national context. Certain issues may be more prominent while others may not be relevant. A selective mix of factors might be at play in different states or in relation to different human rights issues. Nor are these factors exhaustive. New factual matrices can bring to the fore new complications in using individualised, court-based forums to achieve accountability for widespread and serious human rights violations. Even with these caveats, this section does offer explanations as to why traditional accountability forums struggle to understand and remedy structural human rights claims. There are efforts to reform the law and court proceedings and to establish new models for accountability.<sup>61</sup> The next section investigates the role of international human rights in these efforts and the promise of the inquiry procedure.

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<sup>55</sup> Roach, 'Crafting Remedies' (n 53) 49.

<sup>56</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353; see Roach, 'Two-Track Responses' (n 1) for a re-evaluation of Fuller.

<sup>57</sup> Jeremy Waldron, 'The Core Case Against Judicial Review' (2006) 115(6) Yale Law Journal 1346, 1353.

<sup>58</sup> McColgan (n 8).

<sup>59</sup> Roach, 'Two-Track Responses' (n 1) 18-27; Alexandra Huneus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Court' (2015) 40(1) Yale Journal of International Law.

<sup>60</sup> Martha Minow, *In Brown's Wake* (OUP 2010).

<sup>61</sup> Fredman, 'Making Equality Effective' (n 7).

### *3. Giving Voice to the Voiceless: International Human Rights Law*

What role does the international human rights system—specifically the inquiry procedure under the OP-CEDAW—play in accountability for grave and systemic human rights abuses? This section provides a contextual understanding on the broad goals of accountability under the international human rights system and the history of the inquiry procedure under the OP-CEDAW.

#### *A. Accountability on the International Plane*

By signifying and ratifying UN human rights treaties, states have consented to being held accountable on the international plane. Treaty bodies are not judicial bodies.<sup>62</sup> They are a geographically diverse body of experts that monitor the state's implementation of treaty obligations.<sup>63</sup> They do not issue binding interpretations of the treaty nor do they have the power to enforce remedial orders. Treaty bodies are not 'courts to which appeals may be taken from a state's highest domestic court.'<sup>64</sup> Their role in accountability needs to be understood in light of the different nature of the international human rights system.

Treaty bodies' accountability relies on strength of reasoning. First, as argued in Section I, domestic human rights protection may be incomplete or inadequate. The UN treaty bodies can be used to draw attention to human rights issues that are neglected in domestic forums. It is hoped that shining the international spotlight on an issue will prompt the state to undertake human rights reforms. This can be successful. The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, concluded in *Toonen v Australia* that sodomy laws violated the individual's right to privacy.<sup>65</sup> The Australian government positively responded to the decision by passing the Human Rights (Sexual Conduct) Act 1994 legalising same-sex sexual activity.<sup>66</sup> Second, the treaty bodies share best practice and provide

<sup>62</sup> Human Rights Committee, 'Obligation of States parties under the OP-ICCPR' (2009) CCPR/C/GC/33 [11].

<sup>63</sup> Article 31(2) of the International Covenant on International Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

<sup>64</sup> Joseph and Castan (n 50) 21; *Jonassen et al v Norway* (2002) CCPR/C/76/D/881/1999.

<sup>65</sup> (1994) CCPR/C/50/D/488/1992.

<sup>66</sup> Nick Poynder, 'When All Else Fails: The Practicalities of Seeking Protection of Human Rights Under International Treaties' (2003) Public Lecture Castan Centre for Human Rights Law <<https://www.monash.edu/law/research/centres/castancentre/public-events/events/2003/poynderpaper>> accessed 19 March 2019.

guidance to states on how to fully implement their treaty obligations.<sup>67</sup> Third, treaty bodies seek to deepen the understanding of open-textured human rights.<sup>68</sup> This work is not legally binding, but the standards developed at the international level can and do influence CSOs, courts, policy-makers and legislators.<sup>69</sup> The CEDAW Committee's work on gender-based violence has been cited by numerous apex courts and used as a model for domestic legislation.<sup>70</sup> In an insightful study on the relationship between treaty bodies and domestic courts, Kanetake demonstrates that courts in the UK, Canada, Australia, Bangladesh, Kenya, Switzerland, Peru, Germany, Belize, The Netherlands and Spain have drawn on the findings of treaty bodies.<sup>71</sup>

There is no guaranteed route to achieving the accountability goals of international human rights law and there are as many successes as failures.<sup>72</sup> The different character of international human rights accountability means there is no competition between domestic and international forums on which body is better able to take account of structural human rights issues. The interaction between international and domestic forums needs to be complementary. The question explored in Section III is how a relatively new accountability mechanism, the inquiry procedure under the OP-CEDAW, can provide guidance on redressing grave and systemic abuses of human rights.

## *B. Accountability under the OP-CEDAW*

Before answering this question, this section concludes by canvassing the history of the OP-CEDAW. Almost immediately upon coming into force,

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<sup>67</sup> Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 124.

<sup>68</sup> Philip Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law' in I. Boisson de Chazournes and V. Gowland Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001).

<sup>69</sup> Martha Nussbaum, 'Women's Progress and Women's Human Rights' (2016) 38(3) *Human Rights Quarterly* 589, 611.

<sup>70</sup> *Vishakav State of Rajasthan* AIR 1997 SC3 011 (India Supreme Court); *Carmichele v Minister of Safety and Security and Another*, 2001 (1) BCLR 995 (South African Constitutional Court); *R v Ewanchuk* [1999]1 SCR 330 (Canadian Supreme Court); *Opuz v Turkey* Application No 33401/02 (European Court of Human Rights, 9 June 2009); Indian Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

<sup>71</sup> Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Court' (2018) 67 *International and Comparative Law Quarterly* 201, 207-15.

<sup>72</sup> *ibid.*

there were concerns that CEDAW was a second-class instrument.<sup>73</sup> Unlike some other UN treaties, it did not have an individual right of petition or an inquiry procedure. The absence of these remedial mechanisms was viewed as a weakness.<sup>74</sup> The extent of this weakness can be seen by examining CEDAW's central accountability mechanism: the periodic reporting process. Under this process, the CEDAW Committee reviews the state's efforts to implement the treaty, identifies areas of concern and provides recommendations on how the state can accelerate its effort to achieve gender equality. This process is heavily dependent on the state providing information to the CEDAW Committee. Unsurprisingly, states, for a multitude of reasons, do not consistently submit their reports on time nor do they always provide a critical assessment of gender inequality.<sup>75</sup> This factual gap has partially been filled by shadow reports of CSOs. Civil society, however, can have its own agenda and may focus on some specific issues at the expense of others.<sup>76</sup> The CEDAW Committee is not empowered to supplement any bias in reporting through its own fact-finding missions. The periodic reporting process does have strengths and remains a cornerstone mechanism, but exclusively relying on it for accountability results in an incomplete picture. Since the 1980s, there was a desire to strengthen accountability under CEDAW. The feeling was that the CEDAW Committee should not be overly dependent on states and should itself be empowered to grapple with the many different facets of gender inequality.<sup>77</sup> Throughout the 1990s, the UN Division for the Advancement of Women, the CEDAW Committee, CSOs and academics campaigned for an optional protocol. This process culminated in the OP-CEDAW in 2000.

Examining the drafting history of the OP-CEDAW provides clarity on the aims of the inquiry procedure. It was proposed that, upon receipt of reliable information into grievous or widespread abuses of CEDAW, the CEDAW Committee should engage in dialogue with the state about the allegations and, if required, proceed to conduct an inquiry which could include a fact-finding visit to the state.<sup>78</sup> The majority of states were in

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<sup>73</sup> Theodor Meron, 'Enhancing the Effectiveness of the Prohibition of Discrimination Against Women' (1990) 84 *American Journal of International Law* 213.

<sup>74</sup> *ibid.*

<sup>75</sup> Felipe Gomez Isa, 'OP-CEDAW: Strengthening the Protection Mechanism of Women's Human Rights' 20(2) *Arizona Journal of International and Comparative Law* 291, 304.

<sup>76</sup> Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018) Chapter 5.

<sup>77</sup> Jane Connors, 'Optional Protocol' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *CEDAW: Commentary* (OUP 2012) 608.

<sup>78</sup> *ibid* 659.

## Beyond the Courtroom

favour of the inquiry procedures but there were states in opposition.<sup>79</sup> Those in support of the inquiry hoped that it would 'facilitate the examination of widespread violations, including those that crossed national borders.'<sup>80</sup> It was also hoped that the inquiries could have an educational effect by exposing the root causes of discrimination against women.<sup>81</sup> Increasing attention to systemic gender inequality 'would [hopefully] contribute to the integration of the human rights of women throughout the UN system.'<sup>82</sup> Supporters felt the inquiries could fill an accountability gap 'in cases where individual women who had suffered over and above other women could not be identified'<sup>83</sup> and 'protect women from reprisal or practical constraints on their ability' to bring claims.<sup>84</sup>

States in opposition were concerned that the inquiry procedure could undermine state sovereignty and there was debate on the threshold criteria for initiating an inquiry.<sup>85</sup> Some states felt that there was a difference between serious crimes (racial discrimination) and the elimination of discrimination against women, such that it would be inappropriate to set up a 'court of judgment' under CEDAW.<sup>86</sup> The academic community was strongly in favour of an inquiry procedure, but had concerns that it might tax the limited resources of the CEDAW Committee, needlessly replicate existing accountability mechanisms and expose the CEDAW Committee to 'selectivity and political bias.'<sup>87</sup>

The effect of these debates can be seen in the text of the OP-CEDAW. Under Article 8(1), an inquiry procedure may be initiated if the CEDAW Committee receives reliable information that CEDAW has been grievously and systematically violated. Under the rules of procedure, the CEDAW Committee can ascertain the veracity of information<sup>88</sup> by examining 'its consistency, corroborating evidence, the credibility of its source and information from other sources, national or international, official or non-official.'<sup>89</sup> The state has an initial opportunity to respond (Article 8(1)). The CEDAW Committee considers all this information when deciding to conduct an inquiry which may include a state visit (Article 8(2)). The state has a right to receive the Committee's findings and

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<sup>79</sup> Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention' (1997) E/CN.6/5.

<sup>80</sup> Connors (n 77) 660.

<sup>81</sup> *ibid.*

<sup>82</sup> O'Rourke (n 10) 9.

<sup>83</sup> Connors (n 77) 660.

<sup>84</sup> O'Rourke (n 10) 9.

<sup>85</sup> Connors (n 77) 661.

<sup>86</sup> Byrnes and Connors (n 26) 687.

<sup>87</sup> *ibid* 772.

<sup>88</sup> *ibid* 662.

<sup>89</sup> *ibid* 666.



recommendations (Article 8(3)); has six months to respond (Article 8(4)); and the response should detail the steps it has taken as a result of the inquiry findings (Article 9(1)). The entire inquiry ‘shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages’ (Article 8(6)). States are permitted to opt out of the inquiry procedure under Article 10.<sup>90</sup> Only four states have opted out.<sup>91</sup>

As of April 2019, the CEDAW Committee has conducted five inquiries: into murdered and missing women in Ciudad Juárez, Mexico;<sup>92</sup> murdered and missing Indigenous women in Canada;<sup>93</sup> access to modern contraception in Manila, The Philippines;<sup>94</sup> access to abortion in Northern Ireland;<sup>95</sup> and bride-kidnapping in Kyrgyzstan.<sup>96</sup> For the five inquiries, the CEDAW Committee undertook fact-finding missions. In all five inquiries, there had been grave and systemic violations of CEDAW and all states, besides The Philippines, have provided a written response. The limited use of the inquiry procedure may be due to CSOs and the CEDAW Committee’s ‘reticence to publicly activate the procedure’.<sup>97</sup> These decisions have largely been ignored in the discourse on OP-CEDAW.

#### ***4. Re-Imagining Accountability for Grave and Systemic Human Rights Abuses***

The drafters of the OP-CEDAW had a bold vision for the inquiry procedure—grappling with the root causes of discrimination against women, redressing gender inequalities that do not fit within the traditional remedial paradigm and alleviating the burdens that prevent women from seeking accountability.<sup>98</sup> Have these goals been realized? Are the inquiry procedures able to take account of grave and systemic human rights

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<sup>90</sup> *ibid* 662.

<sup>91</sup> Loveday Hodson, ‘Women’s Rights and the Periphery: CEDAW’s Optional Protocol’ (2014) 25(2) *The European Journal of International Law* 561, 564.

<sup>92</sup> CEDAW Committee, ‘Report of the inquiry concerning Mexico of the CEDAW Committee under article 8 OP-CEDAW’ (2005) CEDAW/C/OP.8/MEX/1.

<sup>93</sup> CEDAW Committee, ‘Report of the inquiry concerning Canada of the CEDAW Committee under article 8 of OP-CEDAW’ (2015) CEDAW/C/OP.8/CAN/1.

<sup>94</sup> CEDAW Committee, ‘Report of the inquiry concerning the Philippines of the CEDAW Committee under article 8 of OP-CEDAW’ (2015) CEDAW/C/OP.8/PHI/1.

<sup>95</sup> CEDAW Committee, ‘Report of the inquiry concerning the UK and Northern Ireland of the CEDAW Committee under article 8 OP-CEDAW’ (2017) CEDAW/C/OP.8/GBR/1.

<sup>96</sup> CEDAW Committee, ‘Report of the inquiry concerning Kyrgyzstan of the CEDAW Committee under article 8 of OP-CEDAW’ (2018) CEDAW/C/OP.8/KGZ/1.

<sup>97</sup> O’Rourke (n 10) 13.

<sup>98</sup> *ibid*; Connors (n 77) 660-64.

## Beyond the Courtroom

abuses? This section analyses the five inquiries against the central blockages identified in Section I. It begins by canvassing how the inquiry procedure can redress obstacles that prevent claims from proceeding and then investigates if the reasoning and remedial process in the inquiry procedure confronts grave and systemic human rights abuses. This analysis reveals the multiple strengths of the inquiry procedure. The institutional design, particularly the active role provided for CSOs and the CEDAW Committee, means that human rights abuses do not go unchallenged because of costs or technical legal rules. The intense focus on one specific grave and systemic issue sheds light on the embedded and interwoven structures and attitudes that underpin endemic human rights violations. In turn, this gives the CEDAW Committee a strong basis on which to propose targeted recommendations to prevent further violations. A careful reading of the inquiries also identifies areas for reflection and future reform.

### *A. Out of the Shadows: Procedural Innovation under the Inquiry Procedure*

#### **1. Overcoming Knowledge Gaps**

The inquiry procedure enables *CSOs to instigate the inquiries*, overcoming to a certain extent, the lack of awareness individuals may have about their rights. In all five inquiries, it is CSOs that lodged concerns with the CEDAW Committee. At the drafting table, it was hoped that CSOs would be able to bring forward claims for vulnerable women who lacked legal literacy and knowledge of the human rights framework.<sup>99</sup> It is difficult to evaluate whether this aim has fully materialised. For all five inquiry procedures, there was no indication that the CEDAW Committee members met with individuals who were previously unaware of their rights. The confidentiality of the inquiry process makes ‘it difficult to track, in detail, the work’ of the CEDAW Committee.<sup>100</sup> In all five inquiries domestic legal proceedings challenged gender-based violence (Mexico, Canada and Kyrgyzstan)<sup>101</sup> and restrictions on sexual and reproductive

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<sup>99</sup>Isa (n 75) 311, citing Amnesty International, ‘The Optional Protocol to the Women’s Convention’ (1997) AI: IOR/51/47/97.

<sup>100</sup> Rourke (n 10) 13.

<sup>101</sup> ‘Inquiry Procedure: Mexico (n 92) [107], [145]-[48]; ‘Inquiry Procedure: Canada’ (n 93) [169]; ‘Inquiry Procedure: Northern Ireland (n 95) [11],[12]; ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [32]-[41].

health rights (The Philippines and Northern Ireland),<sup>102</sup> implying that there was knowledge of the human rights claim. There may still have been individuals affected by gender-based violence or the restrictions on contraception and abortion who were unaware of their rights. In theory, the CSOs could direct the CEDAW Committee to consult with these women during the fact-finding mission. The promise still holds that any individualised knowledge gaps that might exist can be overcome by creating a prominent space for CSOs in accountability process. For future inquiry procedures, the CEDAW Committee should endeavour, where possible, to engage with women who have not been aware that their human rights have been violated.

As all five inquiries were instigated by CSOs, it is pertinent to critically reflect on their role in accountability for human rights. Do the concerns of CSOs cluster around certain types of grave and systemic issues whilst ignoring other serious violations of human rights? Public interest litigation has been critiqued for being co-opted by an elite group of CSOs that are more concerned with advancing their own agenda.<sup>103</sup> How can the inquiry procedure ensure it addresses the panoply of grave and systemic issues? These challenges raise questions about creating accountability processes at the UN, that are not reliant on CSOs, and providing support for local grassroots CSOs in the international human rights law system. There are no easy solutions, but this is an issue that requires attention as the inquiry procedure continues to develop.

## 2. Beyond Time Limits

The inquiry procedure adopts a *fluid approach to time limits* that seeks to understand the relationship between past events and current violations of human rights. This fluid approach, however, still respects the principles of international law. Akin to statutes of limitations in domestic jurisdictions, international treaties do not have retroactive effect unless states manifest a different intention.<sup>104</sup> There is no indication in the text of the OP-CEDAW that it is meant to apply retroactively. The basis for claims under the individual communications and inquiry procedures must be for violations of CEDAW that occurred after the OP-CEDAW came into force in 2003. Individual communications have been defeated on this basis.<sup>105</sup> Under the

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<sup>102</sup> 'Inquiry Procedure: The Philippines (n 94) [20]; *R (on the application of A and B) v Secretary of State for Health* (2017) UKSC 41 (UK Supreme Court).

<sup>103</sup> Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1.

<sup>104</sup> Article 28 of The Vienna Convention on the Law of Treaties (adopted 23 May 1965, entered into force 27 January 1980) 1155 UNTS 331.

<sup>105</sup> *Muñoz-Vargas y Sainz de Vicuña v Spain* (2005) CEDAW/C/39/D/7/2005.

inquiry procedure, the CEDAW Committee took a different account of the passage of time. It did not draw ‘an arbitrary historical borderline between events occurring before and after’ the coming into force of the OP-CEDAW.<sup>106</sup> In evaluating the disproportionate levels of violence against Indigenous women in Canada, both the CEDAW Committee and the state ‘acknowledged that the past must be understood for its effect on the current situation.’<sup>107</sup> This acknowledgment manifests in two ways. First, the CEDAW Committee took account of the history of Indigenous people in Canada and the state’s colonial policies so as to understand the root causes of current violence against Indigenous women. Second, it considered ‘the continuing effects of the cases of missing and murdered women that occurred before 2003,’ such as the poor quality of investigations and the long-term impact on families.<sup>108</sup> Similarly, the CEDAW Committee linked the rise of bride-kidnapping to the collapse of the USSR and ‘a “lost generation” of Kyrgyz men who sought reaffirmation of their masculinity’ through bride-kidnapping.<sup>109</sup> Moving away from a strict application of time limits allows the adjudicative forum to understand factors from the past that contribute to contemporary grave and systemic abuses and to assess the on-going effects of past violations while still only holding states accountable for incidences that happened after 2003.

### 3. Comprehensive Approach to Human Rights

One of the greatest strengths of the international human rights system, particularly of CEDAW, is its *comprehensive approach to human rights*. CEDAW requires states to take all appropriate measures to eliminate discrimination in all fields of life.<sup>110</sup> In one instrument it protects civil, political and socio-economic rights and rights within the family. CEDAW and the CEDAW Committee’s transformative approach to equality and non-discrimination is canvased below. The focus here is on the scope of human rights protection and its impact on accountability for grave and systemic human rights abuses. The CEDAW Committee interprets the treaty in an evolutionary manner. It addresses the gendered dimensions of issues to which CEDAW does not explicitly refer, including the effects of

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<sup>106</sup> ‘Inquiry Procedure: Canada’ (n 93) [92].

<sup>107</sup> *ibid* [89].

<sup>108</sup> *ibid* [91].

<sup>109</sup> ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [23].

<sup>110</sup> Article 1 of CEDAW.

intersectionality, migration and climate change.<sup>111</sup> In doing so, it anticipates ‘the emergence of new forms of discrimination that had not been identified at the time of drafting.’<sup>112</sup> There are notable gaps in CEDAW, for instance there are no obligations in the text on gender-based violence, gender-based poverty or sexual orientation and gender identity. The CEDAW Committee’s evolutionary interpretation has, to varying degrees, overcome these gaps.<sup>113</sup> While not perfect, it is attentive to the stubborn and emerging ways that women’s rights are violated. If a domestic system does not offer legal recourse for accountability for certain types of structural human rights issues, the comprehensive and evolutionary obligations in CEDAW offer a route to accountability.

This potential is best exemplified in The Philippines inquiry. Many domestic jurisdictions contain no right to access contraception. There may not be an obvious legal route to bring this claim before domestic accountability forums. Or the claim must be argued through the lens of other human rights and aspects of the claim might remain invisible. CEDAW does have provisions on family planning and control of reproduction.<sup>114</sup> It uses these provisions to demonstrate that depriving women of contraception is harmful. By squarely examining the denial of the right to access contraception, the CEDAW Committee emphasized how it harms sexual and reproductive health. At the same time, the comprehensive approach to women’s rights embodied in the text of CEDAW directs the CEDAW Committee to analyse the claim from multiple legal perspectives which reveal the interlaced and often unseen facets of the human rights violation. In Northern Ireland, the CEDAW Committee evaluated abortion through the lens of multiple human rights, including negative cultural norms, a right to health, family planning, education and equality for rural women. O’Rourke is worried that the CEDAW Committee’s inquiries do not tap into the strengths of CEDAW and comprehensively assess the multiple legal rights raised by specific issue. She is particularly concerned that the inquiries into gender-based

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<sup>111</sup> CEDAW Committee, ‘General Recommendation No 28 on core obligations’ (2010) CEDAW/C/GC/28 [18]; CEDAW Committee, ‘General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (2014) CEDAW/C/GC/32; CEDAW Committee, ‘General Recommendation No 37 on gender related dimensions of disaster risk reduction in the context of climate change’ (2018) CEDAW/C/GC/37.

<sup>112</sup> ‘General Recommendation No. 28’ (n 111) [8].

<sup>113</sup> CEDAW Committee, ‘General Recommendation No 19 on violence against women’ (1992) CEDAW/C/GC/19; CEDAW Committee, ‘General Recommendation No 35 on gender-based violence against women’ (2017) CEDAW/C/GC/35; Rikki Holtmaat and Paul Post, ‘Enhancing LGBTI Rights by Changing the Interpretation of CEDAW’ (2015) 33(4) *Nordic Journal of Human Rights* 319; Campbell (n 76) Chapter 5.

<sup>114</sup> Article 10(h) and Article 16(1)(c) of CEDAW.

violence (Canada and Mexico) disproportionately focus on civil and political rights at the expense of socio-economic rights.<sup>115</sup> This criticism is misplaced. In the inquiry in Canada, the CEDAW Committee forcefully concluded that the lack of education (Article 10 of CEDAW), employment opportunities (Article 11 of CEDAW) and transportation in rural areas (Article 14 of CEDAW); substance abuse issues (Article 12 of CEDAW); high rate of exploitative prostitution (Article 6 of CEDAW); and the disproportionate numbers of Indigenous children in the child welfare system (Article 16 of CEDAW) substantially increased Indigenous women's risk of violence.<sup>116</sup> There is similar sensitivity to the interaction between gender-based violence and socio-economic rights for inquiry in Mexico.<sup>117</sup>

#### 4. Chains of Institutions

In the five inquiries, the CEDAW Committee investigates *the chains and layers of actors and institutions* that contributed to the failure to achieve gender equality. In looking at the high rates of violence in Ciudad Juárez, Mexico, the CEDAW Committee examined migration patterns, wealth inequality, the rise of organised crime, poor labour practices, inadequate public services and the incompetence and, arguably, complicity of police forces.<sup>118</sup> For the inquiry into missing and murdered Indigenous women in Canada, the CEDAW Committee evaluated the role of social welfare schemes, the law on prostitution, child protection agencies, highway infrastructure and the lack of housing on Indigenous land reserves.<sup>119</sup> In pinpointing the failure of the police, it examined, in detail, racist and sexist attitudes, missing person policies, the lack of coordinated communication between policies forces in different provinces and the inadequate collection of data.<sup>120</sup> In The Philippines, the CEDAW Committee examined the decentralisation of the health care system and the delays in domestic justice procedures.<sup>121</sup> In Northern Ireland, the CEDAW Committee assessed devolution in the UK; the chilling effect of the law on the medical community; the lack of public services in rural areas and the strategies of pro-life campaign groups.<sup>122</sup> Lastly in the Kyrgyzstan, the

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<sup>115</sup> O'Rourke (n 10) 17-8.

<sup>116</sup> 'Inquiry Procedure: Canada' (n 93) [94], [111], [122], [190].

<sup>117</sup> 'Inquiry Procedure: Mexico' (n 92) [61]-[66].

<sup>118</sup> *ibid* [22]-[25], [39], [42], [63], [76], [87]-[88], [104].

<sup>119</sup> 'Inquiry Procedure: Canada' (n 93) [51]-[52], [55], [94], [106], [112]-[117], [167]-[169].

<sup>120</sup> *ibid* [132]-[166].

<sup>121</sup> 'Inquiry Procedure: The Philippines' (n 94) [16], [20], [23], [44]-[45].

<sup>122</sup> 'Inquiry Procedure: Northern Ireland' (n 95) [9], [13], [17]-[20].

CEDAW Committee interrogated gender stereotypes that negatively impact the enforcement of the law, the burden of evidentiary rules in criminal prosecutions and the non-registration of religious marriages.<sup>123</sup> Rather than attempting to identify a single, specific perpetrator, the CEDAW Committee evaluated the complex web of legal frameworks, institutions and actors that played a role in human rights violations.

### 5. Shifting Burdens

The inquiry procedures *shift the financial and personal costs* of accountability to actors in a better position to bear these burdens rather than requiring one person to absorb these costs. No one individual in the inquiry need worry about legal fees or the expense of collecting evidence of the systemic human rights violations. The CEDAW Committee undertakes these costs. There are concerns that treaty bodies do not have adequate budgetary support, but in comparison to individuals they are well-placed to shoulder these costs. The personal costs—stigmas, repercussions, invasions of privacy—that can deter individuals, especially women, from seeking accountability are also mitigated under the inquiry procedure. Unlike mandatory charging policies, (the obligation to lay charges if the police believe there has been an incident of gender-based violence), the CEDAW Committee did not mandate any women to pursue any particular legal response to a violation of her rights. It is also possible to trace a shift in the CEDAW Committee's approach to mitigating the social costs of accountability. In the first inquiry in Mexico, the report named the murdered women and their family members.<sup>124</sup> This is disconcerting as the report stressed there had been increased threats directed towards victim's families.<sup>125</sup> There may have been strategic reasons for naming the victims as the levels of violence in Mexico were ignored and women literally and figuratively disappear.<sup>126</sup> Naming murdered women could be a powerful statement. Due to the confidentiality requirements, there was no record of the CEDAW Committee's motives or of any repercussions towards the individuals named in the report. Strikingly, in comparison, no individuals were named in the reports from Canada, The Philippines, Northern Ireland and Kyrgyzstan. The high levels of stigma against victims of bride-kidnapping operated to silence women and deny them justice.<sup>127</sup> In dialoguing with

<sup>123</sup> 'Inquiry Procedure: Kyrgyzstan' (n 96) [37], [38], [75].

<sup>124</sup> 'Inquiry Procedure: Mexico' (n 92) [77]-[82].

<sup>125</sup> *ibid* [78], [79], [89].

<sup>126</sup> *ibid* [238], [239].

<sup>127</sup> 'Inquiry Procedure: Kyrgyzstan' (n 96) [26], [75].

individuals, the CEDAW Committee only identified women in the footnotes as ‘Victim X’ or ‘Victim H’. The inquiries accordingly created a private space to share experiences and details of human rights violations while simultaneously being a public forum.

One final procedural aspect needs to be analysed, which points to future developments around the inquiry procedure. Domestic proceedings are notorious for *delay* and the inquiry procedure also suffers from this problem. From the initial submission to the CEDAW Committee to the release of the final report, the Mexico inquiry took three years; the investigation in Canada took four years and the inquiries for The Philippines and Northern Ireland lasted eight and seven years respectively. The latest report from Kyrgyzstan took five years to complete. The delays in producing inquiry reports suggest that the CEDAW Committee was not properly supported in undertaking these inquiries. This confirms the fears of the academic community at the outset of the OP-CEDAW. While the delays reveal glimpses into the need for reform within the UN human rights system, this should not be read as a call to abandon the inquiry procedure. Sadly, the eight years it took to undertake the inquiry procedure in The Philippines was still faster than obtaining accountability in the Filipino courts. A domestic legal challenge to the ban was still working its way through the courts in 2015 when the CEDAW Committee’s inquiry report was released. Even an imperfect system has considerable strengths and the current delays should inspire further discussions on treaty body reform and overall support for the UN human rights system.

### *B. Centre Stage: Engaging with Grave and Systemic Abuses in the Inquiry Procedure*

The design of the inquiry procedure, in theory and practice, facilitated accountability for grave and systemic abuses that often struggle to access justice in traditional domestic settings. Examining the CEDAW Committee’s reasoning in the final reports demonstrated a further strength of the inquiry procedure. The CEDAW Committee’s expertise combined with an exclusive focus on one specific aspect of human rights means that the inquiry procedure could uncover the laws, norms and institutions that underpin severe and widespread abuses. In turn, the CEDAW Committee could propose recommendations that are programmatic and future oriented. This final subsection analyses the CEDAW Committee’s reasoning and recommendations in the reports to assess its ability to engage squarely with grave and systemic human rights violations.



## 1. Expertise in Gender Equality and Non-Discrimination

The expertise of the CEDAW Committee could be a powerful tool to dismantle disadvantage, bias and stereotypes. There are concerns that domestic justice officials lack the expertise on equality, non-discrimination and human rights necessary to ensure accountability. The CEDAW Committee, on the other hand, consists of twenty-three individuals who are specifically appointed for their expertise in gender equality. This expertise is needed as the concept of equality and non-discrimination in CEDAW differs from many national and regional equality protections. CEDAW prohibits sex/gender discrimination against women. It is designed to be asymmetrical as it recognises that ‘it is mostly women who suffer from discrimination on the grounds of their sex.’<sup>128</sup> It also has unique provisions on gender equality: Article 4 requires states to take temporary special measures to achieve gender equality; Article 5 holds that states must modify negative cultural attitudes based on women’s inferiority and Article 14 guarantees gender equality for rural women. These provisions reflect the rich and varied concept of equality in CEDAW. The treaty includes aspects of formal equality, equality of opportunity and results and transformative equality.<sup>129</sup> The analysis in this subsection uses transformative equality to evaluate the expertise of the CEDAW Committee and its reasoning in the five inquiries as it is the model of equality in CEDAW geared towards uncovering unequal structures. There are overlapping definitions of transformative equality.<sup>130</sup> Fredman’s four dimensional model is used as it has been influential at the UN.<sup>131</sup> Transformative gender equality must break cycles of disadvantage; promote dignity by modifying harmful cultural attitudes and stereotypes; guarantee women’s political and social inclusion and transform institutions, systems and structures that perpetuate women’s inequality.<sup>132</sup> To what extent has the CEDAW Committee drawn on the transformative model of equality in undertaking inquiries into systemic and grave abuses?

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<sup>128</sup> Rikki Holtmaat, ‘The CEDAW: A Holistic Approach to Women’s Equality and Freedom’ in Anne Hellum and Henriette Sinding Aasen (eds), *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP 2012) 100.

<sup>129</sup> Campbell (n 76) 80-119.

<sup>130</sup> Holtmaat (n 128) 110; Simone Cusack and Lisa Pusey, ‘CEDAW and the Rights to Non-Discrimination and Equality’ (2013) 14(1) *Melbourne Journal of International Law* 54.

<sup>131</sup> CRPD Committee, ‘General Comment No 6 on equality and non-discrimination’ (2018) CRPD/C/GC/6 [11]; Independent Expert on the effects of foreign debt and other related financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights ‘Guiding Principles on Human Rights Impact Assessment of Economic Reforms’ (2018) A/HRC/40/57 [8.3].

<sup>132</sup> Sandra Fredman, *Discrimination Law* (2<sup>nd</sup> ed, Clarendon, 2011) Chapter 1.

## Beyond the Courtroom

The CEDAW Committee's use of transformative equality both demonstrated the strength of the inquiry procedure and marked out areas for future developments. To varying degrees, the CEDAW Committee was attentive to the multiple dimensions of inequality. The first dimension, breaking cycles of disadvantage, directed the CEDAW Committee to understand how vulnerable and marginalised women experience human rights violations. In Northern Ireland, the CEDAW Committee pointed out that for rural, migrant, asylum seeking and refugee women, the limited availability of sexual and reproductive health services forced them into unsafe abortions.<sup>133</sup> All five inquiries identified a key aspect of disadvantage—gender-based poverty—in exacerbating the risk of gender-based violence and limiting access to sexual and reproductive health services. The CEDAW Committee powerfully concluded that women in Mexico are 'murdered because they are women and because they are poor.'<sup>134</sup> In The Philippines, the contraception ban 'had detrimental consequences for economically disadvantaged women and drove them further into poverty by depriving them of an opportunity to control the number and spacing of their children.'<sup>135</sup> In Kyrgyzstan, the inquiry noted that women from low-income families or female-headed households are 'especially vulnerable to bride kidnapping.'<sup>136</sup>

As to the second dimension, promoting dignity, the CEDAW Committee did not perpetuate gender stereotypes that are often found in domestic judicial systems, although there is space for greater engagement with harmful attitudes that undermine women's equality. The intersectionality aspect of the recognition dimension is discussed further below. At the outset, it is important to flag that evaluating whether the inquiry procedures are free from bias is a difficult task. Due, at least in part, to confidentiality requirements, there are no publicly available records for interviews with stakeholders or the CEDAW Committee's internal deliberations. Historically, there is evidence that the CEDAW Committee members were influenced by the politics of the Cold War.<sup>137</sup> Current geo-political factors and attitudes of Committee members could seemingly also influence the inquiry. It is beyond the scope of this article to undertake an empirical investigation into potential biases within the treaty body. Taking the inquiry reports at face value, the CEDAW Committee is a champion for gender equality and is challenging rather than replicating biases.

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<sup>133</sup> 'Inquiry Procedure: Northern Ireland' (n 95) [69].

<sup>134</sup> 'Inquiry Procedure: Mexico' (n 92) [66].

<sup>135</sup> 'Inquiry Procedure: The Philippines' (n 94) [41].

<sup>136</sup> 'Inquiry Procedure: Kyrgyzstan' (n 96) [25].

<sup>137</sup> Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW* (2002-03) 34 *George Washington International Law Review* 515, 524.

A few examples illustrate this point. It expressed concern that in Mexico and Canada officials blamed women for engaging in high risk behaviour.<sup>138</sup> In Canada, the CEDAW Committee goes a step further and noted that the negative police attitudes towards women were intertwined with racist stereotypes.<sup>139</sup> In The Philippines and Northern Ireland, the CEDAW Committee drew attention to stereotypes that essentialise women as mothers and ‘moral characterisations of abortion that reinforce stigma.’<sup>140</sup> In Kyrgyzstan, the CEDAW Committee challenged gender stereotypes on masculinity that legitimized bride-kidnapping among families, religious leaders and justice officials and the victim shaming that punished women and ostracised them from their families.<sup>141</sup> This may appear to be covering well-trodden ground, but states continue to deny the impact of negative stereotypes on women’s rights. In response to the inquiry in Northern Ireland, despite citing direct statements from the Attorney-General as evidence of negative attitudes to abortion, the UK government held that there was no factual basis to conclude that they failed to combat gender stereotypes.<sup>142</sup>

There is a glaring example where the CEDAW Committee missed the recognition dimension gender equality. The inquiry in The Philippines hinted at the role of the Catholic Church in limiting access to modern contraception.<sup>143</sup> Yet it did not give any significant attention to the role of religion and culture in undermining women’s sexual and reproductive health rights. This silence might be explained by background geo-politics, which are difficult to assess due to the confidentiality requirements under the OP-CEDAW. It does suggest, however, that there is space for the CEDAW Committee to employ its expertise more fully and interrogate all the recognition dimensions of the claim.

The focus on systemic abuses lends itself to the third dimension, identifying structural barriers to gender equality and women’s human rights. In Mexico, Canada, The Philippines and Northern Ireland the inquiries stressed the negative impact of decentralising power from federal to local authorities.<sup>144</sup> In Mexico and Canada, the CEDAW Committee

<sup>138</sup> ‘Inquiry Procedure: Mexico’ (n 92) [57], [207]; ‘Inquiry Procedure: Canada’ (n 93) [140].

<sup>139</sup> ‘Inquiry Procedure: Canada’ (n 93) [138]-[147].

<sup>140</sup> ‘Inquiry Procedure: The Philippines’ (n 94) [42]-[43]; ‘Inquiry Procedure: Northern Ireland’ (n 95) [50]-[51].

<sup>141</sup> ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [4].

<sup>142</sup> ‘Observations of the Government of the UK on Inquiry Report’ (2018) CEDAW/C/OP.8/GBR/2 [30].

<sup>143</sup> ‘Inquiry Procedure: The Philippines’ (n 94) [7], [9], [51(0)].

<sup>144</sup> ‘Inquiry Procedure: Mexico’ (n 92) [265]; ‘Inquiry Procedure: Canada’ (n 93) [194]-[195]; ‘Inquiry Procedure: The Philippines’ (n 94) [23]; ‘Inquiry Procedure: Northern Ireland’ (n 95) [52]-[53].

## Beyond the Courtroom

identified how the lack of investment in public services forced women into high risk situations (hitchhiking, prostitution, walking in dimly lit areas) and criticized the state's fragmentary approach to violence and chronic mismanagement of investigations.<sup>145</sup> The criminalisation of abortion in Northern Ireland perpetuated a black market in dangerous abortifacients; forced women to travel to England; and created a culture of silence on abortion that resulted in a lack of adequate post-abortion health care. For women who could not afford to travel for an abortion, there is virtually no state support for raising unplanned children.<sup>146</sup> The lack of legal recognition of unregistered religious unions meant women in Kyrgyzstan, who are kidnapped and forced to marry in a religious ceremony, had no legal protection, including child support, when they leave the forced marriage.<sup>147</sup> There are limited facilities in Kyrgyzstan to obtain the necessary forensic evidence to prosecute these crimes.<sup>148</sup> Again, there are areas for further engagement with oppressive structures. Rourke is critical of the inquiry in The Philippines in that it does not sufficiently establish a right to safe and legal to abortion.<sup>149</sup> This may be explained by the inquiry's focus on access to contraception or, again, it might link to the relative silence on the role of religion in limiting women's sexual and reproductive health rights.

The final dimension, participation, is emphasised throughout the inquiries. The Canadian inquiry stressed the low rates of Indigenous women serving as police officers and as justice officials.<sup>150</sup> And the Committee is highly critical that Filipino and Northern Irish women are denied a voice in the most intimate choices over their bodies.<sup>151</sup> Together, CEDAW's sophisticated concept of equality and non-discrimination and the CEDAW Committee's expertise has resulted in a rich jurisprudence on women's rights in the inquiry process that brings to the fore nuanced and structural inequalities. This analysis also exposes areas where the CEDAW Committee could more fully engage with sensitive aspects of equality and systemic human rights abuses.

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<sup>145</sup> 'Inquiry Procedure: Mexico' (n 92) [265], [267]; 'Inquiry Procedure: Canada' (n 93) [172], [187].

<sup>146</sup> 'Inquiry Procedure: Northern Ireland' (n 95) [25]-[29], [35].

<sup>147</sup> 'Inquiry Procedure: Kyrgyzstan' (n 96) [29].

<sup>148</sup> *ibid* [38].

<sup>149</sup> Rourke (n 10) 22.

<sup>150</sup> 'Inquiry Procedure: Canada' (n 93) [175].

<sup>151</sup> 'Inquiry Procedure: The Philippines' (n 94) [41]; 'Inquiry Procedure: Northern Ireland' (n 95) [42].

## 2. Zoning in on Grave and Systemic Issues

One of the strongest features of the inquiry procedure is its exclusive focus on *grave and systemic human rights abuses*. The grave component of the inquiry procedure is centred on ‘substantial harms’.<sup>152</sup> In relation to murdered and missing Indigenous Women in Canada, the CEDAW Committee highlighted the ‘severe pain and suffering to relatives and communities.’<sup>153</sup> In Kyrgyzstan, the CEDAW Committee noted that women had the deplorable choices of remaining in a forced marriage and risk being exposed to sexual violence, or escape the marriage and risk ‘separation from their children, poverty and social isolation.’<sup>154</sup> In Northern Ireland, the CEDAW Committee concluded that limiting access to abortion can condemn women to the ‘tortuous experience of being compelled to carry a [unwanted] pregnancy’,<sup>155</sup> and in The Philippines the lack of contraception could become a matter of life and death.<sup>156</sup> The systemic component of the inquiry maps the ‘significant and persistent pattern of acts that do not result from a random occurrence’.<sup>157</sup> The CEDAW Committee expressed concern about a ‘culture of violence...that is based on women’s alleged inferiority’ (Mexico); the lack of coordinated responses to violence (Canada); the official and deliberate policy to ‘place certain ideology above the well-being of women’ (The Philippines); the deliberate retention of criminal laws (Northern Ireland) and the failure to enforce criminal law and implement programmes to change ‘persistent attitudes’ (Kyrgyzstan).<sup>158</sup> Traditional court-based adjudicative forums often do not have a mandate or can only incidentally evaluate patterns of abuse. The inquiries, on the other hand, focus on the most severe human rights violations and on the interlocking and intricate patterns of oppression.

## 3. Multiple Perspectives

The design of the inquiry procedure permits the CEDAW Committee to examine the claim from *multiple perspectives*. In comparison, traditional

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<sup>152</sup> ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [86].

<sup>153</sup> ‘Inquiry Procedure: Canada’ (n 93) [214].

<sup>154</sup> ‘Inquiry Procedure: Kyrgyzstan’ (n 96)

<sup>155</sup> ‘Inquiry Procedure: Northern Ireland’ (n 95) [81].

<sup>156</sup> ‘Inquiry Procedure: The Philippines’ (n 94) [47].

<sup>157</sup> ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [87].

<sup>158</sup> ‘Inquiry Procedure: Mexico’ (n 92) [261]; ‘Inquiry Procedure: Canada’ (n 93) [214]; ‘Inquiry Procedure: The Philippines’ (n 94) [48]; ‘Inquiry Procedure: Northern Ireland’ (n 95) [82]; ‘Inquiry Procedure: Kyrgyzstan’ (n 96) [89]-[90].

## Beyond the Courtroom

adversarial accountability processes are generally focused on the individual factual matrix. The court may not be able to grasp how differently situated individuals experience violence or restrictions on sexual and reproductive health. The inquiry procedure, on the other hand, takes a holistic approach to the claim. For the inquiry into Northern Ireland, the CEDAW Committee considered how the criminalisation of abortion impacted rural women, migrant women and women who live in poverty<sup>159</sup> and in Canada, the CEDAW Committee assessed the different circumstances for Indigenous women on- and off- land reserves.<sup>160</sup> The attention to intra-group difference is linked to the fact-finding mission under the inquiry procedure and the CEDAW Committee member's consultation with numerous stakeholders. Using Canada as an example, the CEDAW Committee members met with local and national government officials from various different government departments, members of the police service, lawyers, the Canadian Human Rights Commission, the Ombudsman for Victims of Crime, members of Parliament, representatives from national and regional indigenous organisations, indigenous women's organisations, academics, services provides for indigenous people on- and off-reserve and forty family members of missing and murdered indigenous women.<sup>161</sup> The CEDAW Committee engaged with a similarly wide array of actors when conducting state visits in Mexico, The Philippines, Northern Ireland and Kyrgyzstan.<sup>162</sup> Its dialogues with numerous actors and individuals allowed the inquiry procedure to take account of a wide range of identities, factors and circumstances. This in turn provided a foundation for the CEDAW Committee's appreciation of how these differences contributed to the experience of endemic and widespread human rights abuses.

### 4. Systemic Remedies

The remedies in the inquiry procedure are exclusively designed to redress multiple structures that perpetuate grave and systemic abuses. The recommendations start with addressing legal frameworks. Canada is urged to reform the law on prostitution and conduct a national inquiry into murdered and missing Indigenous women. The Philippines is encouraged to revoke the contraception bans and to monitor the health system; and Northern Ireland is directed to decriminalise abortion and expand the

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<sup>159</sup> 'Inquiry Procedure: Northern Ireland' (n 95) [69].

<sup>160</sup> 'Inquiry Procedure: Canada' (n 93) [204].

<sup>161</sup> *ibid* [85]-[87].

<sup>162</sup> 'Inquiry Procedure: Mexico' (n 92) [10]-[17]; 'Inquiry Procedure: The Philippines' (n 94) [5]; 'Inquiry Procedure: Northern Ireland' (n 95) [7].

grounds for legal abortion.<sup>163</sup> The recommendations then shifted towards the specific aspect of gender inequality under review. For Mexico, Canada and Kyrgyzstan, the CEDAW Committee provided a series of recommendations directed at the justice system, including enhancing coordination between different judicial and governmental agencies; building trust between communities and the police; strengthening police complaints mechanisms and enhancing victim services.<sup>164</sup> In Kyrgyzstan, the CEDAW Committee recommended the registration of religious marriages to ensure victims of bride-kidnapping are entitled to the protections of family law.<sup>165</sup> The Philippines and Northern Ireland recommendations are targeted at the health system. The Philippines is encouraged to provide sufficient budgets so local government units that can provide affordable contraception and to redress lost institutional capacity due to the contraception ban.<sup>166</sup> Northern Ireland is directed to provide usable guidance to health care professionals on legal abortion; to include sex education in the classroom; and to protect women from harassment by anti-abortion groups.<sup>167</sup> Each inquiry also recommended that the state addresses larger cross-cutting structural factors such as socio-economic conditions, cultural attitudes on women, access to justice and the negative effects of colonisation and globalisation and increase the participation of women in decision making processes.

The inquiry procedure overcomes the traditional remedial deficit as its recommendations are designed to transform cultural norms, structures and institutions. However, remedial mechanisms at international human rights law are never straightforward. The inquiry procedure can be critiqued for focusing on the structural at the expense of the individual. Domestic courts seeking to hold states to account for structural human rights abuses are increasingly adopting a two-track approach to remedies.<sup>168</sup> They are striving to find a balance between systemic remedies and the need for immediate individualised relief.<sup>169</sup> No such balance is achieved through the inquiry procedure as individualised concrete relief is not offered. Does this mean the inquiry procedure risks losing sight of the realities of human rights experiences? These concerns are misguided. The

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<sup>163</sup> 'Inquiry Procedure: The Philippines' (n 94) [51(a)]-[51(d)]; 'Inquiry Procedure: Northern Ireland' (n 95) [85(a)], [85(b)].

<sup>164</sup> 'Inquiry Procedure: Mexico' (n 92) [271]-[286]; 'Inquiry Procedure: Canada' (n 93) [217(a)]-[217(f)].

<sup>165</sup> 'Inquiry Procedure: Kyrgyzstan' (n 96) [95(b)].

<sup>166</sup> 'Inquiry Procedure: The Philippines' (n 94) [52(a)], [52(d)].

<sup>167</sup> 'Inquiry Procedure: Northern Ireland' (n 95) [85(d)], [86(d)], [86(g)].

<sup>168</sup> Roach, 'Two-Track' (n 1).

<sup>169</sup> Sandra Liebenberg, *Socio-Economic Rights* (Juta 2012) 400, 408.

## Beyond the Courtroom

CEDAW Committee engaged in dialogue with numerous women and their family members who have experienced gross human rights violations. In reading the inquiry reports, what springs from the page is attention to the nuances of each woman's experiences and the vivid portrait of the cruelty of grave and systemic human rights abuses. Furthermore, as discussed in Section II, the inquiry procedure needs to be understood as operating in harmony with domestic forums and other international mechanisms, such as individual communications, which operating together can provide both individualised and structural relief.

### *5. Conclusion*

By shifting away from an individualised conception of accountability, the inquiry procedure can squarely confront accountability for grave and systemic human rights abuses. The inquiries adopt a relaxed and fluid approach to procedural rules and shift the burdens of pursuing accountability from the individual to actors more capable of bearing these costs. By focusing on the severity and magnitude of the human rights abuses, the CEDAW Committee can engage from a multi-faceted perspective with laws, policies, institutions, norms and actors that perpetuate human rights abuses. As a result, the CEDAW Committee's recommendations are directed at remedying these endemic factors. The inquiry procedure can overcome many of the obstacles that exist to achieving accountability for grave and systemic abuses and can harmoniously complement domestic individualised accountability forums. The analysis in this article points the way forward for future reform including supporting local and grassroots CSOs and, providing the treaty bodies with the requisite human and financial resources to reduce the delays in conducting inquiries and, hopefully, will prompt the CEDAW Committee to address all aspects of the claim.

The on-the-ground impact of the inquiry procedures is mixed. Despite numerous federal and local reforms, the rates of violence against women in Mexico remain alarmingly high.<sup>170</sup> The public inquiry into missing and murdered indigenous women is bogged with delay.<sup>171</sup> Although President Duterte of the Philippines has a problematic human rights record, he has

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<sup>170</sup> 'Mexico confronts surge in violence against women' (28 December 2017) Al Jazeera <<https://www.aljazeera.com/news/2017/12/mexico-femicide-violence-women-increases-171228152443323.html>> accessed 6 April 2018.

<sup>171</sup> 'MMIW inquiry leaders say federal red tape to blame for delays' (1 November 2017) Global News <<https://globalnews.ca/news/3836984/mmiw-inquiry-federal-delays-report/>> accessed 6 April 2018.



implemented Executive Order No 12 to ensure there is ‘zero unmet need for modern family planning.’<sup>172</sup> Abortion remains a criminal offence in Northern Ireland, although the UK government is taking steps to support Northern Irish women to obtain safe and affordable abortions in England.<sup>173</sup> The government in Kyrgyzstan has indicated it will undertake reform but it is too early to assess the impact of the inquiry on bride-kidnapping.<sup>174</sup> More research is required to fully understand the domestic impact of the inquiry procedures. Enforcing treaty body recommendations is a perennial challenge in international law. It is imperative that, when initiating an inquiry procedure, CSOs give careful consideration to how they will use the final inquiry report strategically in domestic and international, legal and political forums. Despite the strengths of the inquiry procedure, it is often ignored in international human rights law. It warrants greater consideration by those seeking to challenge laws, policies and practices that contribute to grave and widespread violations.

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<sup>172</sup> Executive Order No 12, S. 2017 “Zero Unmet Needs for Modern Family Planning”

<sup>173</sup> ‘Observations’ (n 142).

<sup>174</sup> ‘Observations of the Kyrgyz Republic under Article 8 of the OP-CEDAW’ (2018) CEDAW/C/OP.8/KGZ/2.