Barbra Schlifer Commemorative Clinic
Freedom From Violence.

September 30th, 2016

Submissions on the Draft Update of CEDAW's General Recommendation No. 19 (1992) on Gender Based Violence against Women

Background on the Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is the only Clinic of its kind in Canada. It has been providing legal representation, counseling, and interpretation in over 100 languages to women who have experienced all forms of violence since 1985. The Schlifer Clinic was established in the memory of Barbra Schlifer, an idealistic young lawyer whose life was cut short by violence on the night of her call to the bar of Ontario on April 11, 1980. The Schlifer clinic does not substitute for the state mandated legal aid services in Ontario, Canada; rather, it supplements the lack legal aid services for survivors of violence.

We assist about 4,000 women every year. We also engage in various educational initiatives, including public legal education, professional development for legal and non-legal professionals, and clinical education for law students. We work on law reform activities both within Canada and internationally, and consult broadly with all levels of government on policy or legislative initiatives that impact on women survivors of violence. The Clinic serves women from ethno-racially and socio-economically diverse backgrounds, frequently from highly marginalized communities. Our clients often experience multiple social inequalities, including poverty, homelessness, racism, and discrimination on the basis of religion, country of origin, newcomer status, mental health, and disability.

We have been part of numerous legal test cases, are represented at public policy tables and in law reform efforts related to violence against women. For example, the Clinic intervened in a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab. [1] We also actively challenged the government's baring of niqabs at the citizenship oath ceremony, at first through the UN Reporting mechanisms (UN Committee on the Elimination of Racial Discrimination, "CERD")[2], and later in the case of a woman who challenged the government under federal law.[3] Beginning in 2012, the Barbra Schlifer

[1] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.
[2] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .
[3] *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FC 156 (CanLII), <http://canlii.ca/t/ggc86>, retrieved on 2016-09-14

Clinic made an application to challenge the federal government's destruction of the gun registry on the basis that it violated the Charter rights of women who experience violence.[4] We have also intervened at the Supreme Court of Canada on the need to broaden the scope of humanitarian and compassionate grounds in Canada's immigration provisions, [5] and at the Federal Court on the need for Canada's refugee determination process to recognize the intersecting vulnerabilities of identifiable groups from so-called "safe countries of origin" who experience state neglect and harm, such as women who experience violence, gay, lesbian and trans people, and others. [6]

Despite the Schlifer Clinic's successes in individual cases, we still see a deep reluctance in the Canadian courts to engage in advanced international thinking about violence against women and the law, including CEDAW and its Optional Protocol. Whereas there is growing international consensus that the prevention of violence against women is a state responsibility and, along with torture, slavery and capital punishment, should be considered *jus cogens*,[7] even as a signatory to CEDAW, Canadian courts still make their decisions about violence against women in an archaic liberal model of protection of privacy from state interference, placing violence against women by their partners outside state responsibility.[8] However, according to the interpretations of the treaties Canada has signed to protect the rights of women, violence against women is a matter where the state can be held accountable for its failure to protect women against non-state actors from perpetrating violence within its borders.[9]

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[4] Shaun O'Brien, Nadia Lambek, Amanda Dale. 2016. "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the Charter in the Context of Marginalized Groups." 35 *National Journal of Constitutional Law* 163. Online: http://schliferclinic.com/wp-content/uploads/2016/05/Accountingfor-Deprivation.pdf. See also: Laurie Monsebraaten. 2013. "Toronto's Barbra Schlifer Clinic files evidence in Charter case to restore Canadian gun registry." *The Toronto Star*. Online: https://www.thestar.com/news/canada/2013/05/30/torontos_barbra_schlifer_clinic_files_evidence_in_charter_case_to_restore_canadian_gun_registry.html.

[5] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.

[6] *YZ v Canada (Minister of Citizenship and Immigration),* 2015 FC 892, [2015] FCJ No 880.

[7] See Hilary Charlesworth and Christine Chinkin 'The Gender of Jus Cogens' (1993) 15(1) Human Rights Quarterly 63; see especially, Gemma Connell, "Survivors Of Domestic Violence In The Gaza Strip: Living In A Lacuna Of International Law?" (Dissertation submitted for the Master of Studies Degree in International Human Rights Law University of Oxford: unpublished) 2011, pp. 6-26; and Zarizana Abdul Azizi and Janine Moussa, Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women, International Human Rights Initiative, 2014, Malaysia, at http://www.duediligenceproject.org, accessed 28/12/14; Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 35, U.N. Doc. E/CN.4/2006/61 (2006).

[8] See especially *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140 (CanLII), paras 25-27.

[9] Committee on the Elimination of Discrimination against Women
Thirty-second session, 10-28 January 2005, 2/2003, *Ms. A.T. v. Hungary*; see also CEDAW, General Comment 21, 'Equality in Marriage and Family Relations'A/49/38 thirteenth session, 1994; CEDAW General Comment 19 'Violence Against Women', A/47/38 eleventh Session, 1992; CEDAW General Recommendation 12, 'Violence Against Women', A/44/38 eighth session, 1989.

Contextual Specificity in State Protection and Available Redress

Relevant Paragraphs: 4, 7, 8

International standards for state protection and the assessment of available redress mechanisms must recognize that forms of persecution and violence experienced by women are often very different from those experienced by men. This can include persecution specifically on gender-based grounds but also generalized persecution and violence. Although gender is not an enumerated ground for establishing Convention Refugee status, the Convention has been interpreted to include claims by women who demonstrate a well-founded fear of gender-related persecution by virtue of belonging to an innate, immutable social group.[10]

The way that women can access state protection and available redresses also differs from context to context. In forced migration situations, women may not be able to effectively access protection due to discrimination, fear of further attacks, reprisals by state or government officials, or re-traumatization when disclosing sensitive material such as instances of sexual assault or GBV. If women flee their country and make a refugee claim, the evidence that women may be able to bring forward to support their claim may also be different or more difficult to provide. These differences need to be fully taken into account if women's human rights are to be respected.

In 1993, Canada became the first country to issue specific guidelines on the treatment of refugee women claimants fleeing gender-related persecution in the refugee determination system. Other countries (such as the United States and Australia) have adopted their own guidelines, or have changed legislation to recognize gender-based persecution (such as Sweden) or have advanced the issue through jurisprudence (such as the UK). However, problematic assumptions about survivors of sexual assault and gender based violence permeate all levels of Canada's immigration and refugee determination regime, including at the Immigration and Refugee Board, the newly formed Refugee Appeal Division, and subsequent judgments by the Federal Court.

These prejudices exacerbate the trauma faced by migrant and refugee women going through the system and act as a deterrent to disclose prior sexual abuse as part of their claim for refugee status, potentially leading to insurmountable adverse credibility inferences. Refugee determination should be informed by sound principles and international protection standards and not discriminatory and misogynistic presumptions about the behaviour and lived experiences of women who have experienced violence.

Credibility assessments highlight the problematic assumptions which continue to be made about women when they claim insufficient state protection in their country of origin. Credibility will generally be assessed on the basis of plausibility, relevant knowledge,

[10] See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

demeanor, and consistency of testimony.[11] All of these factors are highly relevant to gender-based claims. For example, demeanor credibility findings can be extremely problematic for victims of sexual assault, whose narrative may have significant gaps and disjuncture as the claimant may not be able to recount the most traumatic parts of her narrative.[12] The woman may also mistrust authority[13] or may be reluctant to speak about incredibly personal circumstances, especially in the early stages of the proceeding before trust in the system has been developed or in proceedings before male lawyers and decision makers.[14]

The woman may also testify in such a way that is contrary to Western concepts of plausibility and truthfulness.[15] Furthermore, also pertinent to gender-based claims are assessments of plausibility which are often highly flawed and based on problematic inferences contingent on a fixed understanding of rationality in situations of post-trauma. These inferences manifest in procedural as well as substantive problems when analyzing the refugee claim, and can be seen in negative credibility inferences, insensitive questioning, and a general inability to empathize with claimants as they recount an incredibly difficult and personal violation. [16]

This type of treatment of gender-based claims presupposes that a woman who has experienced violence should be able to think rationally about the trauma that she just suffered and act accordingly. This thinking perpetuates the myths of violence against women and does not account for the contextual specificity of available state protection and the unique lived experiences of women in the forced migration context who have experienced violence. Instead, refugee determination systems should consider how the social, cultural, religious, and economic context in which the claimant finds herself shape how the woman may be ostracized by the broader community for disclosing her experiences of violence and seeking state protection.

The CEDAW Committee has itself recognized that contextual specificity is necessary when determining adequate state protections in the context of domestic violence and child protection;[17] inadequate pre-natal care;[18] inability to access abortion;[19] employment

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[11] See James C. Hathaway and Michelle Foster. (2014) The Law of Refugee Status, 2nd Edition. Cambridge, UK: Cambridge University Press, page 139.
[12] James C. Hathaway and Michelle Foster. (2014) The Law of Refugee Status, 2nd Edition. Cambridge, UK: Cambridge University Press, page 145.
[13] *Lubana v. Canada (Minister of Citizenship and Immigration*), (2003) FCT 116.
[14] This may be particularly exacerbated by the shortened timelines as imposed by the current designated countries of origin (DCO).
[15] For example, averting their eyes or displaying particular type of body language may make the claimant appear dishonest to the eyes of a Canadian decision maker.
[16] See also *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 405 at para. 28, *Isakova v. Canada (Citizenship and Immigration)*, 2008 FC 149 at para. 26, *Yoon v. Canada (Citizenship and Immigration*), 2010 FC 1017 at para 5. *Desire v. Canada (M.C.I*), [2013] FC 167, [2013] FCJ No. 244; *Dezameau v Canada (M.C.I.),* [2010] FC 559, [2010] FCJ No. 710.
[17] *González Carreño v. Spain*, CEDAW/C/58/D/47/2012; see also *Jallow v. Bulgaria*, CEDAW/C/52/D/32/2011
[18] Alyne da Silva v. Brazil, CEDAW/C/49/D/17/2008.

discrimination and sexual violence;[20] and the intersection between domestic violence, poverty, Indigeneity, and housing rights;[21] among others. However, more focus on the intersecting nature of violence against women is necessary, particularly on how multiple points of marginalization affects women's ability to access state protections and adequately exercise available mechanisms of redress.

Best interests of children in state protection should also be more robustly protected. Recently, the Clinic had leave to intervene on a Supreme Court of Canada case that tested the scope of harms considered by the Humanitarian and Compassionate immigration provision, which is used by women to stay their deportations when their experiences of violence have not been properly heard through the refugee or immigration processes, including best interests of the child ("BIOC"). We won a wide-ranging reinterpretation of that provision, which will assist women who experience violence in making humanitarian and compassionate claims in the future.[22] Broader interpretations of BIOC factors should be explicitly included in measures of international protections for women experiencing violence.

Definition Of "Intersectionality" In Varying Contexts

Relevant paragraphs: 11, 12

Informed critiques of human rights abuses against women and the inadequacy of state protection must also problematize the definition of "intersectionality." This concept varies across contexts and should be used to obscure the specificity of women's lived experiences of violence.

Crucial to the understanding of what a human rights-based approach entails are recent human rights and anti-discrimination developments at the national and international levels. Specifically, it is widely agreed that this view of women's human rights must be "intersectional" in nature, and that States Party's international treaty obligations expressly call for an intersectional approach to women's rights.[23] Simply put, an "intersectional approach" recognizes that groups often experience distinctive forms of stereotyping or

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[19] *LC v Peru*, CEDAW/C/50/D/22/2009.
[20] *R.K.B. v. Turkey*, CEDAW/C/51/D/28/2010, see also *Karen Tayag Vertido v. The Philippines,* CEDAW/C/46/D/18/2008.
[21] *Kell v. Canada*, CEDAW/C/51/D/19/2008.
[22] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.
[23] UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13, signed 18 Dec. 1979; entered into force 3 Sept. 1981; CEDAW/C/GC/28; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002-2003) 34 Geo. Wash. Int'l L. Rev. 483; Kimberle Williams Crenshaw, Gender-Related Aspects of Race Discrimination, Background Paper submitted to the Expert Group Meeting on Gender and Racial Discrimination, U.N. Doc. EGM/GRD/2000/WP. 1 (2000); CEDAW General Comment 19 'Violence Against Women', A/47/38 eleventh Session, 1992; CEDAW. Kell v. Canada. Committee on the Elimination of Discrimination against Women, 2012.

barriers based on a combination of race and gender, gender identity, ability or status. According to the Ontario Human Rights Commission:

> In Canada, as the understanding of human rights evolves, the focus is increasingly on a contextualized approach to discrimination. A contextualized approach places less emphasis on characteristics of the individual and more on society's response to the person. It also takes into account historical disadvantage experienced by the group the person belongs to.[24]

Intersectionality, when improperly defined or understood, can invite a hierarchy of rights. For example, certain intersecting vulnerabilities are seen as more deserving of international protection, while other types of marginalization are not. This can be seen in the worldwide rise in Islamophobia, including damaging public discourses about how women should have a "right to choose" while simultaneously imposing discriminating policies robbing women of this choice, such as the bans on hijabs, niqabs, and so-called Burkinis.

In Canada, the debates about the niqab, a veil that covers the face except for the eyes, have been particularly problematic. The Clinic was one of three interveners in a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab.[25] In addition to the intervention, the also Clinic sponsored a grass roots movement for young Muslim women, "Outburst!", that engaged multimedia campaigns on the issue of Muslim women's rights. Prior to the *NS* case, the Clinic also presented deputations to the Quebec General Assembly against *Bill 94,* which requires women wearing the niqab to unveil when working in the public service.[26] The Clinic was also active in a number of ways in challenging the government's baring of niqabs at the citizenship oath ceremony, at first through the UN Reporting mechanisms (UN Committee on the Elimination of Racial Discrimination, "CERD"),[27] and later in the case of a woman who challenged the government under federal law. [28]

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[24] http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims/introduction-intersectional-approach.

[25] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.

[26] Bill n°94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, February 24, 2011. Online: http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html. See also: Quebec's Bill 60, the "Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests" is one of Canada's most visceral and infamous of such debates. Available at: http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Charter.pdf.

[27] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .

[28] *Ishaq v. Canada (Citizenship and Immigration*), 2015 FC 156.

Intersectionality is an approach to anti-discrimination and equality law that attempts to move beyond static conceptions[29] and fixed "identities" of discriminated subjects, and, based on the metaphor of a traffic intersection, delineates the 'flow' of discrimination as multi-directional, and injury as seldom attributable to a single source.[30] However, the literature on intersectionality also has ambitions far beyond an extension of the grounds of discrimination protections. There is little doubt that early exuberance about the achievements of women's rights in domestic legal orders,[31] despite their great potential, and taking Canada as a case in point, has been tempered; feminist scholars have come to acknowledge that "the courts' failure to engage deeply with the equality argument yields an impoverished and decontextualized analysis which allows the differential and prejudicial treatment to persist."[32] Importantly, this diminished law and legal discourse centres on the stripped-down bearer of legal rights, essentialized to a single axis of identity, often competing against herself for protections that may well apply to her as a complex subject, but which are constructed outside intersectional approaches to be separate and at odds with one another.[33] In this sense, even as an elaboration of the law's test or grounds of protection in anti-discrimination law, intersectionality has something to offer.

"Intersectionality" is deserving of a fuller elaboration, and cannot be blindly applied without accounting for women who experience violence and who may experience multiple forms of marginalization. At the heart of the insights and interpretations invited by GR 28

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[29] Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas, "Introduction", *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge Cavendish, 2009) at 1.

[30] Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics 1989 U. Chi. Legal F. 139 1989, at 149.

[31] Doris Anderson, "The Adoption of Section 15: Origins and Aspirations," (2006) 5 JL Equal 39.

[32] Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers Experience of Discrimination". In, Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012), 109 at 111.

[33] A classic example from the international human rights context is 'Sandra Lovelace v. Canada [1977-1981] and the right to enjoy First Nation (Indian) culture under art. 27 of the International Civil and Political Covenant) 024/1977'. Online at http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/40aef4fd0f005d2d41256c02003.
Sandra Lovelace presents herself as neither subsumed by nor divorced from culture, but in critical negotiation with it. Lovelace was shut out of her right to 'access to culture in community with others' (ICCPR article 27) as an Indigenous person, but on the basis of matrimonial property rights which divested women who married outside of the community differently than it did men who did the same. Lovelace argued her case under ICCPR on the basis of discrimination as an Indigenous person and as a woman experiencing 'sex discrimination' (articles 1 and 2). The state's defense rested on its contention that the patriarchy of her community determined her loss of entitlement, and that, in order to respect their autonomy (group rights), the state could not protect her rights as a woman (individual right). Lovelace countered this by submitting evidence that traditional Indigenous culture was not patriarchal, and that this was a colonial distortion of it. Lovelace thus contested both the colonial state's definition of (her) culture and the Indigenous male leadership's collusion with it. Importantly, this complexity of identity, or revelation of symmetry between the patriarchal state and 'cultural' leadership was not recognized in the holding by the HRC, although Lovelace did win the case on the basis of article 27 (not articles 1 and 2).

on intersectionality are the answers to the persistent question: 'does CEDAW require women to choose between cultural belonging and gender protection?' If the interpretations of "intersectionality "do their work, the answer should be that both are *desiderata*.

Moving Away from "Culture" and "Culture-Based" Reasoning when Condemning State Practices

Relevant Paragraphs: 13, 15

All references to culture should be removed when condemning state practices. Discourses which rely on culture as the explanatory phenomenon for violence against women exacerbate problematic myths about violence in specific communities. [34] Placed against the backdrop of notions of 'reasonable accommodation',[35] 'failed multiculturalism' and constrained pluralism in Western liberal democracies, which have evoked notions of women's equality rights as partial justifications for a roll-back of cultural rights,[36] the question of this manipulation of a stagment formulation of "culture" takes on urgency for human rights practitioners.

Culture is a notoriously 'spacious' concept in human rights, as Patrick Thornberry has noted, and "finding a discrete substance for the right' to culture is a 'complex undertaking."[37] It is, in any case, not the primary interest here. It is, however, worth noting at a minimum, as Thornberry has, that bundled into the notion are a number of specific and discernable rights, which might well be named concretely, rather than tackled as an amorphous right.[38] Culture as an umbrella concept is particularly unhelpful in the context of reservations to CEDAW, where, frequently, from the states' side, "culture is claimed as a justification for practices unlikely to be consistent with human rights."[39] This appears to be the position of the Committee. Its sole evocation of culture is as a prohibited ground when used as an excuse for the denial of the rights of women. Women's negotiations at the intersection of these rights and affiliations are complex and painful. Culture in this sense must be examined more critically to "understand the link between culture and relations of

[34] Geraldine A. del Prado, 'The United Nations Protection of the Rights of Women: How Well Has the Organization Fulfilled its Responsibility'(1995) William & Mary Journal of Women in the Law 51, 70.
[35] Recent legislative attempts in Quebec to ban the *niqab* in the name of gender equality have prompted feminist opposition of which the author is a part: see John Bonner, 'Coalition Launches Day of Action', May 20 2010, Rabble.ca, http://www.rabble.ca/blogs/bloggers/johnbon/2010/05/coalition-launches-day-action-against-quebec%E2%80%99s-proposed-bill-94, accessed 10 March.
[36] See Volpp L, 'Feminism versus Multiculturalism' (2001) 5 Columbia Law Review 1181.See also Amanda Dale,
'Women In Sudan', *Studio Two*, television program, Television Ontario, broadcast April 18, 2006 on the hypocrisy of international invasion as a strategy to protect women's rights in Afghanistan and Sudan (Darfur).
[37] Thornberry P, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5:2 *Human Rights Law Review* 1, page 4.
[38] *Ibid,* page 5.
[39] *Ibid,* page 6.

power and domination" [40] that so frequently pit a woman as a bearer of individual rights against the claimed requirements of culture, particularly in cases of violence.

CEDAW's conception of rights is firmly individual. However, "cultural rights are an integral part of human rights, which are universal, indivisible and interdependent."[41] Often, when speaking of culture, CEDAW is exclusively evoking "stereotyped roles [that] perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision;"[42] practices that are, to be sure, real and discriminatory, but about which some perspective and context are required to avoid descent into racist stereotypes. Such commentary has "reinforced the notion that metropolitan centres of the West contain no tradition or culture harmful to women, and that the violence which does exist is idiosyncratic and individualized rather than culturally condoned."[43] European forms of violent discrimination against women seldom receive the same international attention,[44] and the preoccupation with the lurid and with "alien and bizarre" [45] forms of gender persecution[46] among human rights advocates echoes colonial arrogance, and CEDAW can ill-afford to underscore it.

CEDAW is concerned with discrimination, lifting women out of legal obscurity as adjuncts to husbands and family into personhood and thus individual rights protection. Therefore, in referring to culture, it is by necessity referring to those aspects of culture that rankle or violate its mandated protections. Importantly, this is often in the context of responding to states' unilateral evocations of culture as a defence to non-compliance. While this is surely different from protecting an individual woman's right to cultural expression, or her right to be protected as a member of a group, it is not unrelated. Both the state and CEDAW are invoking a vision of culture that is at once partial and totalizing. Bearing in mind the UNESCO concept of culture that is not "a series of isolated manifestations or hermetic compartments,"[47] but "a living process, historical, dynamic and evolving, with a past, a present and a future,"[48] we can support CEDAW's vision of culture as changeable, against states' evocations of homogeneity. But, culture is also "the set of distinctive spiritual,

[40] Yakin Erturk, Report of the Special Rapporteur on Violence Against Women, its causes and consequences' (18 May 2009) A/HRC/11/6, para 18.
[41] CESCR GC 21(n 107) article 5.
[42] CEDAW GC 19 (n 23) para 11.
[43] Holtmaat R, and Naber J, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Intersentia 2011) page 77.
[44] Holtmaat and Naber make the point that article 5 of CEDAW could be evoked to call attention to the widespread practice of cosmetic surgeries on women in 'developed' nations, for example. Holtmaat R, and Naber J, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Intersentia 2011).
[45] Coomaraswamy R, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002-2003) 34 *George Washington International Law Review* 483, page 486. See also Volpp, who, however, does not specifically refer to CEDAW or the international context: See Volpp L, 'Feminism versus Multiculturalism' (2001) 5 *Columbia Law Review* 1181.
[46] See Volpp L, 'Feminism versus Multiculturalism' (2001) 5 *Columbia Law Review* 1181, page 1208.
[47] CESCR GC 21(n 107) para 12.
[48] CESCR GC 21(n 107) para 11.

material, intellectual and emotional features of a society or group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs,"[49] which CEDAW neglects in its singular focus on discrimination expressed *through* or *as* culture. Change*able* does not necessarily equate with 'must be changed'; and where it does, culture's relation to its partner spacious concept 'self-determination' is relevant.

Ultimately, we see the question arise as to the "extent to which the Convention's discourse of equality can be married with the discourse of cultural diversity."[50] The answer to this, in part, is determined by the treaty's normative framework, which, in its more heavy-handed moments, conflates its central insights into the inner workings of patriarchy with the operations of culture *per se*.

In the Canadian context, we have historically seen "cultural practices" used as a reason for oppressive legislation against Indigenous women and families. Recently, in the context of polygamy and forced marriages, we saw legislative changes made that support the ideas that violence against women is a "cultural" issue that happens only in certain communities. However, using such "culture-based" reasoning obscures the complexities of women's experiences of violence, risking the exclusion of women who experience multiple forms of marginalization from state protection. In the context of violence against women, we have observed that this obscure use of the notion of "culture" leaps from supporting equitable protection from violence and instead creates a hierarchical model of who needs more protection over others. Unfortunately, in the context of a one dominant culture and multiple minority communities, these notions places most marginalized women at the bottom of protection grid.

Focusing on "culture" actually endangers the very women that the intended policy changes are supposed to serve. Perpetuating emotionally charged stories without critical discussion has real policy implications and results in disastrous misapprehensions and dangerous conflations. These problematic conflations are evident in the linkages of refugees and forced migrants to security threats and terrorism, the ongoing Burkini debate in Europe over the right to dictate women's choices of dress, and Canada's own treatment of forced marriage.

For example, in 2014, the former Canadian government criminalized forced marriage in its *Bill S-7: Zero Tolerance for Barbaric Cultural Practices Act*. The government focused on the need to "protect women" from the practices of polygamy and forced marriage in immigrant and recently arrived communities. Forced marriage continues to be criminalized by the current Liberal government. Re-circulating these problematic discourses of "cultural" behavior oversimplifies important complexities in women's experiences of violence. Importantly, victims and survivors of gender based violence are actively discouraged from

[49] CESCR GC 21(n 107) para 12.
[50] Thornberry P, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5:2 *Human Rights Law Review* 1, page 17.

coming forward if disclosing that they have experienced forced marriage or trafficking will mean criminal sanctions or deportation for their own family.

The Clinic is committed to providing services to women in culturally and linguistically respectful ways and acknowledges women's experiences and social context in service delivery. The Clinic also suggests that, when condemning violent and discriminatory practices against women, the recommendation should focus on the particular social location, contextual specificity, and lived experiences of the affected women. Broadstroke "culture-based" assertions obscure the nuances and intersecting vulnerabilities of women experiencing multiple sources of marginalization, such as including poverty, homelessness, racism, and discrimination on the basis of Indigeneity, religion, country of origin, newcomer status, mental health, and disability.

Experiences of Women in Context of State-Induced Displacement

Relevant Paragraphs: 4, 12, 15

State induced displacement also exacerbates women's inability to seek adequate modes of state protection and redress. Unfortunately, in the context of state-induced displacement, protection mechanism implemented by the state have repeatedly instigated violence in women's lives, such as when their bodies are used as shields in cases of exchanges for protection during mass population movements, in instances of state-induced marriages, or forced pregnancies. These phenomena in state-induced displacement create a persuasive case for protection that is unique to women's experiences. The unique vulnerability of women to SGBV in contexts of prolonged conflict, particularly at the hands of the state must be recognized when monitoring human rights abuses against women, including the structural inequality experienced by women in contexts of ongoing conflict.

Particularly in instances of prolonged conflict, State Parties must be held accountable for the human rights violations against women in situations of state-induced displacement. This includes disseminating appropriate information to women about available redresses, strengthening access to social supports, including international measures of protection, and the creation of appropriate mechanisms of reparations upon the end of the conflict aimed specifically at rectifying the violence suffered by women in contexts of state-induced displacement and situations of forced migration.

Employment Equity in the Framework of Gender-Based Violence

Relevant Paragraphs: 10, 15

A robust international commitment to combat violence against women must also include a direct commitment to pay equity.

For example, the gender wage gap in Canada is a persistent concern. Women in Canada earn an average of 66.7 cents for every dollar earned by men.[51] A 2015 UN Human Rights report raised concerns about "the persisting inequalities between women and men" in Canada, including the "high level of the pay gap" and its disproportionate effect on low-income women, visible minority women, and indigenous women.[52] Out of 34 countries in the OECD, Canada had the 7th higher gender wage gap in 2014.[53]

The gender wage gap also exacerbates the effects of violence against women. Inequitable earnings perpetuate the unequal power hierarchy between abusers and their victims, and women are often forced to remain in dangerous situations because of very real financial pressures. Overwhelmingly, women's financial worth is negatively impacted by separation and divorce, particularly in instances of domestic violence and when children are involved.[54] As a result, in addition to rectifying the gender wage gap targeted employment supports for women experiencing domestic violence are also necessary.[55] Additionally, the gendered wage gap reveals and communicates to society more generally the relative valuing of the genders. Undervaluing women, exemplifying and maintaining women's subordinate positions in such a material way, contributes to an overall vulnerability to violence and disrespect.

State Accountability Mechanisms and Violence Against Women

Relevant Paragraphs: 15

Careful monitoring of state accountability mechanisms must include domestic and international collaboration on combating violence against women, particularly women who experience multiple forms of marginalization.

Indigenous legal traditions should also be integrated into any meaningful state accountability mechanisms to address the structural factors which exacerbate the ongoing and persistent violence against women particularly from indigenous communities. Similar approaches can then be adapted to other cultural groups, such as new immigrant communities.

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[51] Statistics Canada. 2011. "Average female and male earnings." Online: http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2020102

[52] United Nations Office of the High Commission for Human Rights. 2015."Concluding observations on the sixth periodic report of Canada." Online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCAN%2FCO%2F6&Lang=en

[53] OECD.2014."Gender Wage Gap." Online: http://www.oecd.org/gender/data/genderwagegap.htm

[54] See for example, Anna Aizer. 2010. "The Gender Wage Gap and Domestic Violence," *American Economic Review* 100(4). .

[55] See for example Government of Ontario.2016. "Gender Wage Gap Strategy Consultation." Online: https://www.ontario.ca/page/gender-wage-gap-strategy-consultation

We also note with concern that policies regarding violence against women are becoming increasingly neutral on the one hand and punitive on the other. In Canada, this is seen in the discourse and use of terminology such as 'domestic assault' whereby victims of violence – women – are rendered invisible. This is also reflected in the penalization women experience when, in trying to create safety in their lives, they are required by intersecting and contradictory programs and eligibility requirements to, in effect, give up their homes, their communities and sometimes their children.

Importing international gender-based analyses into domestic policy and strengthening international cooperation on improving state protection mechanisms and making existing safeguards available would allow for a critical examination of the differences in women's and men's lives, and identify the potential impact of policies and programs in relation to these differences. Such commitments to gender-based analyses also examine the intersection of gender and sex with other identity factors such as income, race, age, and religion, among other factors.

Sexual Violence in Employment Contexts and State Protection

Relevant Paragraphs: 8, 15

Sexual violence and its impacts in the employment context highlight yet another dimension of inadequate state protection. In situations which exacerbate unequal power dynamics, such as the employment contexts, women continue to be deterred from reporting sexual assault and adequate state protection mechanisms are often not available. This is particularly true for women from marginalized communities or who are experiencing multiple forms of violence, particularly women are dependent on the employment relationship to continue, such as live-in-caregivers or temporary foreign workers who are tied to one employer and whose immigration status is contingent on maintaining this relationship.[56] Women who are without status and who participate in the informal economy are at an even higher risk because they are afraid to access the limited state protection mechanisms available for fear of deportation. Sexual violence against women who are Indigenous is also alarmingly high.

Recommendation should include the impacts of violence in the employment context when States report on sexual violence, and explicit measures should be implemented to protect women from sexual harassment and other forms of violence of coercion in the workplace. There should also be robust monitoring of the employment conditions of domestic workers, live-in-caregivers, temporary foreign workers, and women without status to recognize their unique vulnerability to violence in their homes and at work.

[56] CUPE. 2015. "Fact sheet: Temporary Foreign Workers Program and the Live-in Caregiver Program," Online: http://cupe.ca/fact-sheet-temporary-foreign-workers-program-and-live-caregiver-program.

Conclusions

Strengthening international commitments to CEDAW must include a commitment to international standards of state protection towards durable solutions, implementation of these standards into domestic legislation, and a normative shift towards recognizing the multiple intersecting forms of violence experienced by women.

We also wish to express that a siloed approach to separating domestic and sexual violence has been shown to have limitations, both in the domestic as well as international arena. We wish to acknowledge that violence against women is experienced in a continuum and across the lifespan, and in different life situations, often by individual women who may not see the benefit of strict policy and strategy separation. It is important that the new approach should acknowledge the social context of the violence but does not create a priority structure among the victims of violence. Attributing violence to notions such as "culture" and "religion," without contextualizing it in ongoing patriarchy places the responsibility over the experience of violence on survivors, rather than shifting it to the state.

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