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# Closing the Protection Gap Through a Legally Binding CEDAW Optional Protocol on Violence against Women and Girls

*Rashida Manjoo*

Professor Emeritus, University of Cape Town, Cape Town, South Africa  
*rashida.manjoo@uct.ac.za*

*Christina Beninger*

Independent Consultant, Heidelberg, Germany  
*christina.beninger@alumni.uct.ac.za*

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## Abstract

Highlighting the historical developments of soft law normative standards on violence against women, as reflected in the documents and interpretations of mechanisms of the United Nations system, the article asserts that there is a need to close the protection gap in international law, and address the issues of widespread impunity, lack of accountability and state responsibility failures. An analysis of select treaty-making processes provides an illustrative picture and understanding of the possibilities regarding addressing the protection gap in respect of violence against women, which is acknowledged as a widespread and pervasive human rights violation. This article focuses on the developments in selected international lawmaking processes, in attempts to close identified protection gaps within international law. The authors propose a solution: the adoption of an Optional Protocol on violence against women and girls, attached to the UN Convention on the Elimination of all Forms of Discrimination against Women. The international treaty-making processes identified in the article provide lessons learned and make recommendations on suggested ways to approach the issue.

## Keywords

violence against women – protection gaps – international human rights law – UN Convention on the Elimination of all Forms of Discrimination against Women – treaty-making processes

### 1 Introduction

Violence against women and girls is described as a pandemic by the World Health Organisation<sup>1</sup> and this widespread and pervasive human rights violation remains a source of global concern. In many contexts, there is growing acknowledgement that violence against women (VAW) is a human rights violation, and not a private matter and/or a social issue.<sup>2</sup> Historically, the latter views have resulted in the differential treatment accorded to women's lives, realities and their experiences of human rights violations, including acts of violence, due to both the protection of the family unit, as well as patriarchal notions linked to the viewing of women as wives, mothers, victims and the property of men.<sup>3</sup> As outlined in section 3 below, currently the Committee monitoring the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has interpreted the existing CEDAW treaty to include VAW, as a prohibited form of discrimination, leading to the creation of a non-legally binding normative framework at the international level.<sup>4</sup> In addition, the UN General Assembly's (UNGA) Declaration on Elimination of Violence

1 World Health Organization, 'Violence against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Prevalence Estimates for Non-partner Sexual Violence Against Women: Executive Summary' (2021) <<https://www.who.int/publications/i/item/9789240022256>> accessed 30 September 2024.

2 See UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>> and UN Special Rapporteur on Violence against Women, <<https://www.ohchr.org/EN/special-procedures/sr-violence-against-women/thematic-reports>>, both accessed 30 September 2024.

3 See generally the reports on family violence presented to the Commission on Human Rights by the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, including UN Doc. E/CN.4/1995/42; E/CN.4/1996/53 (1996) and UN Doc. E/CN.4/1999/68 (1999).

4 See especially UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General Recommendation No. 19: Violence against women' UN Doc. A/47/38 (1992); CEDAW Committee, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' UN Doc. CEDAW/C/GC/35 (2017).

against Women (DEVAW), adopted in 1993, offers an international non-binding consensus document which provides an overview of standards.<sup>5</sup>

Feminist academic literature has exposed the shortcomings and challenges of international human rights law, both in its origin and in its more modern development, with regard to respecting, protecting and fulfilling the human rights of women, including addressing the issue of VAW.<sup>6</sup> The approach to VAW as a general matter for human rights promotion and protection is important. But in terms of understanding the issue as a specific human rights violation, linked to civil, political, economic, social and cultural rights, such a general conceptualization falls short in effectively addressing this specific and pervasive violation that disproportionately affects women.<sup>7</sup> Given the systemic, widespread and pervasive nature of this human rights violation, which is experienced largely by women because they are women, a different set of normative and practical measures to respond to, prevent and ultimately eliminate such violence, is crucial.<sup>8</sup>

The first United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (SRVAW) in her 1996 report noted ‘the international community should consider the possibility of adopting an international convention on the elimination of violence against women. There does not at present exist a comprehensive international legally binding instrument on violence against women, and the position of the Special Rapporteur is only an ad hoc mechanism with no avenue of redress.’<sup>9</sup> After research and consultation processes carried out by the third SRVAW, in her 2014 and 2015 reports to

5 UN General Assembly (UNGA), ‘Declaration on the Elimination of Violence against Women: Resolution 48/104’ (DEVAW) UN Doc. A/RES/48/104 (1993).

6 See generally H Charlesworth, C Chinkin and S Wright, ‘Feminist Approaches to International Law’ (1991) 85(4) *American Journal of International Law* 613 and H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

7 R Manjoo, ‘Normative Developments on Violence against Women in the United Nations System’ in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence – Normative Gaps in International Law* (Routledge Taylor and Francis Group, 2018). See also report of the Special Rapporteur on Violence against Women Rashida Manjoo to the Human Rights Council, ‘Twenty years of developments within the United Nations’ UN Doc. A/HRC/26/38 (2014).

8 R Manjoo, ‘State Responsibility to act with Due Diligence in the Elimination of Violence against Women’ (2013) 2 *International Human Rights Law Review* 240.

9 R Coomaraswamy ‘Report to the Commission on Human Rights by the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy’ UN Doc. E/CN.4/1996/53, para 144 (1996).

the Human Rights Council<sup>10</sup> and to the UNGA,<sup>11</sup> she recommended that the international community examine the normative gap within the existing international human rights law frameworks, and to address more specifically the legal gaps in protection, prevention and accountability in respect of VAW. In these reports and the consultations,<sup>12</sup> she advocated for a specific, legally binding treaty on VAW, whether in the form of a stand-alone treaty or an optional protocol to the CEDAW. The fourth SRVAW in her 2017 report on the adequacy of the international legal framework on VAW, stated that she believes that CEDAW and its general recommendations, the DEVAW, and also the regional human rights instruments addressing VAW, provide a legally binding framework on women's rights and violence against women.<sup>13</sup> However, she acknowledged that an optional protocol to the CEDAW could be considered as a long-term solution to address national level implementation gaps.<sup>14</sup> Her 2019 report to the Human Rights Council acknowledges that the status quo was not effective, and she recommended that an Optional Protocol to CEDAW be adopted, based on its General Recommendation 35, to address VAW.<sup>15</sup> In 2023 and 2024, the fifth and current SRVAW has hosted panel discussions and also issued public statements calling for the adoption of a new instrument on VAW in the form of an Optional Protocol to CEDAW.<sup>16</sup> Currently the situation

10 See reports of the Special Rapporteur on Violence against Women Rashida Manjoo to the Human Rights Council UN Doc. A/HRC/26/38 (2014) and UN Doc. A/HRC/29/27 (2015).

11 See the report of Special Rapporteur on Violence against Women Rashida Manjoo to the General Assembly UN Doc. A/69/368 (2014).

12 See Addendum to Report of the Special Rapporteur on Violence against Women Rashida Manjoo to the Human Rights Council, 'Summary report of the regional consultations on State responsibility and violence against women 2011–2013' UN Doc. A/HRC/23/49/ADD 5 (2013).

13 Report of the Special Rapporteur on Violence against Women Dubravka Simonovic to the General Assembly UN Doc. A/72/134 (2017), para 12.

14 Ibid, at para 93.

15 Report of the Special Rapporteur on Violence against Women Dubravka Simonovic to the Human Rights Council UN Doc. A/HRC/41/42 (2019), para 98b.

16 R Alsalem, 'Sixty-eighth Session of the Commission on the Status of Women, Statement by Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences', (11 March 2024) <<https://www.ohchr.org/sites/default/files/documents/issues/women/sr/statements/SR-VAWG-CSW68-Opening-Statement.pdf>> accessed 30 September 2024, where the SRVAW questioned whether it was time to resurrect plans for an optional protocol to CEDAW specifically dedicated to ending violence against women. See also UN Human Rights Special Procedures 'Statement by current and former Special Rapporteurs on violence against women, its causes and consequences: Now is the time for an optional protocol to CEDAW on violence against women and girls' (7 December 2023) <<https://www.ohchr.org/sites/default/files/documents/issues/women/sr/statements/stm-op-vaw-sr-vaw-7-12-23.pdf>> accessed 30 September 2024.

has progressed to the stage where, with the political support of a Core Group of States,<sup>17</sup> the support of the current SRVAW<sup>18</sup> and three former SRVAW,<sup>19</sup> as well as the Everywoman Treaty NGO,<sup>20</sup> the necessity for a specific CEDAW Optional Protocol on violence against women and girls is being discussed. It is clear that the lack of legally binding obligations on States to act with due diligence in the elimination and prevention of acts of violence has resulted in impunity, rather than accountability being the norm for this widespread and pervasive human rights violation.<sup>21</sup>

While the normative gap in binding international legal obligations on VAW has been well documented,<sup>22</sup> the political challenges linked with this shortcoming in international law have received less advocacy and scholarly attention. Yet the ramifications of the legal gaps in the global human rights framework on VAW are significant, due to a number of political challenges that impede progress on rectifying the normative gaps in the international legal framework. First, any efforts towards bridging the normative gap through binding treaty codification of established international standards take place against a backdrop of the current global pushback on women's rights and gender equality, amid a broad international trend towards more armed conflicts, and more authoritarian and repressive governance in many countries.<sup>23</sup> This trend of democratic backsliding is occurring alongside a growing backlash against women's rights.<sup>24</sup> Gender equality backsliding is on the rise, manifesting '...

17 The Core Group of States include: Antigua and Barbuda, Costa Rica, Democratic Republic of Congo and Sierre Leone. On 21 June 2024, Costa Rica delivered a joint statement to the UN Human Rights Council during the interactive dialogue session of the SRVAW. The statement noted the need to take action to tackle violence against women and girls, including through the adoption of a possible new optional protocol to CEDAW: see Every Woman Treaty, '14 Nations Support Exploring an Optional Protocol' <<https://everywoman.org/15nations/>> accessed 30 September 2024.

18 Reem Alsalem (fifth SRVAW)

19 Yakin Erturk (second SRVAW), Rashida Manjoo (third SRVAW) and Dubravka Simonovic (fourth SRVAW)

20 Every Woman Treaty website <<https://everywoman.org>> accessed 30 September 2024.

21 See report on state responsibility by the Special Rapporteur on Violence against Women Rashida Manjoo to the Human Rights Council UN Doc. A/HRC/23/49 (2013).

22 See Manjoo reports 2014 and 2015, (n 10).

23 See, for example, Amnesty International 'State of the World's Human Rights' (2024) <<https://www.amnesty.org/en/documents/pol10/7200/2024/en/>> at 14–19, accessed 30 September 2024.

24 C Roggeband and A Kizszan 'Democratic Backsliding and the Backlash against Women's Rights: Understanding the Current Challenges for Feminist Politics' (UN Women, 2020) <<https://www.unwomen.org/en/digital-library/publications/2020/06/discussion-paper-democratic-backsliding-and-the-backlash-against-womens-rights>> accessed 30 September 2024.

as States going back on previous commitments to gender equality norms as defined in their respective political contexts'.<sup>25</sup> According to the UN Secretary General Antonio Guterres, 'gender equality is growing more distant. On the current track, UN Women puts it 300 years away'.<sup>26</sup> Ultimately, as UN Women noted in a recent assessment documenting poor global progress on gender equality, 'the world is failing women and girls'.<sup>27</sup> Militarism and insecurity is on the rise globally, with clearly gendered implications in the growing armed conflicts impacting female civilians, such as the use of sexual violence as a weapon of war, in areas including Ukraine, Palestine, the Democratic Republic of the Congo and Tigray in Ethiopia.<sup>28</sup> For example, as the current *SRVAW* notes, the consequences of the 2023–2024 war in Gaza are deeply gendered, severely impacting the fundamental rights of Palestinian women and girls, including reproductive rights.<sup>29</sup> In fact, as of 2022, the number of women living in conflict-affected areas had risen by more than 50% in five years.<sup>30</sup> There are many examples of the concrete impacts on women's rights to be free from *VAW* as part of these broader political dynamics, such as the repeal of the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Treaty) to combat *VAW* by Turkey's government in 2021,<sup>31</sup> the return of the Taliban's gender apartheid policies in Afghanistan,<sup>32</sup>

25 Ibid, at 1.

26 United Nations, 'Secretary-General's remarks to the Commission on the Status of Women' (6 March 2023), <<https://www.un.org/sg/en/content/sg/speeches/2023-03-06/secretary-generals-remarks-the-commission-the-status-of-women>> accessed 30 September 2024.

27 UN Women and United Nations Department of Economic and Social Affairs, Statistics Division 'Progress on the Sustainable Development Goals: The Gender Snapshot 2023' (2023) at 12.

28 See Amnesty International, (n 23) at 15. United Nations 'Israel/oPt: UN experts appalled by reported human rights violations against Palestinian women and girls' (2024) <<https://www.ohchr.org/en/press-releases/2024/02/israelopt-un-experts-appalled-reported-human-rights-violations-against>> accessed 30 September 2024; United Nations 'Ukraine: Rape and Torture by Russian Forces Continuing, Rights Experts Report' (2023) <https://news.un.org/en/story/2023/09/1141417>, accessed 30 September 2024.

29 R Alsalem, 'Women Bearing the Brunt of Israel-Gaza Conflict: UN expert' UN Office of the High Commission for Human Rights (20 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/women-bearing-brunt-israel-gaza-conflict-un-expert>> accessed 30 September 2024.

30 UN Women, (n 27) at 23.

31 I Bengisu, 'Turkey's withdrawal from the Istanbul Convention: A Step in the Wrong Direction' (LSE Blogs, 5 May 2021) <<https://blogs.lse.ac.uk/wps/2021/05/05/turkeys-withdrawal-from-the-istanbul-convention-a-step-in-the-wrong-direction/>>, accessed 30 September 2024.

32 H Barr, 'The Taliban and the Global Backlash Against Women's Rights' (Human Rights Watch, 6 February 2024) <<https://www.hrw.org/news/2024/02/06/taliban-and-global-backlash-against-womens-rights>> accessed 30 September 2024.

and the recent roll-back of women's reproductive rights in countries including the United States.<sup>33</sup>

Second, when it comes to VAW specifically, despite the many normative developments and efforts to advance legal and policy reform at national and regional levels, VAW's widespread and ongoing systemic impact continues. The most recent global VAW prevalence data released by the World Health Organization in 2021 indicate that approximately 30–31% of women globally have been subjected to intimate partner violence (physical or sexual) or sexual violence by a non-partner in their lifetimes.<sup>34</sup> As the authors stated, the data shows that VAW '... is a global public health problem of pandemic proportions, affecting hundreds of millions of women and requiring urgent action'.<sup>35</sup> According to another UN report, the intentional killing of women in 2022 was the highest it had been in twenty years, with more than half of gender-related killing of women and girls (femicide/feminicide), 48,800 in 2022, perpetrated by intimate partners or other family members.<sup>36</sup> Further, rates of VAW worldwide increased significantly during the global COVID-19 pandemic beginning in 2020.<sup>37</sup> The political implications are significant, as discriminatory patriarchal social and cultural norms that reflect gendered bias against women persist worldwide, underpinning and reinforcing VAW. Recent data from the UN Development Program's Gender Social Norms Index released in 2023 shows that a significant majority of the world's population holds gender bias against women (nine out of ten people, from a sample reflecting 85% of the global population).<sup>38</sup> One measured gender bias relating to VAW, the belief that a man has a right to beat his wife, was held by more than a quarter of respondents.<sup>39</sup> The authors note that the data does not show an improvement over time, with the prevalence of gender bias showing little progress in the

33 Human Rights Watch 'Human Rights Crisis: Abortion in the United States After Dobbs' (2023) <<https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs>>, accessed 30 September 2024.

34 World Health Organization, (n 1) at IX.

35 Ibid, at XII.

36 United Nations Office on Drugs and Crime and UN Women 'Gender-Related Killings of Women and Girls (Femicide/Feminicide): Global Estimates of Female Intimate Partner /Family-Related Homicides in 2022' (2023) <<https://www.unwomen.org/sites/default/files/2023-11/gender-related-killings-of-women-and-girls-femicide-feminicide-global-estimates-2022-en.pdf>> at 1, accessed 30 September 2024.

37 UN Women 'Measuring the shadow pandemic: Violence against women during COVID-19' (2021) <<https://data.unwomen.org/publications/vaw-rga>> accessed 30 September 2024.

38 UN Development Program '2023 Gender Social Norms Index – Breaking down gender biases: Shifting social norms towards gender equality' (2023) <<https://hdr.undp.org/system/files/documents/hdp-document/gsn202303.pdf>> at 3, accessed 30 September 2024.

39 Ibid, at 6.

past decade.<sup>40</sup> Gender bias pervades both societies and governance. Ultimately then, the global normative gap on VAW is combined with systemic, deeply engrained gender-based discrimination and impunity for VAW, impacted substantially by discriminatory patriarchal social and cultural norms that prevail globally. This situation raises important questions about the existing political will for changing this deeply gendered accountability deficit arising from the VAW normative gap in international law.

While important, the soft law developments within the United Nations are not legally binding or enforceable, with the consequence of both a legal and political gap. Thus, States can avoid any legally enforceable accountability and ultimately refuse to recognise or comply with the evolving interpretations articulated by human rights treaty bodies and special procedures mechanisms. Arguably it is generally politically comfortable to accept that there is a significant legal gap under international law related to VAW, while still nominally expressing support for the growing body of normative standards, even though these are ultimately non-binding and unenforceable. This legal gap signals that compliance with international normative standards on VAW developed through the international system is ultimately optional. The result is a serious accountability deficit when it comes to combating VAW globally.

In light of these challenges, this article investigates first, the normative protection gap under existing international human rights law on VAW, and second, how international lawmaking processes of selected international human rights treaties can provide insights into how adopting legal responses to protection gaps can be achieved. Section 2 briefly discusses the need for legally binding treaties, including the impact of binding international human rights treaties on combating VAW. Section 3 provides an analysis of historical and current developments on VAW at the global level, beginning with the advocacy work of women's rights organizations in the 1980s, and through the adoption of various international human rights instruments and standards. It highlights the protection gap within international human rights law, due to the lack of legally binding provisions on VAW. Section 4 turns to an analysis of selected comparative models of treaty making processes, including the development of Optional Protocols to existing human rights treaties on substantive topics to address protection gaps in the original treaties. Section 5 draws on the discussion in section 4 to provide an overview of the key common factors reflected in the analysis of selected instruments during the negotiation and adoption phases. Section 6 offers concluding thoughts, proposing recommendations for moving forward with the development of an Optional Protocol on VAW to the CEDAW treaty.

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<sup>40</sup> Ibid, at 3.

## 2 The Need for Legally Binding International Treaties

Regarding the current discussion on the need for a new CEDAW Optional Protocol, as referred to above, it is important to highlight why international laws matter, both in terms of existing and proposed laws. In addition to the foundational international human rights law instruments, the further development of legal frameworks reinforces the specificity of fundamental rights, including the rights of women, children, peoples with disabilities, and migrant workers and their families.<sup>41</sup> Treaties can lead to domestic legal and institutional development, with justice and accountability goals being further advanced, due to behavioural and institutional changes. Simmons in her book *Mobilising for Human Rights*<sup>42</sup> and Richards and Haglund in their book *Violence against Women and the Law*<sup>43</sup> cover this topic generally and specifically on VAW, respectively, highlighting their empirical work regarding the importance of international laws. The numerous global crisis situations currently facing us,<sup>44</sup> have given rise to a critique of the rules-based international order, and the double standards, bias and hypocrisy therein. This has led to legal and non-legal advocacy which challenges the power and privilege of the Global North, a feature that has been entrenched since the origins of the international system.<sup>45</sup> The re-emergence of social movements for a more principled, fair and just international order that values all human life equally, is also visible globally.<sup>46</sup> However, there is also a reliance on the international instruments and institutions in the quest to address justice, accountability and the equal

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41 For a full list of treaties see UN Treaty Collection (UNTC) at <<https://treaties.un.org>> accessed 30 September 2024.

42 B A Simmons, *Mobilizing for Human Rights -International Law in Domestic Politics* (Cambridge University Press, 2009).

43 D L Richards and J Haglund, *Violence against Women and the Law* (Paradigm Publishers, 2015).

44 The conflicts in Palestine, Sudan and Ukraine, among others, reflect the global crisis situations and the challenges being highlighted in respect of peace, security and development, in the United Nations General Assembly and the Security Council in particular.

45 See among others: Issam Younis, 'Genocide in Gaza and the decline of a flawed world order' (24 July 2024) <<https://www.aljazeera.com/opinions/2024/7/24/genocide-in-gaza-and-the-decline-of-a-flawed-world-order>> and Gershom Gorenberg, 'Israel's Disaster Foretold – The ICJ's opinion on the West Bank is devastating, and it isn't wrong' (The Atlantic, 6 August 2024) <<https://www.theatlantic.com/international/archive/2024/08/icj-ruling-west-bank/6793721>> accessed 30 September 2024.

46 For example, the global protests against Israel's war on Palestine, especially Gaza, are taking place in the public sphere, as well as on university campuses. Coalitions and movements have been formed in different fora.

application of international law to all.<sup>47</sup> These are indicators that international laws and institutions remain relevant, despite concerns about compliance, enforcement, value-added, and weaknesses and shortcomings on different levels.

As Simmons notes in her book, there is acceptance that laws matter, whether at the international, regional, national or local levels. The international legalisation of human rights reflects a commitment to a set of explicit legal obligations in protection and prevention efforts, as well as international accountability. International laws reflect politics in the negotiation and ratification processes, but they also reflect what are considered acceptable norms and behaviours that are equally applicable to all. They can alter politics by setting visible goals for public policy and practice and thereby impose political costs for governments that do not comply. They serve notice that governments are accountable and should refrain from human rights violations directly or indirectly – and thus they have the power to constrain.<sup>48</sup> The respect for international legal obligations is reinforced through monitoring, reporting, advocacy, technical and other assistance, and through the avoidance of being labelled as outliers. The link between international instruments and national level developments is visible in its influence on shaping laws, policies and practices in the latter sphere, to achieve positive justice and accountability outcomes and impacts.<sup>49</sup>

Richards and Haglund in their empirical study investigate whether a State's signature and ratification of international human rights instruments has any effect on the State's actual human rights practice. They also investigate whether international laws drive the enactment of domestic VAW laws; whether it improves respect for human rights, including human dignity; and whether transnational advocacy and activism play a role in national level legal changes; among other questions.<sup>50</sup> They acknowledge that political, economic, social and cultural explanations do play a role in the structure and enforcement of legal protections.<sup>51</sup> Their findings indicate that international

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47 Among others, see International Court of Justice case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* [2023] ICJ Press Release 2023/77. After the initial case was lodged by South Africa, numerous other State Parties have applied to the ICJ to join the case. Also see International Criminal Court *Situation in the State of Palestine* [5 August 2024] ICC Case No. ICC-01/18. A recent Amicus Curiae observation was lodged in this case by a group of civil society organisations (6 August 2024) ICC Case No. ICC-01/18-317 07-08-2024 1/13pt.

48 Simmons, (n 42) at 3–22.

49 Ibid, at 5.

50 Richards and Haglund, (n 43) at xi and xii.

51 Ibid, at 21–37.

law appears to have an effect at the national level, through establishing both norms and binding legal obligations, as it can lay the foundation for the enactment of domestic legislation. They argue that the DEVAW,<sup>52</sup> CEDAW,<sup>53</sup> the Rome Statute<sup>54</sup> and the Security Council Resolutions on the Women, Peace and Security Agenda,<sup>55</sup> among others, have all contributed and led to diffusion and internalisation of norms.<sup>56</sup> Such developments have also led to the mobilisation of women's movements nationally and transnationally which has influenced political outcomes; and has led to ratification of treaties thereby moving the norms from the international to domestic levels.<sup>57</sup> Their findings also indicate that rulings by international bodies can affect national legal systems; and that in the absence of explicit domestic legal guarantees the use of international laws by judges and lawyers can expand the meaning of domestic laws.<sup>58</sup>

As Simmons asserts 'treaties provide a political, legal and social resource to individuals and groups whose goal is to hold governments to their promise'.<sup>59</sup> There may be views that the development of non-binding norms is sufficient to effect change, as opposed to legally binding provisions and instruments. Norms can be persuasive, but they do not create a commitment to a global standard that is 'public, explicit and a promise to do something or refrain from doing something'.<sup>60</sup> The voluntary sovereign commitment, through the ratification of international and regional treaties, gives rise to legal commitments and obligations, and is a powerful incentive to stimulate national level changes.<sup>61</sup> Over the years the deeper politicisation of women's human rights has led to shaping changes that demand a shift away from viewing women's rights as largely an important social goal, and towards a holistic human rights issue. With the adoption of the anti-discrimination treaty CEDAW in 1979, an important international law goal was achieved through the equality, non-discrimination

52 DEVAW, (n 5).

53 UN Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (1979) (CEDAW).

54 UN Rome Statute of the International Criminal Court 2187 UNTS 90 (1998).

55 See among others UN Security Council, 'Resolution 1325 (on Women, Peace and Security)', UN Doc. S/RES/1325 (2005).

56 For a discussion on norms emergence, acceptance, internalization and diffusion, see among others, M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' in (1998) 52(4) *International Organization* 887.

57 Richards and Haglund, (n 43) at 89–121.

58 Ibid, see generally the Concluding chapter.

59 Simmons, (n 42) at 15.

60 Ibid, at 7.

61 Ibid, at 12.

and state responsibility framework to address gender inequalities and discrimination.<sup>62</sup> The absence in CEDAW of a specific provision addressing VAW as a human rights violation, in and of itself, raises questions about a protection gap, which needs to be addressed through a binding international law. Section 3 below will provide an overview of the historical developments of soft law normative standards on VAW, as reflected in the documents and interpretations of mechanisms of the UN system.

### 3 Historical and Current Developments on Violence against Women at the UN

The core principles underpinning understandings of VAW, within soft law developments in the UN system, include that it is a form of discrimination, and it is a manifestation of the historically unequal power relationships between men and women, which has led to domination over and discrimination against women by men and to the prevention of the full advancement of women.<sup>63</sup> The analysis of developments within the UN over almost four decades indicates that the work on VAW was triggered by the advocacy of women's rights activists and organisations – more especially at UN world conferences on women held in Mexico, Copenhagen, Nairobi and Beijing.<sup>64</sup> Such activism led to a declaration, numerous resolutions and reports, including the adoption in 1985 of the first UN General Assembly resolution on domestic violence in the family.<sup>65</sup> UN organised expert group meetings have taken place over the years, including a groundbreaking expert group meeting on VAW in Vienna in 1991,

62 CEDAW, (n 53). See also: CEDAW Committee 'General Recommendation 28: Core obligations of States' UN Doc. CEDAW/C/GC/28 (2010).

63 DEVAW, (n 5) at preamble.

64 UNGA, 'Report of the World conference of the International Women's Year (*Mexico*)' (1975) UN Publication, Sales no. E.76. IV. 1, <<http://www.un.org/womenwatch/daw/beijing/otherconferences/Mexico/Mexico%20conference%20report%20optimized.pdf>> accessed 30 September 2024; UNGA, 'Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace (*Copenhagen*)' (1980) UN Publication, Sales No. E. 80. IV. 3, <<http://www.refworld.org/docid/3b00f0344.html>>; UNGA 'Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace (*Nairobi*)' (1985) UN Publication Sales No. E. 85. IV.10, <<http://www.un.org/documents/ga/conf177/nfls/thirdwcw1985-nfls.htm>>; UNGA, 'UN Fourth World Conference on Women, Platform for Action, for Equality, Development and Peace (*Beijing*)' (1995) UN Doc. A/CONF.177/20 <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>>, all accessed 30 September 2024.

65 UNGA, 'Resolution 40/36' UN Doc. A/RES/40/36 (1985).

which led to a few crucial recommendations.<sup>66</sup> In 1991, the Commission on the Status of Women (hereafter CSW), made a recommendation to the Economic and Social Council (ECOSOC) regarding the adoption of a framework for an international instrument that would explicitly address VAW.<sup>67</sup> In the same year the ECOSOC accepted this recommendation, through the adoption of a resolution.<sup>68</sup> This resolution mandated the UN Secretary-General to convene a meeting of experts to discuss the possibility of preparing an international instrument on VAW.

The expert group meeting was held in 1991 in Vienna and a report was produced in 1992. The report reflects that the participants discussed the development of a convention on VAW; prepared a draft declaration on the elimination of VAW; discussed the elaboration and strengthening of CEDAW General Recommendations and the development of a CEDAW optional protocol; and considered the need to appoint a thematic rapporteur on VAW.<sup>69</sup> The conclusions of the expert group meeting acknowledged that the existing instruments, including CEDAW, do not give sufficient consideration to VAW, and consequently one of the recommendations was the development and adoption of a specific convention on the issue. Yet the outcome of these deliberations was a draft declaration on VAW, albeit within an understanding, that in the future, it could serve as the basis for an optional protocol to CEDAW or a specific convention on VAW.<sup>70</sup>

It is argued that the proposed convention on VAW received less attention than the other measures because the expert group meeting participants concluded that a declaration would be easier to elaborate and execute than a binding treaty, and also that a treaty would face political hurdles because some State leaders doubted that VAW actually qualified as a human rights violation.<sup>71</sup>

66 UN Economic Commission for Africa 'Mission Report on the Expert Group Meeting on Violence Against Women' (11–15 November 1991, Vienna), UN Doc. ECA/ATRCW/3.18(v)/91 <<http://repository.uneca.org/bitstream/handle/10855/12527/Bib-53619.pdf?sequence=1>>, accessed 30 September 2024. See also UN Economic and Social Council (ECOSOC) 'Report of the Expert Group Meeting on Violence against Women', UN Doc. EGM/VAW/1991 (1991).

67 ECOSOC 'Report of the 35th Session of the Commission on the Status of Women', UN Doc. E/CN.6/1991/14 (1991). See also report to the Commission on Human Rights by the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, UN Doc E/CN.4/1995/42 (1995) at para 26.

68 ECOSOC 'Resolution 1991/18', UN Doc. 1991/18 (1991).

69 ECOSOC 'Report of Secretary General on Violence against Women in all its forms' UN Doc. E/CN.6/1992/4 (1991).

70 UN Economic Commission for Africa, (n 66); ECOSOC (1991) (n 66).

71 J Joachim, 'Shaping the Human Rights Agenda: The Case of Violence against Women' in *Gender Politics in Global Governance* (Rowman and Littlefield Publishers Inc., Maryland, 1999) at 152.

Also, the participants viewed an optional protocol or a new convention as a long-term measure to be implemented if the general recommendations of CEDAW, the implementation of the DEVAW standards, and the work of the mandate of the SRVAW proved ineffective over time.<sup>72</sup> Others have argued that a declaration, as opposed to a convention on the elimination of VAW, was adopted because of fears of confusion between the scope of the CEDAW and a new binding treaty on VAW; fears that a new binding instrument might run the risk of limited ratification; and also because of concerns about the expense of implementing a new binding instrument.<sup>73</sup>

The draft declaration on VAW that was developed at the 1991 meeting was submitted to the CSW and to the ECOSOC in 1992.<sup>74</sup> Subsequent to an inter-sessional working group meeting the revised draft declaration was tabled at the 1993 CSW session with the ECOSOC urging the UNGA to adopt the draft declaration.<sup>75</sup> The explicit recognition, by the international community, of women's rights as human rights occurred at the second UN World Conference on Human Rights held in Vienna in 1993, where a call was also made for the adoption of the draft declaration on VAW.<sup>76</sup> The Vienna Declaration and Programme of Action, adopted by the Conference, noted that 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights'.<sup>77</sup> Although this Declaration did not specifically define VAW, it did call for the elimination of violence against women in public and private life.<sup>78</sup> The DEVAW was the first international soft law document on VAW adopted by consensus in the UNGA in December 1993.<sup>79</sup> The DEVAW provides a comprehensive framework in terms of definition, scope, obligations of States to act with due diligence and the role of the UN in addressing this human rights violation. It is a non-legally binding document, which has no specific monitoring or review mechanism to assess compliance with the standards articulated. In the preamble there is recognition that the

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<sup>72</sup> Ibid.

<sup>73</sup> See generally H Charlesworth and C Chinkin, 'Violence Against Women: A Global Issue' in J Stubbs (ed.) *Women, Male Violence and the Law 13* (Institute of Criminology Monograph Series, No. 6, Sydney, 1994). See also J Fitzpatrick, 'The Use of International Human Rights Norms to Combat Violence Against Women' in R Cook (ed.) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) at 532–571.

<sup>74</sup> ECOSOC 1991 'Report of Secretary General', (n 69).

<sup>75</sup> UN Economic and Social Council Resolution, UN Doc. E/1993/207 (1993).

<sup>76</sup> UNGA, 'Vienna Declaration and Programme of Action', UN Doc A/CONF.157/23 (1993).

<sup>77</sup> Ibid, at para 38.

<sup>78</sup> Ibid, at para 18.

<sup>79</sup> DEVAW, (n 5).

root causes of VAW are patriarchy and the subordination of women; and that VAW is a manifestation of historically unequal power relations between men and women.<sup>80</sup>

Also, in 1994 the Commission on Human Rights adopted a resolution establishing the mandate of the SRVAW.<sup>81</sup> In the discharge of the mandate, the SRVAW is required to prepare annual thematic and country visit reports and communications findings. The work and reports of the SRVAW over thirty years reflect substantive conceptual clarity, contributions to norm developments, and country specific recommendations. The annual reports of all five mandate holders reflect developments which have expanded the scope of the mandate to include a consideration of intersectional aspects underpinning VAW; the continuum of violence in the private and public spheres; nationality laws and statelessness; access to justice concerns due to ineffective and discriminatory practices and the denial of effective redress; the setting of new standards for addressing violence as a product of social, political and economic inequality; the impact of the climate crisis on women and girls; exploring the utility of an expanded understanding of the due diligence standard for enforcing state responsibility; developing model legislation on domestic violence and rape; and the development of indicators on VAW, among others.<sup>82</sup> Unfortunately, the clarification of norms and standards, and the provision of guidance, has not resulted in effective measures by States in the quest to eradicate VAW. The current advocacy for a VAW Optional Protocol to CEDAW reinforces the need for a legally binding instrument to address normativity, compliance and implementation issues.

In their annual resolutions on VAW, the UN Commission on Human Rights,<sup>83</sup> its successor the UN Human Rights Council,<sup>84</sup> and the UNGA<sup>85</sup> call upon States to exercise due diligence to prevent and investigate acts of VAW and to punish the perpetrators. States are broadly called upon to develop civil and criminal measures to address offender accountability; to ensure victim safety; and to

80 Ibid, at preamble.

81 UN Commission on Human Rights, 'Resolution 1994/45', UN Doc. E/CN.4/1994/45 (1994).

82 See Office of the UN High Commissioner for Human Rights (OHCHR) <<https://www.ohchr.org/EN/special-procedures/sr-violence-against-women/thematic-reports>> accessed 30 September 2024 for thematic and country visit reports of the Special Rapporteur on Violence against Women.

83 UN Commission on Human Rights resolutions available at <<http://ap.ohchr.org/documents/E/CHR/resolutions>> accessed 30 September 2024.

84 UN Human Rights Council Resolutions available at <<http://ap.ohchr.org/documents/E/HRC/resolutions>> accessed 30 September 2024.

85 UN General Assembly Resolutions available at <[www.un.org/documents/ga/res/](http://www.un.org/documents/ga/res/)> accessed 30 September 2024.

provide redress and justice measures that victims can access effectively. The numerous UN resolutions that have been adopted reflect both conceptual clarity and specificity in articulating standards in attempts to provide guidance to Member States in understanding state obligations and the responsibility to act with due diligence in responding to and preventing VAW. Unfortunately, the direct impact of such resolutions in national level developments is difficult to establish, considering the levels of impunity that continue to exist and the pervasive and continuing nature of the violation. The provision of guidance through such resolutions may have resulted in legal and service provision developments in some countries, including laws, policies, mechanisms and programs, but the lack of adoption of legally binding universal norms and standards, raises questions about the effectiveness and sustainability of such an approach. The engagement of the UN Security Council regarding VAW is reflected in the non-binding resolutions on women, peace and security that it has adopted. Security Council Resolution 1325 was adopted in 2000 and focuses on the incorporation of a gender perspective in conflict resolution by addressing the special needs of women; and is aimed broadly at empowering women in relation to issues of conflict prevention, resolution and reducing gender-based violence through mainstreaming gender-specific concerns in peace and security policy considerations.<sup>86</sup>

In addition, the work of treaty bodies also reflects concerns regarding VAW, whether in their Concluding Observations or General Recommendations/Comments. Within the UN treaty system, there is no binding international human rights provision that specifically and comprehensively addresses the issue of VAW, but there have been numerous non-legally binding soft law developments within this system.<sup>87</sup> Treaty monitoring bodies within the UN system contribute to the soft law developments through their reviews of State party reports, their interactive dialogues, their concluding observations and recommendations, and the development of general recommendations and comments. Beyond the monitoring function, treaty bodies can also investigate complaints, known as the communications procedure, and make findings that highlight gaps in compliance with normative standards emanating from treaty obligations. In their interpretative work, numerous treaty bodies have made observations and recommendations regarding the nature of obligations of the State regarding VAW, whether perpetrated by state or non-state actors.

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86 UN Security Council Resolution 1325, (n 55).

87 For an analysis of international human rights law and violence against women see generally A Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) and B Meyersfeld, *Domestic Violence and International Law* (Hart Publishing, 2010).

In particular, the CEDAW Committee, the Human Rights Committee and the Committee against Torture, have demonstrated a responsiveness to interpret relevant treaty provisions to include women's experiences of violence.<sup>88</sup> The following paragraphs will only focus on developments within CEDAW.

### 3.1 *The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and VAW*

The CEDAW is the specific international treaty on the rights of women. This binding convention was adopted by the General Assembly in 1979 and entered into force in 1981. It does not directly address all manifestations of VAW, with the only exception being Article 6, which requires states parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. In addition, Article 16 addresses the issue of forced marriage and child marriage, now acknowledged as forms of violence. According to the *Travaux Préparatoires* for CEDAW, efforts to include more specific references to VAW in the Convention were unsuccessful. Belgium proposed that the phrase 'and attacks on the physical integrity of women' be added to Article 6.<sup>89</sup> The delegate from Pakistan objected to the proposal,<sup>90</sup> thus the proposed amendment was withdrawn due to the lack of support.<sup>91</sup> CEDAW links a State's obligation to protect women from violence in terms of obligations to eliminate discrimination against women generally, including through the interpretation of Articles 2, 5, 10 and 16, among others. Article 2(e) in particular creates a due diligence obligation on the part of States to prevent discrimination against women, with General Recommendation 28<sup>92</sup> providing more specific guidance as to what state responsibility to act with due diligence means for States. The CEDAW Committee (hereafter Committee) makes it clear that the due diligence requirement entails obligations of means or conduct and also obligations of results.<sup>93</sup> Thus, the Committee

88 See Manjoo report 2014, (n 10). The report reflects some information on the work of other Treaty Bodies regarding VAW. The Human Rights Council's monitoring work relating to the Universal Periodic Review also reflects that the issue of VAW is raised during the interactive dialogues.

89 L A Rehof, 'Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women' United Nations Audiovisual Library of International Law (1993) at 92, <[www.un.org/law/avl/](http://www.un.org/law/avl/)>, accessed 30 September 2024.

90 UN Commission on the Status of Women, 'Summary record of the 638th meeting' UN Doc. E/CN.6/SR.638 (1976).

91 Rehof, (n 89) at 91.

92 CEDAW Committee (2010), (n 62).

93 *Ibid*, at para 9.

has adopted an interpretation that treats VAW first and foremost as a matter of discrimination, but not as a human rights violation in and of itself, with discrimination as one of the causes and consequences of VAW.

The absence of specific treaty provisions addressing all forms of VAW led the Committee to embark on a soft law interpretative approach, through the adoption of General Recommendations 12, 19, 30 and 35 specifically, to address the issue. Due to concerns about the lack of information on VAW in States' reports, in 1989 the Committee adopted General Recommendation 12<sup>94</sup> urging States to include information on actions taken to prevent VAW in their periodic reports. It is argued that many States' Parties did not consider violence to be covered by CEDAW and hence did not include information in their reports, prior to the adoption of General Recommendation 12.<sup>95</sup> In 1992, the Committee adopted General Recommendation 19<sup>96</sup> wherein it interpreted the definition of discrimination in Article 1 of the treaty as encompassing VAW. It includes a list of specific rights that VAW violates, including the right to life; right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of the person; the right to equality in the family and equal protection under the law, among others.<sup>97</sup> General Recommendation 30<sup>98</sup> was adopted in 2013 and addresses the issue of gender-based sexual violence that occurs in times of conflict and post-conflict and highlights that in conflict and post-conflict situations, States Parties are bound to apply the Convention and other international human rights and humanitarian law when they exercise territorial or extraterritorial jurisdiction.

In 2017, the Committee adopted General Recommendation 35<sup>99</sup> on gender-based VAW, to update General Recommendation 19. Among others, the changes in the updated document include: new language used to identify the issue; the clarification of both general and specific human rights obligations; the reinforcement of the interdependency of rights and also the links between articles of the CEDAW and VAW; detailed guidance to States in respect of general legislative measures, prevention, protection, prosecution and punishment, reparation, coordination, monitoring, data collection; and international

94 CEDAW Committee, 'General Recommendation No. 12: Violence Against Women' (Eighth session, 1989).

95 Rehof, (n 89) at para 50.

96 CEDAW Committee, 'CEDAW General Recommendation No. 19: Violence Against Women' UN Doc. A/47/38 (1992).

97 Ibid, at para 11.

98 CEDAW Committee, 'General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post Conflict Situations', UN Doc. CEDAW/C/GC/30 (2013).

99 CEDAW Committee (2017), (n 4).

cooperation. In paragraph 2 the Committee asserts that the prohibition of gender-based VAW has now evolved into a principle of customary international law due to soft law developments such as General Recommendation 19, *opinio juris* and state practice.<sup>100</sup> However, in the very same General Recommendation the Committee acknowledges that gender-based VAW remains pervasive in all countries of the world, with high levels of impunity.<sup>101</sup>

Furthermore, the Committee notes that ‘in many states, the legislation addressing gender-based VAW remains non-existent, inadequate and/or poorly implemented.’<sup>102</sup> The contradiction, as reflected in General Recommendation 35, is cause for concern as it highlights that CEDAW’s articulation about legally binding obligations on States, through the evolution of a prohibition of VAW into customary international law, is questionable. State practice together with *opinio juris* form the corpus of customary international law, thereby establishing a State’s obligations and responsibility. As noted in an International Court of Justice case, ‘not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’<sup>103</sup> However, ‘persistent breaches of a norm may undermine its effectiveness if it is seen as something that states pay lip service to but do not adhere to in actual practice.’<sup>104</sup> Factually, the soft law developments on VAW within the UN system have not led to substantive change at the national level in many contexts. This requires a responsive and nuanced discussion on the protection gap in international law, and whether there is a need for a legally binding comprehensive international treaty on VAW, with its own monitoring body – whether in the form of a stand-alone treaty or an optional protocol to CEDAW.<sup>105</sup>

### 3.2 *The CEDAW Optional Protocol*

The CEDAW did not, at the time of its adoption, include a provision for the monitoring body to hear individual communications regarding States’ implementation of and compliance with the Convention. During the drafting of the treaty, it was suggested that a communication procedure be included, but some delegates objected on the basis that such procedures were only for serious

100 Ibid, at para 2.

101 Ibid, at para 6.

102 Ibid, at para 7.

103 *North Sea Continental Shelf* [1969] ICJ Rep 3 at para 77.

104 I Bantekas and L Oette, *International Human Rights Law and Practice* (3rd ed., Cambridge University Press, 2020) at 62.

105 See Manjoo reports 2014 and 2015, (n 10).

international crimes such as apartheid and racial discrimination, rather than discrimination against women.<sup>106</sup> Consequently, a communications procedure was not included in the Convention. It is argued that the weak protection mechanisms in the treaty, rendered CEDAW a second-class instrument within the family of UN human rights treaties.<sup>107</sup> The subsequent adoption of the Optional Protocol to CEDAW<sup>108</sup> in 1999 and its speedy entry into force in 2000, strengthens the women's rights protection work of the Committee. The Optional Protocol has two procedures that allow the Committee to receive complaints from individuals or groups of individuals and also to initiate inquiries if grave and systematic violations of women's rights are occurring in a State. A State's consent is required to conduct country visits to undertake confidential inquiries.<sup>109</sup> States' Parties can opt out of the inquiry procedure at the time of ratification.<sup>110</sup> It is asserted that in respect of the individual complaints mechanism, the Committee's interpretative views reflect a dual focus i.e. on the level of legislative protection as well as the substantive requirements for implementation.<sup>111</sup> The Optional Protocol only requires States' Parties to give due consideration to the Committee's final views and does not mandate compliance with recommendations made to the State Party (a principle that is also applicable to the concluding observations issued by the Committee).<sup>112</sup>

The discussion on the need for an Optional Protocol began in the early 1990s with the Committee being in the forefront of arguing that this was necessary, including to bring this treaty in line with other human rights treaties.<sup>113</sup> The UN administrative agency supporting the work of the Committee (as well as the CSW), the Division for the Advancement of Women, hosted an expert group meeting on this subject in 1991.<sup>114</sup> Additionally, the UN World Conference

106 ECOSOC, 'CSW Summary Record' UN Doc. E/CN.6/SR. 674 (1976) at paras 4 and 14.

107 T Meron, 'Enhancing the Effectiveness of the Prohibition of Discrimination Against Women' (1990) 84 *American Journal of International Law* 213.

108 Optional Protocol to the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, 2131 UNTS 83 (1999) (CEDAW Optional Protocol).

109 Ibid, at art 8. CEDAW Committee, 'Rules of Procedure', Annex I of the Report of the Committee on the Elimination of Discrimination against Women, UN Doc A/56/38 (2001) at 80 and 81.

110 Ibid, at art 10.

111 A Hellum and SA Aasen, *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) at 46.

112 CEDAW Optional Protocol, (n 108) at art 4.

113 For a comprehensive overview of the process of elaboration and negotiations, see J Connors, 'Optional Protocol' in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women – A Commentary* (Oxford University Press, 2012).

114 'Report of the Expert Group Meeting on Violence against Women', UN Doc EGM/VAW/1991/1 (1991) and ECOSOC (1991) (n 69).

in 1993 reinforced the need for an optional protocol and recommended its elaboration.<sup>115</sup> In 1994, the Committee in its Suggestion No. 5, on the feasibility of preparing an optional protocol to the Convention, recommended to the CSW to establish a group of independent experts to prepare a draft, but this was not endorsed by the CSW.<sup>116</sup> Subsequently, that same year, two NGOs organised a meeting of women's rights experts which was held in the Netherlands and the outcome of this meeting was a draft of an optional protocol (the Maastricht draft).<sup>117</sup> It is argued that this document served as the basis for later discussions and negotiations,<sup>118</sup> including through the development of a Working Paper prepared by a Committee member who had attended the Maastricht meeting.<sup>119</sup> The following year, the Committee issued Suggestion No. 7 noting the different elements that needed to be included in an optional protocol.<sup>120</sup> During the 1995 CSW session, the CEDAW Suggestion No. 7 document was not discussed, but the recommendation was made for the Secretary-General to seek the views of all relevant parties on an optional protocol to the Convention, taking into account CEDAW Suggestion No. 7, and for the Secretary-General to present the views in a report to the 1996 session of the CSW.<sup>121</sup> This led to the ECOSOC adopting a resolution mandating the CSW to establish an open-ended working group for the elaboration of an optional protocol.<sup>122</sup> The CSW established the working group in 1996, and the first meeting was held soon thereafter, with the discussion focused on the CEDAW Suggestion No.7 and the views of States and other relevant parties which had been submitted to the UN Secretary-General.<sup>123</sup> The outcome of the second meeting held in 1997 was an

115 Vienna Declaration, (n 76).

116 UNGA, 'Report of the CEDAW Committee – Thirteenth Session' UN Doc A/49/38 (1994).

117 The meeting was organised by the Women in Law Project of the International Human Rights Law Group with the Maastricht Centre for Human Rights. Among the participants were three members of the CEDAW Committee and also members of other treaty bodies. See Connors, (n 113) at 611.

118 FG Isa, 'The Optional Protocol for the Convention on the Elimination of all Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights' in (2003) 20(2) *Arizona Journal of International and Comparative Law* 291 at 306.

119 CEDAW, 'Working paper presented to the Fourteenth Session of CEDAW', UN Doc. CEDAW/C/1995/WG.1/WP.1 (1995).

120 CEDAW Suggestion No. 7 on Elements for an optional protocol to the Convention in UNGA, 'Report of the CEDAW Committee – Fourteenth Session', UN Doc A/50/38 (1995).

121 The views were presented in two reports of the UN Secretary-General, UN Doc E/CN.6/1996/10 (1996) and UN Doc E/CN.6/1997/5 (1997).

122 ECOSOC, 'Resolution 1995/29', UN Doc E/RES/1995/29 (1995).

123 UN Secretary-General reports, (n 121).

official draft Optional Protocol,<sup>124</sup> and the following year the draft was further debated, due to numerous concerns and contestations.<sup>125</sup> Finally, in 1999 at the fourth meeting of the working group, the revised document was approved by consensus, and it was adopted by the CSW,<sup>126</sup> the ECOSOC,<sup>127</sup> and the UNGA<sup>128</sup> later that year.<sup>129</sup>

The process of the development of the Optional Protocol was not an easy one, starting with the historical objections to include an individual communication procedure in the CEDAW; the subsequent CSW failure to entertain the Committee's suggestions; and the limited participation of States, and also the broader women's movement, in the elaboration and negotiation process. It is argued that the women's movement had limited participation and there was no defined political strategy from within the women's movement.<sup>130</sup> Among the numerous contested substantive issues during the negotiation process, was the issue of who could submit a communication to the committee – should it be restricted to individuals or could someone submit on behalf of an individual or groups of individuals. It was strongly argued by some States and experts that the broader view must be adopted, and the CEDAW must be on the same level as other human rights treaties. Another issue was that of justiciability and whether all or just some of the substantive provisions would qualify for using of the individual communication procedure. Attempts at a narrow framing were rejected and it was agreed that all provisions of the CEDAW treaty are justiciable in the communication procedure. A third contested issue was that of a prohibition against reservations to the optional protocol. Some delegates argued that since this was a procedural mechanism, no reservations should be allowed. Others argued that such a prohibition was contrary to the well-established practice of

124 ECOSOC, 'Working Group on the Elaboration of a Draft Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, UN ESCOR. 41st Session' UN Doc. E/CN.6/WG/L.1 (1997).

125 ECOSOC, 'Working Group on the Elaboration of a Draft Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, UN ESCOR. 43rd Session' UN Doc. E/CN.6/27 (1998).

126 ECOSOC, 'Report of the CSW – 43rd Session' UN Doc. E/1997/27, Chapter 1 (1999).

127 ECOSOC, 'Resolution 1999/13' UN Doc. E/RES/1999/13 (1999).

128 UNGA, 'Resolution 54/4. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women', UN Doc A/RES/54/4 (1999).

129 The Optional Protocol to CEDAW was adopted in October 1999 and it entered into force in December 2000. Currently there are 115 States Parties to the Optional Protocol: UNTC 'Status of Treaties: Chapter IV. Human Rights – 8.b Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (2024) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en)>, accessed 30 September 2024.

130 Isa, (n 118) at 320.

permitting appropriate reservations. Ultimately, the prohibition on reservations clause was included. The inquiry procedure was also opposed by some delegates, and to ensure consensus on the adoption of the optional protocol, the President of the Working Group proposed that an opt-out clause should be included. This was accepted and consensus was reached.<sup>131</sup> The adoption of this procedural optional protocol has potentially expanded the protection mechanisms within the UN human rights system, regarding the human rights of women.<sup>132</sup>

A comprehensive overview of the norms and standards, and the implementing mechanisms relevant to the right of women to be free from all forms of violence, as found in the established African, European and Inter-American regional human rights systems, is beyond the scope of this article.<sup>133</sup> Briefly, in two of the regional systems, legally binding instruments on violence against women were adopted,<sup>134</sup> while the African system adopted a comprehensive instrument on the human rights of women.<sup>135</sup> Despite the absence of specific legally binding provisions on violence against women in the UN system, in adopting legally binding instruments, these three regional systems have largely adopted the soft law norms and standards emanating from the international system. These instruments have expanded the understandings of VAW to concretely frame it as a human rights violation and also as a form of discrimination; and also address the issue of state responsibility to act with due diligence in responding to and preventing this human rights violation.<sup>136</sup> Unfortunately, these three legally binding regional instruments do not apply to the rest of the globe, although the normative standards elaborated therein can be adopted at the national level, beyond these regions.

<sup>131</sup> For a comprehensive overview see Connors, (n 113) at 607–679.

<sup>132</sup> Due to space limitations, this article does not expand on the way that the CEDAW Committee has utilised the expanded powers in terms of the Optional Protocol and whether such developments have had a positive impact, particularly regarding the elimination of violence against women.

<sup>133</sup> See the chapter by R Manjoo and R Nekura, 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' in N Luwaya, R Manjoo and J Omar (eds.) *Violence against Women – Law, Policy and Practice* (Juta and Company, 2020).

<sup>134</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Belém do Pará) 33 ILM 1534 (1994); Council of Europe, Convention on preventing and combating violence against women and domestic violence, CETS No. 210 (2011) (Istanbul Convention).

<sup>135</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), CAB/LEG/66.6 (2003).

<sup>136</sup> For a comprehensive overview of how the three regional human rights systems address violence against women, see Report of the Special Rapporteur on Violence against Women Rashida Manjoo to the General Assembly, UN Doc. A/70/209 (2015).

#### 4 Comparative Models of Treaty Making Processes

Reflecting on the challenges discussed above, how can the political agenda towards stronger legal protections against VAW at the global level be effectively advanced, especially in a time of global rollback on human rights generally and women's rights and gender equality specifically? The intention of this article is to first, identify the normative and protection gap and second, propose possible responses to these challenges, positing concrete, practical recommendations for building political support and outlining a practical process towards developing an Optional Protocol to CEDAW on VAW (hereafter OP VAW). Specifically, this section presents an analysis of the treaty making negotiations and processes that characterized the development of selected other international human rights treaties, and in particular, optional protocols to existing treaties on substantive topics. This analysis provides useful and relevant insights into key elements and lessons learned that can be applied to the process of moving forward an OP VAW. As Herro discusses, scholarly attention to the 'pre-negotiation' process, where initiatives to develop international human rights treaties originate and progress towards drafting and adoption, is an understudied area.<sup>137</sup> As she explains '... no serious attempt has been made to empirically identify the unique attributes of the pre-negotiation of UN human rights treaties and to understand the conditions under which states arrived at the table and why they did so'.<sup>138</sup> While it is not the intention of this article to address this gap comprehensively, we do seek to uncover and analyse key factors, dynamics and processes by which international human rights instruments (including optional protocols) achieve the political and practical support towards adoption, and how this could support the adoption of an OP VAW.

In this section we look to a series of brief case studies on how selected human rights treaties and optional protocols were negotiated and ultimately adopted, focusing on elements and approaches that appear particularly relevant for moving forward politically and practically with an OP VAW. A common theme across each instrument analysed is that it was developed to address a protection gap in existing international human rights treaties, whether for a specific category of persons (for example, persons with disabilities) or for a particular human rights issue (for example, prevention of torture in custodial settings). The methodology employed includes analysis of original UN reports of the work of the bodies mandated to negotiate and draft the treaties as well as secondary

<sup>137</sup> A Herro, 'The Pre-negotiation of UN Human Rights Treaties: The Case of the Convention on the Rights of Persons with Disabilities' (2019) 24 *International Negotiation* 240 at 241.

<sup>138</sup> *Ibid.*, at 241.

literature. This section assesses how the ‘diplomatic dance’ was successfully achieved to build the necessary political support among States to move forward.

Section 4.1 below begins with an analysis of the negotiation of adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD was selected for this analysis as it is the most recent international human rights law treaty (IHRL), adopted in 2006. It provides a highly relevant case study into how a very inclusive and ultimately effective negotiation and adoption process unfolded, as the attempt to develop a treaty on the rights of persons with disabilities transformed from failed UN resolutions that did not gain broad support, to an almost universally ratified treaty. Section 4.2 focuses on how the existing four UN Optional Protocols on substantive topics (as explained below) were negotiated and adopted to address protection gaps in existing human rights treaties.

#### 4.1 *Analysis of the Development of Selected International Human Rights Treaties: the Convention on the Rights of Persons with Disabilities (CRPD)*

The CRPD was adopted in 2006, providing a comprehensive binding global treaty to ensure protection of the rights of persons with disabilities.<sup>139</sup> The treaty was developed to fill the ‘legal lacuna’ in global human rights protections for persons with disabilities, which were not adequately addressed by existing IHRL treaties or various soft-law normative developments.<sup>140</sup> The treaty making process was initiated in 2001 when an Ad Hoc Committee was established, ‘taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development’, by a General Assembly resolution brought forward by Mexico to develop an international convention on the rights of persons with disabilities.<sup>141</sup> Thus the treaty negotiation and finalisation process of five years moved notably quickly as compared to most international human rights treaty negotiations. The treaty entered into force only two years later, in 2008, following the requisite ratification by twenty States.<sup>142</sup>

139 UN Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (2006) (CRPD).

140 M A Stein and J E Lord, ‘Forging Effective International Agreements: Lessons from the UN Convention on the Rights of Persons with Disabilities’ in J Heymann and A Cassola (eds.) *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (Cambridge University Press, 2012) at 29.

141 UN General Assembly, ‘Resolution 56/168. Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities’ UN Doc. A/RES/56/168 (2001).

142 UNTC, ‘Status of Treaties: Chapter IV Human Rights: 15. Convention on the Rights of Persons with Disabilities’ (2024) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en)>, accessed 30 September 2024.

As of 2024, the CRPD enjoys almost universal support globally, with 191 States parties.<sup>143</sup>

According to Stein and Lord, the advent and quick progress of the treaty negotiation process following Mexico's resolution in 2001 was somewhat of a surprising development given there had been little high level State-led political support for this initiative prior to this resolution, although there had been growing civil society advocacy efforts.<sup>144</sup> In addition, there had been growing efforts led by the UNGA to bring attention to disability rights, through initiatives including the Decade for Disabled Persons (1983–1992), the adoption of the 'Standard Rules on Equalization of Opportunities for Persons with Disabilities'<sup>145</sup> (1993) and the World Programme of Action concerning Disabled Persons (1991).<sup>146</sup> A Special Rapporteur on the Rights of Persons with Disabilities was established in 1994 by the Commission for Social Development.<sup>147</sup> The UN Human Rights Council subsequently adopted a resolution in 2014 creating the position of a Special Rapporteur on the Rights of Persons with Disabilities.<sup>148</sup> In addition, within the UN system, the Department of Economic and Social Affairs (DESA) has played a key role in leading initiatives on disability issues for decades, including serving as the Secretariat for the CRPD Ad Hoc Committee.<sup>149</sup>

In terms of State-led leadership, Mexico's role was significant. It successfully lobbied for disability to be included in the Durban World Conference on Racism, and alongside interested NGOs, played a pivotal role in lobbying other States to support the treaty making effort following the GA resolution to establish the Ad Hoc Committee.<sup>150</sup> However, this was not the first State-led effort to advocate

<sup>143</sup> Ibid.

<sup>144</sup> M Stein and J Lord, 'Convention on the rights of persons with disabilities' (United Nations Audiovisual Library of International Law, 2023) <[https://legal.un.org/avl/pdf/ha/crpd/crpd\\_e.pdf](https://legal.un.org/avl/pdf/ha/crpd/crpd_e.pdf)>, accessed 30 September 2024.

<sup>145</sup> UNGA, 'Resolution 48/96. Standard Rules on the Equalization of Opportunities for Persons with Disabilities' UN Doc. A/RES/48/96, Annex (1994).

<sup>146</sup> UNGA, 'World Programme of Action concerning Disabled Persons' UN Doc. A/RES/37/52 (1982).

<sup>147</sup> UN Department of Social and Economic Affairs, 'Special Rapporteur on Disability of the Commission for Social Development' (2024) <<https://social.desa.un.org/issues/disability/special-rapporteur-on-disability-of-the-commission-for-social-development>>, accessed 30 September 2024.

<sup>148</sup> UNGA, 'Resolution adopted by the Human Rights Council 26/20: Special Rapporteur on the rights of persons with disabilities' UN Doc. A/HRC/RES/26/20 (2014).

<sup>149</sup> UNGA, 'Final Report of the eighth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' UN Doc. A/61/611 (2006) at para 5.

<sup>150</sup> Stein and Lord (2012), (n 140) at 30.

for a convention on disability rights. Sweden and Italy had both proposed this initiative in the late 1980s, which met with little support.<sup>151</sup> As Lawson explains, ‘the idea met with considerable opposition. Some States (including the United Kingdom and Japan) raised objections based on cost, while others (including Germany and Norway) considered that the existing conventions provided adequate protection.’<sup>152</sup> This appears to be one of the main debates featuring in the negotiations leading to the CRPD – whether there should be a convention at all, based on an assumption that existing human rights treaties were sufficient. However, as Lawson argues, persons with disabilities had long been rendered invisible, largely due to discrimination, even within existing treaties; a specialized treaty would help to fill this gap in protection with specificity relevant to the experiences and needs of persons with disabilities.<sup>153</sup>

Herro’s analysis of the ‘pre-negotiation’ process of the Ad Hoc Committee’s early sessions demonstrates how initial State support led by Mexico’s UNGA proposal (alongside 19 countries of the Global South) needed to be strengthened to bring on board a broader range of States. As noted above, many States initially expressed uncertainty about the feasibility and necessity of the CRPD.<sup>154</sup> As Herro’s analysis shows, measures to ‘structure’ the process and build clarity and support included Mexico’s presentation of an influential initial draft treaty text at the inception of the Ad Hoc Committee as a starting point for discussions and early agreement among key States about foundational provisions, as well as framing of the initiative as essential for human development, alongside coalition building and collaborating with civil society to build pressure on other States.<sup>155</sup> Indeed, Lawson points to the inclusion of disability rights NGOs in the negotiation process as pivotal in securing greater State support for the CRPD.<sup>156</sup>

The Ad Hoc Committee, at its second session in 2003, established a temporary Working Group to produce a first draft of an international treaty. It specifically directed the Working Group, to comprise twenty-seven State representatives (reflecting regional groups) and twelve NGO representatives, to take into account all

151 UN Enable, ‘Human Rights and Persons with Disabilities’ Background Paper prepared by the Division for Social Policy and Development of the United Nations Secretariat for the Informal Consultative Meetings on International Norms and Standards for Persons with Disabilities (9 February 2001), <<http://un.org/esa/socdev/enable/rights/humanrights.htm>>, accessed 30 September 2024.

152 A Lawson, ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn’ (2007) 34 *Syracuse Journal of International Law and Commerce* 563 at 586.

153 *Ibid.*, at 583–585.

154 See Herro, (n 137) at 250–51.

155 *Ibid.*

156 Lawson, (n 152) at 588–589.

contributions from 'States, observers, regional meetings, relevant United Nations bodies, entities and agencies, regional commissions and intergovernmental organizations, as well as civil society including non-governmental organizations (NGOs), national disability and human rights institutions and independent experts', thus establishing a very broad and inclusive platform of stakeholders.<sup>157</sup> Following this process and the Working Group's completion of a draft treaty, the Ad Hoc Committee adopted the draft and recommended its adoption via resolution at the General Assembly in 2006.<sup>158</sup>

As reflected in the reports of the Ad Hoc Committee sessions, there was broad agreement that the CRPD should contain monitoring provisions, that should be at least as good, and preferably better, than those of other treaties, as the most recent human rights treaty at the time.<sup>159</sup> As such, the CRPD, under Article 34, established a specialised monitoring treaty body, the Committee on the Rights of Persons with Disabilities. The Committee has the power to receive and review State reports on compliance with CRPD treaty obligations.<sup>160</sup> However, as is the practice with other international human rights treaties, the power to hear individual communications and undertake inquiries is not included in the treaty, and was instead the subject of an Optional Protocol.<sup>161</sup> The CRPD OP was adopted at the same time as the CRPD in 2006, and also came into force in 2008.<sup>162</sup> It currently has 106 States Parties.<sup>163</sup>

A unique and highly relevant feature of the negotiation process of the CRPD was the extensive, official participation of a broad range of stakeholders including civil society and NGOs.<sup>164</sup> As one involved civil society delegate notes

157 UNGA, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Second Session', UN Doc. A/58/118 & Corr.1 (3 July 2003) at para 15.

158 UNGA, 'Final Report of the eighth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' UN Doc A/61/611 (2006).

159 UNGA, 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its sixth session' UN Doc A/60/266 (2005) at para 157.

160 CRPD, (n 139) at art 35.

161 Ibid, at arts 1(2) and 6.

162 UN Convention on the Rights of Persons with Disabilities Optional Protocol 2518 UNTS 283 (2006) (CRPD Optional Protocol).

163 UNTC, 'Status of Treaties: Chapter IV – Human Rights 15. a Optional Protocol to the Convention on the Rights of Persons with Disabilities' (2024) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en)> accessed 30 September 2024.

164 Stein and Lord (2023), (n 144).

'it is commonly accepted that the extent of NGO participation and involvement in the drafting and negotiations of the CRPD has been unprecedented'.<sup>165</sup> For example, interested NGOs, in particular disabled persons organizations (known as DPOs), organised themselves into the International Disability Caucus (IDC) as a broad, unified and highly influential coalition representing and advocating on behalf of persons with disabilities under the slogan 'nothing about us without us'.<sup>166</sup> The IDC played a pivotal role in initiating a highly participatory process where NGOs (and national human rights institutions) were involved in all stages of negotiations and treaty drafting, alongside States' governmental representatives. As a result, the treaty reflects the inputs and perspectives of persons with disabilities and those organizations who advocate on their behalf.

#### 4.2 *Analysis of the Development of Selected Substantive Optional Protocols*

In this section we investigate the process and dynamics behind the development of selected Optional Protocols to existing UN international human rights law treaties. There are currently nine UN Optional Protocols (OPs). Five of the existing OPs focus exclusively on procedural matters, specifically the individual communications process and inquiries that allows for existing UN treaty bodies to hear individual complaints of human rights violations and to conduct inquiries.<sup>167</sup> The development of the procedural CEDAW Optional Protocol on individual communications is discussed in section 3 above. The other four OPs focus on substantive topics not fully addressed in the original treaty, making them analogous to the focus of a proposed OP VAW to CEDAW. These include: the first two OPs to the Convention on the Rights of the Child (CRC),<sup>168</sup> focused

165 M V Reina, 'How the International Disability Caucus worked during negotiations for a UN Human Rights Convention on Disability', Global Action on Aging (2006). <<https://globalag.igc.org/agingwatch/events/CSD/2008/maria.htm>>, accessed 30 September 2024.

166 Handicap International, 'Voices on the CRPD: How the CRPD came to life' (undated) <<https://www.hi.org/crpd/en/development-and-special-atmosphere-of-the-negotiations>>, accessed 30 September 2024.

167 The five Optional Protocols pertaining to individual communications powers are: Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (1966); CEDAW Optional Protocol, (n 108); Optional Protocol to the Convention on the Rights of Persons with Disabilities 2518 UNTS 283 (2006); Optional Protocol to the Covenant on Economic, Social and Cultural Rights 2922 UNTS 29 (2008); Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2983 UNTS 135 (2011).

168 UN Convention on the Rights of the Child 1577 UNTS 3 (1989) (CRC).

on the rights of children in armed conflict<sup>169</sup> (CRC OP1) and the sale and prostitution of children and child pornography<sup>170</sup> (CRC OP2); and OP2 to the International Covenant on Civil and Political Rights (ICCPR),<sup>171</sup> on the abolition of the death penalty.<sup>172</sup> The first Optional Protocol to the Convention against Torture<sup>173</sup> (OPCAT) deals with both substantive and procedural issues, focused on the prevention of torture in places of detention, a topic not addressed in the original treaty, and the establishment of a specialised torture subcommittee. Given that the proposed OP VAW focuses on a substantive addition of a topic omitted in the text of the original CEDAW treaty, the sections below focus on considering how and why the existing substantive OP s moved forward, and the possible lessons that can be considered.

#### 4.2.1 Substantive Optional Protocols to the Convention on the Rights of the Child (CRC)

##### 4.2.1.1 *Optional Protocol 1 – Children in Armed Conflict*

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC OP1) was adopted by the UNGA in 2000, following six years of negotiations led by an inter-sessional open-ended Working Group established by the UN Commission on Human Rights resolution 1994/91 in 1994.<sup>174</sup> The CRC OP1 entered into force in 2002, two years after adoption, following the minimum State ratifications.<sup>175</sup> The purpose of the CRC OP1 is to address the rights of children in armed conflict, an issue considered to be inadequately addressed in the original text of the CRC treaty. In particular, Article 38 of the CRC prohibits the recruitment and participation of children as soldiers in armed conflict, but only under the age of fifteen,

169 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2173 UNTS 222 (2000).

170 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (2000).

171 International Covenant on Civil and Political Rights 999 UNTS 171 (1966) (ICCPR).

172 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1642 UNTS 414 (1989).

173 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (2002) (OPCAT).

174 UN Commission on Human Rights, 'Resolution 1994/91: Implementation of the Convention on the Rights of the Child' (1994) at para 10.

175 UNTC, 'Status of Treaties: Chapter IV: Human Rights – 11. b Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (2024) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en)> accessed 30 September 2024.

whereas all other CRC provisions apply to children until the age of eighteen.<sup>176</sup> This exception, as well as other shortcomings related to how international humanitarian law and child protection standards were incorporated into the CRC, led to the initiative – extensively advocated by leading intergovernmental and non-governmental organizations including the International Committee of the Red Cross – to develop an OP to enhance the protections to children in armed conflict, and in particular, address the persistent use of child soldiers in conflicts around the world.<sup>177</sup>

The Working Group established by the UN Commission on Human Rights focused on developing an OP to raise the minimum permitted age for children to be recruited into armed forces to eighteen, drawing on a preliminary draft OP prepared by the UN Committee on the Rights of the Child on the involvement of children in armed conflicts.<sup>178</sup> Thus, in this case, it was the CRC Committee that advanced the initiative to move forward with an OP, recommending the total prohibition on all involvement of children in armed conflict under the age of eighteen.<sup>179</sup> Likewise, the United Nations Children's Fund (UNICEF), the UN agency mandated to advance child rights, was an active participant in the Working Group and advocated strongly for a total prohibition on children in armed conflict.<sup>180</sup> Resolution 1994/91 specifically invited all governments, specialized agencies and NGOs to participate in the Working Group.<sup>181</sup> Indeed, as Breen's analysis shows, NGOs played a leading role in advocacy driving both the initial development of the CRC and OPI.<sup>182</sup> In fact, NGOs had lobbied heavily against the age exception in Article 38 of the CRC permitting child soldiers from age fifteen, although resistance by key States held strong.<sup>183</sup> The

176 UN CRC, (n 168) at art 38(3). Article 1 of the CRC defines a 'child' under the convention as anyone under the age of eighteen years.

177 See D Helle, 'Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child' (2000) 82 (839) *International Review of the Red Cross* 79.

178 Ibid, paras 11–12.

179 See ECOSOC, 'Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Second Session' UN Doc. E/CN.4/1996/102 (1996) paras 36, 47.

180 ECOSOC, 'Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its sixth session' UN Doc. E/CN.4/2000/74 (2000) paras 101–103.

181 Ibid, at para 14.

182 C Breen, 'The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2003) 25(2) *Human Rights Quarterly* 453.

183 N Cantwell, 'Non-Governmental Organisations and the United Nations Convention on the Rights of the Child' (1992) 91(19) *Bulletin of Human Rights* 16.

development of the OP1 was viewed as an opportunity to rectify this exception. At the same time, there was extensive campaigning at both the UN and State levels and via NGO efforts to highlight the plight of child soldiers globally, including the formation of the Coalition to Stop the Use of Child Soldiers.<sup>184</sup> The 1993 Vienna World Conference on Human Rights specifically called for attention to the issue of child soldiers, while the report of Graça Machel, the United Nations Secretary-General's independent expert, on the impact of armed conflict on children, was highly influential.<sup>185</sup>

Despite these efforts, it took six years for the Working Group to finalise a final draft of the OP, especially in the face of strong opposition from certain powerful States, in particular the United States, to a total prohibition on the participation of children under eighteen in armed conflicts. For example, in the report of the Working Group's Fifth Session held in 1999, the Chairman pointed to the ongoing lack of consensus among States to enshrine a minimum age of eighteen for participating in armed conflict, while also highlighting the extensive and growing range of initiatives (led by the UN, national governments and NGOs) and resulting increased global support for this effort.<sup>186</sup> Ultimately, the final text was a compromise, falling short of the 'straight-18' total prohibition of any participation in hostilities under the age of eighteen that the 'vast majority' of delegates had advocated for. It allowed an exception for voluntary participation of children under eighteen (Article 3), a position the United States in particular, as well as a handful of other States including the United Kingdom and Pakistan, had pursued.<sup>187</sup> As documented in the report of the Working Group's Sixth Session, many States and NGO representatives were disappointed in this 'watered down' version.<sup>188</sup> However, the compromise ultimately allowed

184 R Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards Universal Ratification' (2010) 18 *International Journal of Children's Rights* 535 at 536.

185 UNGA, 'Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly resolution 48/157' UN Doc. A/51/306 (1996).

186 ECOSOC, 'Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fifth Session' UN Doc. E/CN.4/1999/73 (1999).

187 ECOSOC, 'Report of the Working group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fourth Session' UN Doc. E/CN.4/1998/102 (1998), see in particular paras 19, 40, 62, 65.

188 ECOSOC, 'Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its sixth session' UN Doc E/CN.4/2000/74 (2000). See the summary of delegation submissions at Section V, from para 91, and see the government of Ethiopia's statement regarding the 'watered down' nature of the text at para 136.

the text of the Optional Protocol to be finalised by consensus and move forward for adoption by the UNGA. The Optional Protocol on children in armed conflict is now widely ratified, with 173 States parties.<sup>189</sup>

#### 4.2.1.2 *Optional Protocol 2 – Sale of Children, Child Prostitution and Child Pornography*

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC OP2) was adopted in 2000 by the UNGA, following six years of negotiations. The CRC OP2 entered into force two years later, in 2002.<sup>190</sup> The purpose of the CRC OP2, as expressed in its preamble and Article 1, is to prohibit the sale of children, child prostitution and child pornography, and to 'extend' the existing CRC provisions in light of 'significant and increasing international traffic in children', 'the widespread and continuing practice of sex tourism', and 'the growing availability of child pornography on the Internet'.<sup>191</sup> Pursuant to UN Commission on Human Rights resolution 1994/90, an inter-sessional open-ended Working Group was appointed by ECOSOC in 1994 to work alongside the UN Committee on the Rights of the Child and the Special Rapporteur on the sale, sexual exploitation and sexual abuse of children to elaborate 'guidelines for a possible draft optional protocol'.<sup>192</sup> The initiative to develop CRC OP2 was part of a broader focus at the UN on the issue of child exploitation, and followed, for example, the appointment of a Special Rapporteur on the sale of children, child prostitution and child pornography and Commission on Human Rights' adoption of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography.<sup>193</sup> The Working Group purposefully sought to include a broad range of stakeholders in its discussions, recommending that the proposed OP '... should receive the widest possible

189 UNTC, 'Status of Treaties: Chapter IV Human Rights: 11. b Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (2024) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en)> accessed 30 September 2024.

190 Ibid.

191 CRC OP2, (n 170) at preamble, art 1.

192 ECOSOC, 'Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication' resolution 1994/9 (1994).

193 ECOSOC, 'Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication: Report of the working group' UN Doc E/CN.4/1995/95 (1995) para 15.

consideration and, in this context, invites representatives of the Committee on the Rights of the Child, the Special Rapporteur on the sale of children, child prostitution and child pornography and all relevant intergovernmental and non-governmental organizations to attend any future session of the working group and to offer views on the draft text'.<sup>194</sup>

As reflected in the report of the Working Group's first sessions, the early discussion around this OP was somewhat unusual, given that a number of State delegates expressed doubt or resistance to the idea that the OP was even necessary at all, referring instead to the already existing protections in the CRC and other international standards.<sup>195</sup> However, over the following years of discussions, given the scale of the child exploitation issue globally, the Working Group found common ground to finalise a text. As Maxwell discusses, alongside an emphasis on criminalization, the OP's '... purpose was to clarify CRC obligations with respect to sexual exploitation and impose additional obligations on States parties so that effective responses to these urgent problems could be implemented'.<sup>196</sup> There was ultimately strong uptake by States, with currently 178 States parties to the CRC OP2.<sup>197</sup>

#### 4.2.2 Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty (ICCPR OP2),<sup>198</sup> was adopted in 1989 by the UNGA,<sup>199</sup> entering into force two years later in 1991. Negotiation of the final text had taken nearly a decade, following an initial draft protocol put forward by a group of supportive States.<sup>200</sup> The OP2's primary focus is to prohibit the use of execution in all

194 Ibid, at para 224.

195 Ibid, at paras 15–25.

196 F Maxwell, 'Children's Rights, The Optional Protocol and Child Sexual Abuse Material in the Digital Age: Moving from Criminalisation to Prevention' (2023) 31 *The International Journal of Children's Rights* 61 at 67.

197 UNTC 'Status of Treaties: Chapter IV Human Rights: II. c Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography' (2024) online: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-II-c&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-II-c&chapter=4&clang=_en), accessed 30 September 2024.

198 ICCPR OP2, (n 172).

199 UNGA, 'Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty' UN Doc A/RES/44/128 (1989).

200 UNGA, 'Draft Second Optional Protocol to the International Covenant on Civil and Political Rights,' UN Doc. A/C.3/35/L.75 (1980). Submitted by Austria, Costa Rica, Dominican Republic, Federal Republic of Germany, Italy, Portugal and Sweden.

circumstances, and impose a duty upon States Parties to ‘take all necessary measures to abolish the death penalty within its jurisdiction.’<sup>201</sup> Article 4 provides that the UN Human Rights Committee has monitoring powers under the OP2. The OP2 thus fills a gap in the original ICCPR treaty, where Article 6, on the right to life, permits the use of the death penalty in limited circumstances, specifically ‘only for the most serious crimes.’<sup>202</sup> Abolition of the death penalty had already been an issue of focus at the UN for decades, and the subject of various research reports and resolutions, including the non-binding ‘Safeguards guaranteeing protection of the rights of those facing the death penalty’ adopted by ECOSOC in 1984.<sup>203</sup> As Schabas comprehensively details, a number of States had been advocating for the UN to take a stronger stand towards abolition of the death penalty since the 1950s.<sup>204</sup> These efforts included a series of UN-commissioned expert reports and resolutions documenting both the lack of evidence of the death penalty in deterring crime and the broader global trend towards abolition.<sup>205</sup> This advocacy and evidence building phase led to the development of a full text draft treaty presented as Optional Protocol 2 to the ICCPR to the UNGA in 1980, by a number of European and Latin American ‘abolitionist’ States.<sup>206</sup> The sponsors indicated that the intention was to highlight the issue at the UN and initiate efforts for further discussion among States, ultimately working towards a binding protocol.<sup>207</sup> As Hood and Hoyle argue, the rise of abolitionist attitudes was part of a ‘new dynamic’ arising since the 1950s, where States were increasingly in favour of abolishing the death penalty, influenced in large part by the rise of international human rights law.<sup>208</sup> Global campaigns led by international NGOs such as Amnesty International were also influential in bringing attention to this issue and building support for abolition since the 1970s.<sup>209</sup>

201 ICCPR OP2, (n 172) at art 1. Article 2(1) allows an exception by reservation, to permit ‘the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.’

202 ICCPR, (n 171) at art 6(2).

203 ECOSOC, ‘Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty’ resolution 1984/50 (1984).

204 W A Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed., Cambridge Press, 2009) at 155–6.

205 *Ibid*, at 156–67.

206 UNGA, ‘Draft Second Optional Protocol to the International Covenant on Civil and Political Rights,’ UN Doc. A/C.3/35/L.75 (1980).

207 Schabas, (n 204) at 174.

208 R Hood and C Hoyle, ‘Abolishing the Death Penalty Worldwide: The Impact of a New Dynamic’ (2009) 38 *Crime and Justice* 1.

209 Amnesty International Secretariat, ‘Report of the Amnesty International Conference on the Death Penalty’ (London, 1978), <<https://www.amnesty.org/download/Documents/204000/act510021978en.pdf>>, accessed 30 September 2024.

However, the issue was highly contentious, reflected by a negotiation process that took ten years before the OP2 was finalized and adopted at the UNGA. It seems to have been a rather unusual process of negotiation, as the matter was not immediately referred to a designated working group or subcommittee and took many years to move forward. The main area of division was between ‘abolitionists’, States that favoured abolition of the death penalty, and ‘retentionists’, States that favoured retaining the death penalty. As Schabas’s analysis of State statements at the time demonstrates, a number of Muslim-majority States rejected the initiative as being contrary to Islamic law, and other States, such as Japan, resisted on the grounds that capital punishment was an effective crime deterrent.<sup>210</sup> Given the political divisions, several years of comments and discussion at the UNGA followed until the matter was referred in 1982, with the draft protocol, to the UN Commission on Human Rights to consider elaborating a draft second OP and report back in two years.<sup>211</sup> The Commission on Human Rights, which was generally supportive of the initiative, in 1984 then referred the matter to its expert Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>212</sup> The Sub-Commission in turn appointed one of its members, Marc Bossuyt, as a rapporteur to assess whether such a protocol should be developed. Bossuyt’s report found broad support for the abolition of the death penalty and included a revised version of the original draft protocol. It ultimately served as the basis for the final draft of the OP2 adopted in turn by the Commission on Human Rights, ECOSOC, and ultimately, the UNGA in 1989.<sup>213</sup> Indicative of how many States were still unprepared to support the abolition of the death penalty, the UNGA vote on the adoption of the OP2 had more votes against and abstentions than it did votes in favour.<sup>214</sup> However, as of 2024, as more and more States endorse abolition of the death penalty, the ICCPR OP2 has gained broader State support, with ninety-one States Parties.<sup>215</sup>

210 See, for example, State statements recorded in UN General Assembly discussions in 1982, UN Doc. A/C.3/37/SR.67 (1982).

211 UNGA, UN Doc. A/C.3/37/SR.67 (1982).

212 UN Commission on Human Rights ‘Elaboration of a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty’ UN Doc E/1984/14 (1984).

213 UNGA, ‘Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty’, UN Doc. A/RES/44/128 (1989).

214 The vote resulted in fifty-nine votes in favour, twenty-six votes against and forty-eight abstentions.

215 UNTC, ‘Status of Treaties: Chapter IV Human Rights: 12. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty’ (2024) [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-12&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en), accessed 30 September 2024.

4.2.3 Optional Protocol to the Convention against Torture (OPCAT)

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the UNGA in 2002, following fifteen years of negotiation.<sup>216</sup> It entered into force four years later, in 2006, following the minimum State ratifications.<sup>217</sup> According to Article 1, the OPCAT's objective is 'to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture ...'.<sup>218</sup> The OPCAT is unique in that it enshrines preventive efforts to combat torture, establishing the Subcommittee on Prevention of Torture (SPT), an international monitoring body linked to the UN Committee against Torture treaty body with the power to conduct visits to detention facilities within the territory of States Parties.<sup>219</sup> Given this unique feature, and its potential relevance to a similar sub-committee model for an OP VAW to CEDAW, below we look in greater detail at the nature of the negotiations and ultimate agreement on the SPT's structure and mandate. While this idea had been proposed during the original negotiations of the CAT treaty itself, led by Swedish lawyer Jean-Jacques Gautier (founder of the Association for Prevention of Torture), it had not been included in the final treaty text given strong political resistance during the Cold War era.<sup>220</sup> The effort to introduce this preventive investigatory mechanism was revisited, in the form of the Costa Rica draft Optional Protocol, submitted to the UN Commission on Human Rights in 1991.<sup>221</sup> The text of this initial draft was influenced by a series of experts from various non-governmental and academic institutions, including the Association for Prevention of Torture and Amnesty International.<sup>222</sup> An inter-sessional Working Group under the UN Commission on Human Rights was established in 1992 to develop the text. Ultimately it took

216 OPCAT, (n 173).

217 UNTC, 'Status of Treaties: Chapter IV Human Rights: 9. b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2024), <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en)>accessed 30 September 2024.

218 OPCAT (n 173) at art 1.

219 Ibid, at arts 2, 4.

220 M Nowak, M Birk and G Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed., Oxford University Press, 2019).

221 Association for the Prevention of Torture (APT), 'Letting in the light: 30 Years of Torture Prevention' (2007) at 33.

222 Ibid.

fifteen years to draft and finally adopt the OPCAT, characterized by difficult negotiations over contentious issues.<sup>223</sup>

Especially given the sensitivities around state sovereignty at play, as Nowak et al discuss, the draft OPCAT was highly controversial and faced strong political opposition from many States during its development.<sup>224</sup> This was despite the fact the OPCAT had high level support, including from several UN Special Rapporteurs, the 1993 World Conference on Human Rights, and numerous international organisations.<sup>225</sup> As one involved organisation explains, a major area of contention was the power given to only one international monitoring body to conduct monitoring visits in all States parties under the draft text.<sup>226</sup> As Murray et al discuss, in the first decade of the Working Group's debates, there were many points of contention around the scope and powers of this proposed body, as well as its make-up and processes, that led to an extended deadlock.<sup>227</sup>

The final report of the Chairperson, Elizabeth Odio Benito, of the Working Group on the OPCAT on its Tenth Session in 2002 offers valuable insights into the nature of the political negotiations and main points of debate that culminated during the drafting and finalization of the OPCAT.<sup>228</sup> These included concerns about: duplication with existing mechanisms; the nature and scope of the visiting functions of the international body; the role and power of national preventive mechanisms; and funding issues. First, there were concerns about establishing an additional monitoring body because of possible duplication with existing mechanisms, specifically the Committee Against Torture. Some States, including the United States, expressed concerns about the creation of an additional body, while others emphasised the need for a specialized body with a strong preventive mandate (including the European Union), as distinguished from the CAT's monitoring and sanctioning function.<sup>229</sup> As a group of involved NGOs noted 'with respect to the issue of duplication ... the international

223 Amnesty International, 'Preventing Torture Worldwide – The Optional Protocol to the Convention against Torture' (2003) <<https://www.amnesty.org/en/wp-content/uploads/2021/06/ior510022003en.pdf>> at 1–2, accessed 30 September 2024.

224 Nowak et al, (n 220).

225 Amnesty International, (n 223) at 1–2.

226 APT, (n 221) at 34.

227 See R Murray, E Steinerte, M Evans and A Hallo de Wolf (eds), 'Drafting OPCAT: Towards deadlock 1991–2000' in Murray et al (eds.) *The Optional Protocol to the UN Convention Against Torture* (Oxford UP, 2011) at 22–38.

228 UN Commission on Human Rights, 'Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session' UN Doc. E/CN.4/2002/78 (2002).

229 Ibid, at paras 17, 20, 30.

mechanism would not be duplicating the work of existing mechanisms and would not be concerned with issues already being considered elsewhere in the United Nations system. The new mechanism would instead bring added value to existing mechanisms on torture.<sup>230</sup> There was broad agreement, however, that should such a body be established, it should function as a subcommittee of the existing CAT, which would remain the 'parent body' of the UN's work on torture.<sup>231</sup>

Second, while there may have been some consensus on the basic structure of the new subcommittee, determining the functions of the proposed subcommittee was controversial. As Murray et al explain, '[i]t was always understood that the Optional Protocol was intended to establish an international mechanism that would have extensive and intrusive powers. The central difficulty was how to reconcile this with State sovereignty ...'.<sup>232</sup> A number of States were in favour of a body with 'very extensive visiting functions', as well as advisory functions, empowered to conduct unrestricted and unannounced visits within the territories of States Parties (as advocated by the European Union along with a number of Latin American countries).<sup>233</sup> Others advocated for a mere technical advisory role, and expressed concern about the establishment of an international body with such extensive visiting powers within State territories, raising concerns about sovereignty implications (including China, Cuba, Egypt, Syria, Japan and the United States).<sup>234</sup>

The introduction of the idea of national preventive mechanisms went some way to addressing the above concerns and breaking the ongoing negotiating deadlock. While the initial draft of the Optional Protocol (the Costa Rica draft) had referenced only a single international monitoring body to be granted extensive, unannounced visiting powers, this issue proved very controversial throughout the years of negotiations. Ultimately, this resulted in two counter drafts, put forward by Mexico (with the support of (Africa, Asia, Eastern Europe, Latin America and the Caribbean group (GRULAC)) and the European Union respectively, which introduced the concept of national monitoring bodies to work in parallel and complementary to the proposed international body. The Mexican draft viewed these as the primary mechanism, while the European Union version emphasized the primary role of the international body.<sup>235</sup> This approach was presented as the 'two pillar system' and received broad support

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230 Ibid, at para 19.

231 Ibid, at para 30.

232 Murray et al, (n 227) at 31.

233 UN Commission on Human Rights, (n 228) at para 20.

234 Ibid, at paras 21, 40.

235 Ibid, at para 11.

from a number of States and interested NGOs. One opponent to this plan was the United States, which was generally critical of the whole project.<sup>236</sup> While there were certainly differing views on what the respective powers of the international and national bodies should be, with some favouring only a technical advisory role for the international body and stronger powers for the national mechanisms, while others advocated for a very robust visiting power for the international body, there was general support for the two pillar idea in principle.<sup>237</sup>

The issue of funding the proposed international body given its broad visiting investigatory powers was raised by some States. For example, the United States and Japan expressed concern at the likely expense and advocated for the cost to be borne by States Parties and not the regular UN budget.<sup>238</sup> A number of States, such as the Netherlands and Cuba, disagreed and argued for the importance of properly resourcing the body, especially given its preventive focus, via the UN regular budget.<sup>239</sup>

In an attempt to reconcile the above debates, the Chairperson put forward a draft Optional Protocol for consideration by first the Commission on Human Rights, and then the ECOSOC, which would then be recommended for an adoption vote in the General Assembly. The draft OP included the two pillar approach, with both an international Subcommittee for the Prevention of Torture, with unrestricted visiting powers, and the mandatory establishment of national prevention mechanisms by States Parties.<sup>240</sup> In answer to the debate over funding, the Chairperson's draft included a provision mandating that the costs of the Subcommittee would be paid by the UN.<sup>241</sup> The United States, as well as other States including Libya,<sup>242</sup> Russia, Egypt, and others, rejected the draft, indicated there was insufficient consensus, and called for further discussion – with the visiting powers of the international body continuing to be a major concern.<sup>243</sup> Despite this resistance, however, the Chairperson's draft proposal was adopted by both the Commission on Human Rights in April

<sup>236</sup> Ibid, at paras 14–18.

<sup>237</sup> Ibid, at paras 20–21.

<sup>238</sup> Ibid, at para 32.

<sup>239</sup> Ibid, at paras 33–34.

<sup>240</sup> OPCAT, (n 173) at arts 2–4.

<sup>241</sup> Ibid, at art 25.

<sup>242</sup> Speaking on behalf of Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, the Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates, Yemen and Palestine, *ibid*, at para 108.

<sup>243</sup> Ibid, at paras 57, 66, 69, 108.

2002,<sup>244</sup> and ECOSOC in July 2002 by a recorded vote of thirty-five in favour to eight against, with ten abstentions.<sup>245</sup> The draft OP was then ultimately adopted by the General Assembly in December 2002, by a vote of 127 in favour to four against (including the United States) with forty-two abstentions.<sup>246</sup> The OPCAT has gained some measure of global support, although less than other major human rights treaties, and it is currently ratified by ninety-one States parties.<sup>247</sup>

## 5 Analysis of Treaty Development Processes

The case studies discussed in section 4 above explore the negotiations and political considerations behind the development and adoption of selected human rights treaties including Optional Protocols that sought to bridge a gap in global legal protections for specific groups of persons or address a specific issue of serious harm not considered in the original treaty. This section provides insights into the practical and political factors and dynamics that contributed to the successful negotiation and adoption of the instruments. Drawing on the examples discussed above, the following emerge as common factors in successful treaty elaboration, negotiation and finalisation, even in the face of long and controversial negotiation processes:

1. State leadership, where State(s) 'champion(s)' initiate and lead the initiative at the UN, especially including the role of multilateral, geographically diverse State alignment.
2. NGO engagement, advisory and lobbying impact.

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244 See ECOSOC, 'Official Records of the Economic and Social Council, 2002, Supplement No. 3 UN Doc. E/2002/23, chap. II, sect. A', referencing the UN Commission on Human Rights resolution 2002/33 (22 April 2002).

245 ECOSOC Press Release: 'Following Vote, Economic and Social Council Recommends General Assembly Adoption of Optional Protocol to Convention Against Torture' UN Doc. ECOSOC/6026 (25 July 2002).

246 UNGA, 'Resolution adopted by the General Assembly [on the report of the Third Committee (A/57/556/Add.1)] 57/199. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc A/RES/57/199 (9 January 2003).

247 UNTC 'Status of Treaties: Chapter IV Human Rights: II. 9. b Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2024) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en), accessed 30 September 2024.

3. The role of designated committees or Working Groups at the UN as official, resourced platforms for negotiation and drafting.
4. Track record of UN and international high-level support for a particular issue, including the involvement of specialized agencies and mandates.
5. The role of dissents, disagreements and lack of consensus and the need for compromise and consensus building during the negotiations.

First, the presence of State champion(s) that effectively advocate for the development of a treaty, as well as the building of strong multilateral (with geographical diversity) State support for the instrument, is crucial. For example, in the case of the CRPD, Mexico was a strong advocate and initiated the resolution and worked alongside other Latin American countries and NGOs to build broader State support to develop the treaty. The OPCAT was championed by Costa Rica, alongside powerful and multi-regional aligned States, including European Union members and a bloc of Latin American countries.

Second, broad multi-stakeholder engagement in the negotiation process, including the presence of strong advocacy and lobbying from expert international NGOs (in addition to States and UN agencies) especially when aligned as a coalition, appear essential to help drive the campaign agenda, provide expert input, and lobby States to build support. The CRPD's notably inclusive treaty making process, as well as the CRC OP1 on armed conflict and the development of the OPCAT, are clear examples of the important impact of the role of well-organised and influential NGOs.

Third, each case study above highlights the essential role of Working Groups appointed by and supported by the UN, typically the UN Commission on Human Rights and its successor, the UN Human Rights Council. Such Working Groups provided an official and resourced multistakeholder politically influential platform for broad dialogue and debate and global State participation and NGO input. Importantly, in terms of UN procedure, Working Groups established under the UN Human Rights Council (or previously, the UN Commission on Human Rights under ECOSOC) can directly recommend a resolution to the General Assembly for final adoption.

Fourth, each case study above also illustrates the importance of a track record of strong UN and international high-level support and evidence about the need for stronger legal protections on a particular issue, alongside demonstrated UN and international attention to building momentum for political support towards negotiations. For example, in the case of both substantive Optional Protocols to the CRC, there were a number of initiatives (State led, UN led, and NGO led) to build evidence, drive advocacy campaigns and dedicate UN resources towards the issues, such as the commissioning of high-level UN studies and the appointment of Special Rapporteurs. In the case

of the OPCAT, there was also strong internal support from UN agencies and mechanisms, including the work of the Special Rapporteurs on Torture and the attention to the issue at the 1993 World Conference on Human Rights. In the case of the CRC OPs, the Committee on the Rights of the Child played a key role in advocating for the need to develop the substantive OPs to address gaps in the original treaty. The ICCPR OP2 was the product of several decades of UN-led research and advocacy in favour of abolition of the death penalty.

Finally, in each of the examples discussed above, there is evidence of active practical efforts to negotiate compromises and trade-offs on key deadlocked issues, such as the counter proposals brought forward by Mexico and the European Union regarding national mechanisms in the negotiation of the OPCAT, or the ultimate compromise on the voluntary participation exception to the prohibition of children engaging in armed conflict under CRC OP1. Despite dissents, disagreements and lack of consensus sometimes, the voting patterns indicate sufficient support for the adoption of the OPs, even when there was a high number of votes against, and abstentions combined.

The above factors are useful to consider when building the political case for moving forward with an OP VAW to CEDAW. Acknowledging and reflecting on past practices provides an opportunity to craft an effective approach to developing the elaboration and negotiation process of a new OP VAW.

## 6 Conclusion: Proposal for a CEDAW Optional Protocol on VAW

This concluding section briefly outlines a proposed process for moving forward with a CEDAW Optional Protocol on VAW, drawing from the preceding treaty-making case studies and analysis. The analysis in section 5 has highlighted particular entry points and processes that have been followed in order to address the protection gaps on some key protection issues in international human rights law. In addition, currently, the elaboration and negotiation processes regarding two future UN human rights treaties, a treaty on the Human Rights of Older Persons and one on Business and Human Rights also have relevance for discussions on the elaboration of an OP VAW. The processes regarding the proposed treaties have followed a similar route through the resolutions adopted by the General Assembly<sup>248</sup> and the Human Rights Council<sup>249</sup>

<sup>248</sup> UNGA, 'Resolution adopted by the General Assembly on 21 December 2010: 65/182 Follow-up to the Second World Assembly on Ageing' UN Doc. A/RES/65/182 (2010).

<sup>249</sup> UNGA, 'Resolution adopted by the Human Rights Council 26/9: Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' UN Doc. A/HRC/RES/26/9 (2014).

respectively. Open-ended Intergovernmental Working Groups have been established, consisting of States, relevant UN agencies, NGOs and experts. Research documents and working group reports have been developed, and expert group meetings have taken place over the years, with the gaps in IHRL being identified. The mandate of such processes is ultimately to make recommendations on how to close the protection gap, and/or elaborate an international legally binding instrument on the issue.<sup>250</sup>

Drawing on the findings in sections 4 and 5, and also the relevant developments to date, the logical recommendation on a process for the elaboration of a CEDAW OP VAW is one that commences with a resolution through the Human Rights Council. First, this will require state champions as a necessary starting point. As noted above, there currently exists a supportive Core Group of States including Antigua and Barbuda, Costa Rica, Democratic Republic of Congo and Sierra Leone. For example, on 21 June 2024, Costa Rica delivered a joint statement to the Human Rights Council during the interactive dialogue session of the SRVAW.<sup>251</sup> The statement expressed concern about the pervasive problem of VAW and noted the need to take action to tackle the problem, including through the adoption of a possible new Optional Protocol to CEDAW.<sup>252</sup>

Second, NGO engagement regarding advocacy and lobbying is visible in the work of a coalition of individuals and organisations, especially under the umbrella organisation called Everywoman Treaty. This coalition has worked over the years on research, advocacy and training regarding the protection gap in international law on VAW. The Global South focus of the organisation has been valuable and there is a need to keep building and globally expanding this coalition, with clear strategic priorities and the development of position papers. In addition, the efforts of academics and other experts is also crucial in framing the issue as a human rights violation which requires the specific elaboration in IHRL. For example, as discussed above, in 1991, the Maastricht Centre for Human Rights hosted a NGO meeting of women's rights experts, with the outcome being the draft of an Optional Protocol to CEDAW. This document served as a valuable contribution to the discussions within the CEDAW Committee on the need for an Optional Protocol.

250 See for example UNGA, 'Open-ended Working Group on Ageing Fourteenth session: Draft decision submitted by the Chair of the Open-ended Working Group' UN Doc. A/AC.278/2024/L.1 (2024) at para 25(a).

251 See summary provided by Every Woman Treaty (n17). In addition to the Core Group, other signatories to the statement include: Colombia, Dominican Republic, Ecuador, El Salvador, Maldives, Montenegro, Nepal, Panama, Peru and Saudi Arabia.

252 Ibid.

Third, the role of designated expert committees or working groups at the UN as official, resourced platforms for elaboration and negotiation of an optional protocol is a necessary step. There is now widespread recognition that VAW is a human rights violation, thus the Human Rights Council is a logical forum for States' Parties to propose a resolution for the establishment of a working group to address the protection gap and consider the drafting of an CEDAW OP VAW. The reports of the working group serve as important source documents on the way forward and can ultimately result in a recommendation for a further resolution to the General Assembly on next steps towards the drafting of an optional protocol. Section 4 above highlights such developments in respect of the CRPD, OPCAT, the CRC OPs, and the ICCPR OP.

Fourth, high level support from within the UN system is also a necessary component in the ultimate development of IHRL. In the context of VAW, there is a track record of work and concern about this issue, as reflected in the reports of CEDAW, the CSW, the SRVAW and specialized UN agencies. Section 3 above conveys how much UN attention is already focused on VAW, and how strong the evidence base is regarding the protection gap, including its identification in the 1991 meeting held in Vienna regarding the need for a convention on VAW. The specialised UN agencies such as UN Women and the Office of the High Commissioner on Human Rights (OHCHR), as well as the mandate of the SRVAW, can serve as important mechanisms to support the work of a working group on the issue of VAW. The analysis in section 4 also reflects some of the work of UN agencies in hosting expert group meetings and producing research reports on the different treaties.

Fifth, the role of dissents, disagreements and lack of consensus and the need for compromise and consensus building during the elaboration and negotiation processes is visible in the analysis in section 4. For example, because of disagreements, and in order to reach consensus, the OPCAT reflects the acceptance of a counter proposal regarding the establishment of national level preventative mechanisms. As discussed above, due to opposition to the CEDAW OP, more especially the inquiry procedure, an opt-out clause was included in respect of the inquiry procedure, in order to reach consensus. It can be anticipated that there will be dissent and consequently compromises made in the process of elaborating a CEDAW OP on VAW.

In conclusion, it must be acknowledged that the CEDAW Committee faces numerous challenges including time constraints to review reports and enter into dialogues with States, resulting in delays in the effective processing of reports.<sup>253</sup> The adoption of General Recommendations, the review of country

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253 Hellum and Aasen, (n 111) at 33.

reports in pursuit of the monitoring function, and the processes under the Optional Protocol, has provided the Committee with the opportunity to expansively interpret several articles of CEDAW, including those on discrimination, stereotyping and harmful practices which can be applied to VAW. However, it appears that the work of the Committee has not effectively led to a reduction of VAW, or to the adoption of legally binding universal norms, standards and measures which may lead to more responsive solutions to addressing this widespread and pervasive human rights violation. In addition, the efficacy of the Committee is impacted by other factors, including the content of its observations and recommendations; the fact that these are not legally binding and consequently its impact on compliance; and the issue of reservations and their effect on the obligations of States.<sup>254</sup> It is argued that the Committee produces documents with varying levels of generality or specificity and that the recommendations or concluding observations are not considered legally binding by some States.<sup>255</sup>

In light of these challenges, questioning the practicality of seeking a substantive Optional Protocol on VAW is to be expected. However, many of the identified challenges are related to procedural aspects, but as noted in section 3 above, there is a protection gap in IHRL regarding VAW. Closing the protection gap is an issue of substantive development in international human rights law and must be distinguished from the procedural challenges faced by the monitoring body. A different discussion is necessary regarding the latter aspect in order to strengthen the protection role of the CEDAW Committee. Ultimately, given the existing protection gaps under international human rights law and the ongoing pervasive scale of VAW globally, we conclude that the negotiation and adoption of an Optional Protocol on VAW to the CEDAW treaty is a necessary step to meaningfully challenge ongoing impunity and lack of accountability worldwide for this deeply gendered global human rights violation.

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254 *Ibid*, at 50.

255 *Ibid*, at 51.