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## Not Hers Alone: Victim Standing Before the CEDAW Committee After *M.W. v. Denmark*

**ABSTRACT.** *M.W. v. Denmark* constitutes the first case in which the Committee on the Elimination of Discrimination against Women (CEDAW Committee) granted victim standing to an individual who did not identify as a woman to allege a violation of their rights under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Note argues that the CEDAW Committee should embrace and expand on its admissibility decision in *M.W. v. Denmark* by allowing any individual to allege CEDAW violations without restriction on the basis of sex, gender, or gender identity.

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## INTRODUCTION

In 2012, an Austrian national, M.W., submitted an individual communication to the Committee on the Elimination of Discrimination against Women (CEDAW Committee), alleging that Denmark had violated the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>1</sup> At first glance, M.W.'s case appears to be a straightforward domestic-violence and parental-rights dispute.<sup>2</sup> Earlier, in 2007, M.W. had attempted to file a police report against her abusive husband, S., but Danish authorities believed her husband's account and arrested M.W. instead.<sup>3</sup> Then, in 2012, after M.W. and S. had separated, S. and an accomplice kidnapped O.W., the young son of M.W. and S.<sup>4</sup> Rather than reunite M.W. with her son, Danish authorities granted S. custody over O.W.<sup>5</sup>

The twist? Instead of asserting that only her rights under CEDAW had been violated, M.W. alleged that O.W.'s rights had been violated too.<sup>6</sup> Denmark argued that this was impossible: “[O]nly women whose rights under the Convention have been violated, and not boys such as O.W., can claim to be victims.”<sup>7</sup> But the CEDAW Committee rejected Denmark's argument, finding that O.W. had victim standing.<sup>8</sup> For the first time in its history, the CEDAW Committee heard allegations of discrimination against a victim who did not identify as a woman.<sup>9</sup>

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1. United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
  2. Comm. on the Elimination of Discrimination against Women, *M.W. v. Denmark*, U.N. Doc. CEDAW/C/59/D/46/2012 (Oct. 20, 2014) (on file with author) [hereinafter *M.W. v. Denmark* (admissibility)]. This decision has been adopted by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and is in the process of being made publicly available.
  3. *Id.* ¶ 2.1.
  4. *Id.* ¶ 2.3.
  5. *Id.*
  6. *Id.* ¶¶ 1.1, 3.1-2.
  7. *Id.* ¶ 4.8.
  8. *Id.* ¶ 8.3.
  9. When I refer to “woman” or “women” in this Note, I am referring to the concept of women as included in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This explanation does not eliminate all ambiguity, as CEDAW does not contain a definition of the word “women.” See Elise Meyer, Comment, *Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination against Women*, 16 CHI. J. INT’L L. 553, 556 (2016); see also Darren Rosenblum, *Unsex CEDAW*, or

Only seven years old at the time the CEDAW Committee issued the admissibility decision in *M.W. v. Denmark*, O.W. was probably too young to appreciate the unprecedented access he had gained to this unique and influential human rights mechanism. CEDAW is the only United Nations (UN) treaty solely dedicated to eliminating discrimination against women, and the CEDAW Committee is the treaty body that monitors State compliance with its terms. One function of the CEDAW Committee is to receive “communications” directly from individuals who, like M.W. and O.W., allege that a specific State, in a specific instance, violated their rights under CEDAW.<sup>10</sup> If an individual does not have victim standing, however, the CEDAW Committee will find that individual’s communication inadmissible and will not issue a decision on the merits.<sup>11</sup> An individual lacking standing thus has no opportunity to present the substance of their claims before the CEDAW Committee, let alone to secure the authoritative finding that their rights have been violated, any recommendation as to how the violation should be remedied, or the international publicity that the Committee’s decisions provide. Nor does an individual lacking standing have the opportunity to shape the interpretation and evolution of CEDAW, as individuals whose communications are admitted can do.<sup>12</sup> Whether individuals who do not identify as women can gain standing to allege CEDAW violations and, as a result, what

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*What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 100, 123-24 (2011) (observing that CEDAW does not define “women” and suggesting that CEDAW’s drafters did not critically interrogate the concept). I use the word “women” as included in CEDAW without weighing in on debates over the scope of this category because I recognize that no matter how inclusively the term “women” is interpreted, it will not embrace all people who may face sex- and gender-based discrimination, see Rosenblum, *supra*, at 107, and thus will not eliminate the need for a non-gender-specific interpretation of victim standing. The aim of this Note is not to pinpoint who counts as a woman under CEDAW, but rather to argue that there is not and should not be a blanket bar on victim standing before the CEDAW Committee based on sex, gender, or gender identity.

10. See *Committee on the Elimination of Discrimination against Women: Introduction*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. (2021), <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx> [<https://perma.cc/5AUR-EVL4>]; see also Hanna Beate Schöpp-Schilling, *The Nature and Mandate of the Committee*, in *THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN* 248, 256 (Hanna Beate Schöpp-Schilling & Cees Flinterman eds., 2007) (discussing the CEDAW Committee’s capacity to hear “communications from individual women”).
11. See Schöpp-Schilling, *supra* note 10, at 256.
12. See Meghan Campbell, *Women’s Rights and the Convention on the Elimination of All Forms of Discrimination against Women: Unlocking the Potential of the Optional Protocol*, 34 NORDIC J. HUM. RTS. 247, 247-48 (2016); see also INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, *EL PROTOCOLO FACULTATIVO DE LA CONVENCIÓN SOBRE LA ELIMINACIÓN DE TODAS LAS FORMAS DE DISCRIMINACIÓN CONTRA LA MUJER: ANÁLISIS DE LOS CASOS ANTE EL COMITÉ DE LA CEDAW* 76-79 (2009) (encouraging increased use of the individual-communications procedure in CEDAW’s Optional Protocol to accomplish a wide range of advocacy objectives).

claims the CEDAW Committee hears, are thus crucial questions not only for the provision of relief to individual victims of sex- and gender-based discrimination, but also for the ongoing development of CEDAW itself.

This Note argues that the admissibility decision in *M.W. v. Denmark* paves the way for a more inclusive interpretation of victim standing before the CEDAW Committee – one that includes any individual alleging CEDAW violations, without restriction on the basis of sex, gender, or gender identity. To date, the CEDAW Committee has largely failed to address sex- and gender-based discrimination against male, nonbinary, and transgender persons<sup>13</sup> due to CEDAW’s almost exclusive focus on women’s rights.<sup>14</sup> With the exception of CEDAW Article 5(a),<sup>15</sup> an anti-gender-stereotyping<sup>16</sup> provision whose potential to broaden CEDAW’s mandate is considered in Section III.B, men are not envisioned as potential victims of sex- and gender-based discrimination under CEDAW.<sup>17</sup> Meanwhile, it took the CEDAW Committee approximately two decades to begin to address violations of the rights of intersex and transgender women,<sup>18</sup> even though they have been advocating before the Committee since

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13. I am aware of overlap among these categories as well as with the category “women.” I have settled on the phrasing “male, nonbinary, and transgender persons” in the interests of inclusivity (since I wish to indicate the full range of people whose standing would be ensured were the CEDAW Committee to adopt the interpretation advanced here) and brevity (since I will need to repeat this phrase throughout the Note).
  14. Tom Dreyfus, *The ‘Half-Invention’ of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles*, 37 AUSTL. FEMINIST L.J. 33, 42 (2012).
  15. CEDAW, *supra* note 1, art. 5(a) (“States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women . . .”).
  16. A report on gender stereotyping and human rights commissioned by the United Nations (UN) Office of the High Commissioner for Human Rights defines a gender stereotype as “a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women,” and gender stereotyping as “the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.” *Gender Stereotyping as a Human Rights Violation*, OFF. OF THE HIGH COMM’R FOR HUM. RTS. 8-9 (Oct. 2013), <https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx> [<https://perma.cc/9EM2-C8VG>].
  17. See Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism*, in *THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY* 197, 204-05 (Margaret Davies & Vanessa E. Munro eds., 2013); Rosenblum, *supra* note 9, at 178, 181-83.
  18. See, e.g., Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, ¶¶ 57(e), 68(f), U.N. Doc. CEDAW/C/GC/37 (Mar. 13, 2018); Comm. on

the early 1990s,<sup>19</sup> and the status of nonbinary individuals and transgender men in relation to CEDAW and the CEDAW Committee remains contested.<sup>20</sup> Inclusive victim standing to allege CEDAW violations would resolve these status questions and ensure that all individuals—regardless of sex, gender, or gender identity—have access to a forum where their claims of sex- and gender-based discrimination can be heard.

This Note is in conversation with over a decade of scholarship and activism promoting an expansive reinterpretation of CEDAW that would incorporate broader concepts of gender and victimhood.<sup>21</sup> Many scholars and activists have argued, for example, that the CEDAW Committee could simultaneously advance women’s rights and LGBTQ+ rights by expanding its understanding of CEDAW’s mandate to include discrimination on the basis of sexual orientation and gender identity in addition to sex and gender, as well as discrimination on these bases against individuals who do not identify as women.<sup>22</sup> Concretely, some scholars have recommended that the CEDAW Committee adopt a more

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the Elimination of Discrimination against Women, *General Recommendation No. 36 (2017) on the Right of Girls and Women to Education*, ¶¶ 45, 46(i), 66, U.N. Doc. CEDAW/C/GC/36 (Nov. 27, 2017) [hereinafter *General Recommendation No. 36*]; Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 33 on Women’s Access to Justice*, ¶¶ 8, 49, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015).

19. See Ali Miller, *Fighting Over the Figure of Gender*, 31 PACE L. REV. 837, 861-62 (2011); see also RYAN R. THORESON, TRANSNATIONAL LGBT ACTIVISM: WORKING FOR SEXUAL RIGHTS WORLDWIDE 28-60 (2014) (discussing the historical context of the International Gay and Lesbian Human Rights Commission (IGLHRC) and similar NGOs with a focus on international LGBTQ+ advocacy); Elisabeth Greif, *Upward Translations—The Role of NGOs in Promoting LGBTI\*-Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 4 PEACE HUM. RTS. GOVERNANCE 9, 23 (2020) (discussing the role of OutRight Action International and its predecessor organization, the IGLHRC, which was founded in 1990, in the recognition of LGBTQ+ rights under CEDAW and stating that “[f]rom early on the CEDAW-Committee was a prime target for intervention and OutRight routinely addressed the Committee”).
20. See Rosenblum, *supra* note 9, at 175.
21. For a synthesis of these critiques, see *infra* Part II.
22. See Berta Esperanza Hernández-Truyol, *Unsex CEDAW? No! Super-Sex It!*, 20 COLUM. J. GENDER & L. 195, 218 (2011); Greif, *supra* note 19, at 16-20; Rikki Holtmaat, *The CEDAW: A Holistic Approach to Women’s Equality and Freedom*, in WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW 95, 115 (Anne Hellum & Henriette Sinding eds., 2013); Rikki Holtmaat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination against Women?*, 33 NORDIC J. HUM. RTS. 319 (2015); Rosenblum, *supra* note 9, at 141; Tan Beng Hui, *Exploring the Potential of the UN Treaty Body System in Addressing Sexuality Rights*, INT’L WOMEN’S RTS. ACTION WATCH ASIA PAC. 7-17 (2007), [https://www.iwraw-ap.org/wp-content/uploads/2018/08/OPS\\_11-Exploring-the-Potential-of-the-UN-TB-System-in-Addressing-Sexuality-Rights.pdf](https://www.iwraw-ap.org/wp-content/uploads/2018/08/OPS_11-Exploring-the-Potential-of-the-UN-TB-System-in-Addressing-Sexuality-Rights.pdf) [<https://perma.cc/7K3H-AFN4>].

inclusive interpretation of CEDAW in its General Recommendations, which advise States Parties on how the Committee will interpret CEDAW, and in its Concluding Observations, which suggest improvements in the overall human rights practices of specific States Parties.<sup>23</sup> A General Recommendation, however, does not appear to be forthcoming,<sup>24</sup> and Concluding Observations are inherently limited to providing targeted analyses of an individual State's compliance with CEDAW.<sup>25</sup> Another avenue, yet unexplored, is the individual communications procedure. This Note supplements existing proposals by knocking down a procedural barrier to victims' and activists' use of the individual communications procedure: the traditional restriction of victim standing before the CEDAW Committee to women.

Part I of this Note reviews the CEDAW Committee's admissibility decisions on communications from male victims alleging CEDAW violations leading up to *M.W. v. Denmark* to highlight the significance of the Committee's decision to grant victim standing to a male child in that case. Part II then makes the normative case for why *M.W. v. Denmark's* interpretation of victim standing should be embraced and expanded. Section II.A argues that inclusive victim standing will further transformative gender equality, Section II.B notes the potential for the CEDAW Committee to play a more central part within the UN human rights regime through inclusive victim standing, and Section II.C addresses potential fears about what inclusive victim standing could mean for women's rights activists. Part III makes the legal case for inclusive victim standing by justifying the conclusion reached in *M.W. v. Denmark* and highlighting opportunities for the CEDAW Committee to expand on the case's reasoning. Section III.A argues that Article 2 of the Optional Protocol to CEDAW (CEDAW's Optional Protocol),<sup>26</sup>

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23. REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 137-38, 177-79 (2011); Holtmaat & Post, *supra* note 22, at 325; OFF. OF THE HIGH COMM'R FOR HUM. RTS., *supra* note 16, at 61-68.

24. Instead, the CEDAW Committee is currently focused on the elaboration of a General Recommendation on the rights of Indigenous women and girls. See Comm. on the Elimination of Discrimination against Women, *Day General Discussion on "The Rights of Indigenous Women and Girls"*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DGDRightsIndigenousWomenAndGirls.aspx> [https://perma.cc/9KGS-M4ZG] ("The purpose of the day of general discussion is to stimulate debate and seek inputs for the elaboration by the Committee of a General Recommendation on the rights of [I]ndigenous women and girls.").

25. See Andrew Byrnes, *The Committee on the Elimination of Discrimination against Women*, in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW, *supra* note 22, at 27, 36.

26. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women art. 2, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter CEDAW's Optional Proto-

the procedural provision allowing victims to submit individual communications to the CEDAW Committee, does not restrict victim standing before the CEDAW Committee on the basis of sex, gender, or gender identity. Section III.B then explains that CEDAW Article 5(a), the anti-gender-stereotyping provision mentioned above, can serve as a substantive foothold for individuals who do not identify as women to gain victim standing to allege violations not only of Article 5(a), but of any right protected by CEDAW. Finally, Part IV illustrates how an inclusive interpretation of victim standing could further transformative gender equality, as well as remedy individual wrongs, in three areas: parental leave, school bathrooms, and gender recognition.

### I. MALE VICTIMS IN THE CEDAW COMMITTEE'S JURISPRUDENCE

*M.W. v. Denmark* may have been the first case in which the CEDAW Committee granted victim standing to an individual who did not identify as a woman, but it was hardly the first time an individual who did not identify as a woman petitioned the CEDAW Committee. This Part reviews, in chronological order, all individual communications decided by the CEDAW Committee as of this Note that alleged that someone other than, or in addition to, a woman was a victim of a CEDAW violation.<sup>27</sup> In doing so, it shows that the CEDAW Committee initially avoided addressing whether individuals other than women have victim standing by declaring their communications inadmissible for other reasons, before ultimately deciding in *M.W. v. Denmark* that victim standing under CEDAW is not necessarily restricted to women. The CEDAW Committee thus shed its apparent reluctance to engage with the question of gender in relation to victim standing to make a strong, straightforward case for victim standing for children of any sex, gender, or gender identity who are harmed by the sex- and gender-based discrimination experienced by their mothers.

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col] (“Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.”).

27. I found these communications by reviewing every CEDAW Committee decision available on the website of the UN Office of the High Commissioner for Human Rights. The dates of these decisions ranged from January 2005 to July 2021. Comm. on the Elimination of Discrimination against Women, *Jurisprudence*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://juris.ohchr.org/en/search/results?Bodies=3&sortOrder=Date> [https://perma.cc/33B8-W6KV]; Comm. on the Elimination of Discrimination against Women, *Sessions for CEDAW—Convention on the Elimination of All Forms of Discrimination against Women*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CEDAW](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CEDAW) [https://perma.cc/2VWD-VTB4].

The CEDAW Committee considered a communication from a person who did not identify as a woman for the first time in 2012.<sup>28</sup> In that case, *J.S. v. United Kingdom*, a man alleged that he was a victim of CEDAW violations because the British Nationality Act of 1948 prevented his mother from passing her citizenship status on to him, while permitting fathers in similar circumstances to do so.<sup>29</sup> The United Kingdom challenged J.S.'s victim standing under Article 2 of CEDAW's Optional Protocol, arguing that "it is clear from the wording of [A]rticle 2 of the Optional Protocol, read together with rule 68 of the Committee's rules of procedure that only women whose rights under the Convention had been violated can be seen as victims," and that "the author—a man—is therefore not a victim of a violation of the Convention."<sup>30</sup> Although arguments for restricting victim standing before the CEDAW Committee to women are neither as strong nor as straightforward as the United Kingdom suggested in this case,<sup>31</sup> J.S. did not respond to the United Kingdom's challenge to his standing and the CEDAW Committee did not address it. The CEDAW Committee ruled the case inadmissible due to nonexhaustion of domestic remedies under Article 4(1) of CEDAW's Optional Protocol without considering any other challenges to the communication's admissibility.<sup>32</sup>

During the following year, in *M.S. v. Denmark*, the CEDAW Committee considered a communication brought by a woman on behalf of herself, her husband, her son, and her daughter, alleging that Denmark was about to violate their rights under CEDAW by deporting them to Pakistan.<sup>33</sup> Denmark challenged the standing of the woman's husband and son:

Article 2 of the Optional Protocol states that communications may be submitted by or on behalf of individuals or groups of individuals who are under the jurisdiction of a State [P]arty and who claim to be victims of a violation by that State [P]arty of a right set forth in the Convention. The Convention concerns discrimination against women. While the term "women" is not clearly defined in the Convention, it is clear that

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28. Comm. on the Elimination of Discrimination against Women, *J.S. v. United Kingdom of Great Britain and Northern Ireland*, ¶¶ 1.1, 2.1, U.N. Doc. CEDAW/C/53/D/38/2012 (Nov. 27, 2012) [hereinafter *J.S. v. United Kingdom*].

29. *Id.*

30. *Id.* ¶ 4.9.

31. See *infra* Section III.A.

32. *J.S. v. United Kingdom*, *supra* note 28, ¶¶ 6.3-7(a).

33. Comm. on the Elimination of Discrimination against Women, *M.S. v. Denmark*, ¶¶ 1.1, 2.6, U.N. Doc. CEDAW/C/55/D/40/2012 (Aug. 15, 2013).

adult males and boys cannot be regarded as women and, as a consequence, cannot be considered victims of a violation of the Convention.<sup>34</sup>

M.S. responded by asserting not only that her family had a right to asylum on the basis of the sexual harassment she had experienced in Pakistan, but also that “adult males and boys can be victims of gender inequality and discrimination too.”<sup>35</sup> The CEDAW Committee decided that M.S.’s communication was inadmissible because she had failed to substantiate her claim that she would be exposed to gender-based violence if she were deported to Pakistan, and again did not consider other challenges to the admissibility of the communication.<sup>36</sup>

In another 2013 case, *M.K.D.A.-A. v. Denmark*, a woman brought a claim on behalf of herself and her son, alleging that they were victims of CEDAW violations because Denmark had failed to protect them from her husband during a custody battle.<sup>37</sup> Denmark challenged the son’s victim standing, combining the reasoning previously seen in *J.S. v. United Kingdom* and *M.S. v. Denmark*:

First, [the State Party] submits that the present communication is inadmissible in relation to the author’s son because he cannot claim to be a victim under the Convention. It recalls the text of [A]rticle 2 of the Optional Protocol to the Convention and states that no provision of the Convention suggests that it is intended to protect males from discrimination. Furthermore, it is clear from the wording of [A]rticle 2 of the Optional Protocol, read together with rule 68 of the Committee’s rules of procedure, that only women whose rights under the Convention have been violated can be considered victims. The Convention concerns only discrimination against women, yet the term “women” is not clearly defined in the Convention. For biological reasons, males cannot be regarded as women and, consequently, in accordance with [A]rticle 2 of the Optional Protocol, the author’s son—a boy—cannot be a victim under the Convention.<sup>38</sup>

M.K.D.A.-A. responded by arguing that “her son is a small child and, under [A]rticle 5 of the Convention, has the status of victim within the meaning of the

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34. *Id.* ¶ 4.14.

35. *Id.* ¶ 5.4.

36. *Id.* ¶¶ 7.8-8(a).

37. Comm. on the Elimination of Discrimination against Women, *M.K.D.A.-A. v. Denmark*, ¶¶ 1.1, 3, U.N. Doc. CEDAW/C/56/D/44/2012 (Oct. 28, 2013) [hereinafter *M.K.D.A.-A. v. Denmark*].

38. *Id.* ¶ 4.11.

Convention along with her.”<sup>39</sup> The CEDAW Committee agreed with Denmark that M.K.D.A.-A. and her son lacked victim standing under Article 2 of CEDAW’s Optional Protocol, but based its decision exclusively on the fact that their claim had already been resolved in M.K.D.A.-A.’s favor in domestic court.<sup>40</sup> The CEDAW Committee did not determine whether, up until the favorable domestic court judgment, M.K.D.A.-A. and her son had been victims within the meaning of CEDAW and CEDAW’s Optional Protocol.<sup>41</sup>

In 2014, in the admissibility decision for *M.W. v. Denmark*, the CEDAW Committee at last weighed in on the question of whether victim standing under CEDAW is necessarily restricted to women. In this case, M.W. submitted a communication on behalf of herself and her son, O.W., alleging that Denmark had violated their rights under CEDAW by failing to act with due diligence in response to M.W.’s husband’s acts of domestic violence and kidnapping.<sup>42</sup> Denmark challenged O.W.’s victim standing, arguing, as before:

With regard to O. W.’s victim status, the State [P]arty recalls [A]rticle 2 of the Optional Protocol, read together with rule 68 of the Committee’s rules of procedure, and considers that only women whose rights under the Convention have been violated, and not boys such as O. W., can claim to be victims.<sup>43</sup>

Although M.W. does not appear to have responded to this argument, the CEDAW Committee did:

The Committee takes note that the State [P]arty challenges the admissibility of the communication with regard to O. W., maintaining that, because he is a boy, he is not a victim within the meaning of [A]rticle 2 of the Optional Protocol. In this regard, the Committee notes that [A]rticle 2 provides that communications may be submitted by or on behalf of individuals, under the jurisdiction of a State [P]arty, claiming to be victims of a violation of any of the rights set forth in the Convention by that State [P]arty. The Committee also notes that [A]rticle 16 (1) (d) of the Convention refers to “children” generally, which means that it applies equally

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39. *Id.* ¶ 5.1. This appears to be in reference to Article 5(b), which concerns the upbringing, development, and interests of children, and not Article 5(a), which concerns gender stereotyping. CEDAW, *supra* note 1, art. 5.

40. *M.K.D.A.-A. v. Denmark*, *supra* note 37, ¶¶ 6.5-7(a).

41. *Id.* ¶¶ 6.5-6.6.

42. *M.W. v. Denmark* (admissibility), *supra* note 2, ¶¶ 1.1, 3.1-3.2; *see also supra* notes 2-5 and accompanying text (describing the facts of the case).

43. *M.W. v. Denmark* (admissibility), *supra* note 2, ¶ 4.8.

to boys and girls. The Committee takes the view that the present communication may be brought on behalf of the author's child, with regard to whom the author should have equal rights and responsibilities as a parent under [A]rticle 16 (1) (d).<sup>44</sup>

The CEDAW Committee thus determined that Article 2 of CEDAW's Optional Protocol does not include an implicit, blanket bar on victim standing for individuals who do not identify as women. The CEDAW Committee declared M.W.'s communication admissible,<sup>45</sup> and, in 2016, went on to decide that Denmark had violated the rights of both M.W. and O.W. under CEDAW Article 2 (State obligations), read in conjunction with Articles 1 (definition of discrimination), 5(a) (anti-gender stereotyping), and 5(b) (shared parental responsibilities), as well as Article 16(1)(d) (parental rights and responsibilities; interests of children).<sup>46</sup> Since this breakthrough decision, no States have challenged the victim standing of male children – or of any male family members, for that matter – before the CEDAW Committee.<sup>47</sup>

Crucially, O.W.'s victim standing does not appear to have been conditioned on his having petitioned the CEDAW Committee jointly with his mother. The CEDAW Committee's deliberations from an earlier case, *G.D. & S.F. v. France*, indicate that O.W. would have been granted victim standing under CEDAW Article 16(1)(d) even if he had applied alone. In that case, G.D. and S.F. alleged that France had violated CEDAW Article 16(1)(g) by preventing their mothers from transmitting their family names to them as children and by preventing them as adults from changing their family names from their fathers' to their

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44. *Id.* ¶ 8.3 (citations omitted).

45. *Id.* ¶ 9(a).

46. Comm. on the Elimination of Discrimination against Women, *M.W. v. Denmark*, ¶ 6, U.N. Doc. CEDAW/C/63/D/46/2012 (Mar. 21, 2016) (adoption of views).

47. See, e.g., Comm. on the Elimination of Discrimination against Women, *L.O. et al. v. Switzerland*, U.N. Doc. CEDAW/C/76/D/124/2018 (Aug. 26, 2020) (illustrating no challenge to standing on the basis of a male child's sex or gender); Comm. on the Elimination of Discrimination against Women, *K.I.A. v. Denmark*, U.N. Doc. CEDAW/C/74/D/82/2015 (Dec. 17, 2019) (same); Comm. on the Elimination of Discrimination against Women, *J.I. v. Finland*, U.N. Doc. CEDAW/C/69/D/103/2016 (Apr. 25, 2018) (same); Comm. on the Elimination of Discrimination against Women, *S.F.A. v. Denmark*, U.N. Doc. CEDAW/C/69/D/85/2015 (Apr. 25, 2018) (same); Comm. on the Elimination of Discrimination against Women, *N.Q. v. United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CEDAW/C/60/D/62/2013 (Apr. 14, 2015) (on file with author) (showing no challenge to standing on the basis of a husband's sex or gender).

mothers'.<sup>48</sup> The CEDAW Committee declared this communication inadmissible,<sup>49</sup> reasoning that the only intended beneficiaries of CEDAW Article 16(1)(g) are "married women, women living in de facto union and mothers," and concluding that "the authors as children cannot claim rights pertaining to the use or the transmission of family names and do not have any personal rights under [A]rticle 16, paragraph 1 (g)."<sup>50</sup>

The deliberations of the CEDAW Committee in resolving this case, however, reveal that G.D. and S.F. might have had standing, even applying without their mothers, if they had alleged a violation of CEDAW Article 16(1)(d). CEDAW Article 16(1)(d) expressly refers to the interests of children, and thus children's rights are protected under this provision.<sup>51</sup> Additionally, during these deliberations, a member of the CEDAW Committee, Ruth Halperin-Kaddari, anticipated the outcome of *M.W. v. Denmark* when she expressed her understanding that granting standing to children as indirect victims<sup>52</sup> of CEDAW violations

48. Comm. on the Elimination of Discrimination against Women, *G.D. & S.F. v. France*, ¶¶ 1, 3-1, U.N. Doc. CEDAW/C/44/D/12/2007 (Aug. 4, 2009).

49. *Id.* ¶ 11.13.

50. *Id.* ¶ 11.10. For critiques of this decision, see *id.* ¶¶ 12.9-10 (dissenting opinion); Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 MELBOURNE J. INT'L L. 54, 81 (2013), which describes the decision as "another example of a communication where the . . . conservative approaches of Committee members to the application of the rights to non-discrimination and equality have affected women's ability to claim their rights"; and Andrew C. Byrnes, *The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on Their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform* 10 (U.N.S.W. L. Rsch. Paper, Paper No. 2010-17, 2010), Byrnes, Andrew C., *The Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Elimination of Discrimination Against Women: Reflections on Their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform* (April 24, 2010). UNSW Law Research Paper No. 2010-17, <https://ssrn.com/abstract=1595490> [<https://perma.cc/F25J-SM2S>], which explains that the case "might . . . be seen as reflecting a certain timidity or at least considerable caution on the part of the Committee in its interpretation of the Optional Protocol and the Convention."

51. Comm. on the Elimination of Discrimination against Women, *Summary Record of the 819th Meeting*, ¶¶ 38, 63, U.N. Doc. CEDAW/C/SR.819 (Feb. 20, 2008) [hereinafter *Summary Record of the 819th Meeting*].

52. Under international human rights law, direct victims are "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power;" G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ¶ 1 (Nov. 29, 1985), while indirect victims are "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization," *id.* ¶ 2.

would enable men to submit individual communications through CEDAW's Optional Protocol based on their status as sons.<sup>53</sup> This discussion was set aside at the time, to be resolved when a specific case arose.<sup>54</sup>

Although *M.W. v. Denmark* clarified that individuals who do not identify as women can, based on their status as children of women who have experienced sex- or gender-based discrimination, gain standing to allege certain violations of CEDAW, the CEDAW Committee has not yet addressed whether individuals who do not identify as women have victim standing as adults who have *directly* experienced sex- or gender-based discrimination. By establishing that victim standing before the CEDAW Committee is not always and necessarily restricted to women, *M.W. v. Denmark* simply clears the path for the CEDAW Committee to extend victim standing to male, nonbinary, and transgender individuals who allege that they have personally experienced sex- and gender-based discrimination.

This Note argues, in Part III, that the CEDAW Committee could and should take this path, embracing and expanding on its reasoning in *M.W. v. Denmark* by adopting an inclusive interpretation of Article 2 of CEDAW's Optional Protocol and Article 5(a) of CEDAW that would allow individuals, regardless of family relationship and without restrictions based on sex, gender, or gender identity, to gain standing to allege violations of their rights under CEDAW. Before explaining why this inclusive interpretation of victim standing under CEDAW is possible, Part II explains why it is desirable.

## II. BENEFITS OF BROADENING CEDAW'S MANDATE

This Part explains why the CEDAW Committee's decision to grant victim standing to a male child in *M.W. v. Denmark* is a positive development, beyond its opening the door for victims of sex- and gender-based discrimination who do not identify as women to allege CEDAW violations. Section II.A argues that inclusive victim standing will further transformative equality, one of three core State obligations under CEDAW.<sup>55</sup> This obligation consists of "address[ing]

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53. *Summary Record of the 819th Meeting*, *supra* note 51, ¶¶ 53, 59.

54. *Id.* ¶ 61.

55. See Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, ¶¶ 7, 10, U.N. Doc. A/59/38 (Part I), annex I (Mar. 18, 2004) [hereinafter *General Recommendation No. 25*]. The other core obligations under CEDAW are formal equality (also known as antidiscrimination) and substantive equality. These three approaches to equality complement, rather than compete with, each other. See

prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.”<sup>56</sup> Section II.B then observes that inclusive victim standing could enable CEDAW to play a more central part within the UN human rights regime, as an exclusive focus on women’s rights has historically marginalized the treaty and currently limits its contributions to evolving conversations around gender and LGBTQ+ rights. Finally, Section II.C responds to potential counterarguments that inclusive victim standing would divert attention and funding away from women as well as diminish the credibility and respectability of women’s rights activists.

### A. *Furthering Transformative Equality*

Inclusive victim standing to allege violations of CEDAW would further transformative equality by helping the CEDAW Committee address prevailing gender relations. The relational nature of gender roles means that rules governing women will not change unless those governing men do as well,<sup>57</sup> as the CEDAW Committee itself has argued when discussing transformative equality:

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.<sup>58</sup>

CEDAW’s preamble likewise notes that States are “[a]ware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”<sup>59</sup> The CEDAW Committee would be better positioned to consider the “lives of women and men . . . in a contextual way,” to “change . . . the traditional role of men as well as the role of women in society and in the family,” and to transform the way that

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RIKKI HOLTMAAT & JONNEKE NABER, WOMEN’S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE 27 (2011); Holtmaat, *supra* note 22, at 110; Cusack & Pusey, *supra* note 50, at 63.

56. *General Recommendation No. 25*, *supra* note 55, ¶ 7.

57. See Miller, *supra* note 19, at 838; Otto, *supra* note 17, at 205; Rosenblum, *supra* note 9, at 191.

58. *General Recommendation No. 25*, *supra* note 55, ¶ 10.

59. CEDAW, *supra* note 1, pmb1.

“opportunities, institutions and systems . . . [are] grounded in historically determined male paradigms of power and life patterns” if it did not limit its analysis to women’s experiences.<sup>60</sup>

Scholars have argued that the CEDAW Committee’s almost exclusive focus on women prevents it from developing this relational gender analysis. Consider, for example, the arguments advanced by Simone Cusack and Lisa Pusey:

At the same time as CEDAW’s asymmetry concentrates attention on women, it conceals how the social and cultural construction of men/masculinities contributes to the stratification and subordination of women. The exclusive framing of CEDAW has informed the gender analysis of communications with the effect that the Committee has regularly left this potential cause of discrimination unexamined. Yet, it is difficult to see how CEDAW’s object and purpose can be achieved unless the social and cultural construction of men/masculinities – a key factor contributing to gender inequality – is also explored. As the Committee moves to consolidate and strengthen its jurisprudence over the coming decades, it is important that it takes steps to ensure that its gender analysis is inclusive of men/masculinities. In fact, CEDAW requires it to take such steps.<sup>61</sup>

While bringing men within its mandate will enable the CEDAW Committee to gain a clearer picture of gender as a system of relations, bringing all transgender and nonbinary individuals within its mandate will specifically push the CEDAW Committee to promote reduced reliance on the gender binary as a means of ordering society and thus further transformative equality. As Darren Rosenblum explains:

Women face subjugation by the power relationship that establishes men as superior but more significantly from the division of humanity into two groups, one of which necessarily sits on top. Focusing only on “improving women’s lives” serves to reinforce the very binary that must be dismantled to achieve change. . . . “Women’s lives” cannot be improved until being a “woman” or a “man,” or for that matter one of the many other sexes that exist, means less in terms of social, legal and political standing.<sup>62</sup>

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60. *Id.*; see Cusack & Pusey, *supra* note 50, at 87.

61. Cusack & Pusey, *supra* note 50, at 88. Cusack and Pusey also argued that increased attention to intersectional discrimination would improve the CEDAW Committee’s gender analysis. *Id.* at 90–91.

62. Rosenblum, *supra* note 9, at 104.

Almost exclusively focusing on women as victims of sex- and gender-based discrimination, as CEDAW and the work of the CEDAW Committee has to date,<sup>63</sup> is insufficient to achieve transformative equality.<sup>64</sup> The CEDAW Committee must generate an analysis of gender as truly relational, which would be more readily achievable if the Committee were to bring all individuals within its mandate and recognize that anyone can experience sex- and gender-based discrimination.<sup>65</sup>

Inclusive victim standing to allege violations of CEDAW would also help the CEDAW Committee combat gender stereotyping, not only by contributing to the relational analysis of sex and gender discussed above, but also by departing from the stereotypical narrative of victimhood and vulnerability that has been embedded in CEDAW since its drafting in the 1970s. CEDAW reproduces colonial<sup>66</sup> tropes of womanhood that cast women as innocent victims of male aggression in need of protection from the State.<sup>67</sup> CEDAW Article 6, for example, provides that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>68</sup> The CEDAW Committee perpetuated this narrative of women’s vulnerability and victimhood as recently as 2020 in its General Recommendation No. 38,<sup>69</sup> which interprets CEDAW Article 6 in the context of global

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63. See, e.g., Dreyfus, *supra* note 14, at 40-43; Loveday Hodson, *Women’s Rights and the Periphery: CEDAW’s Optional Protocol*, 25 EUR. J. INT’L L. 561, 562 (2014); Miller, *supra* note 19, at 859-60; Rosenblum, *supra* note 9, at 158, 166.
64. See Simone Cusack, *The CEDAW as a Legal Framework for Discourses on Gender Stereotyping*, in WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW, *supra* note 22, at 124, 145; Miller, *supra* note 19, at 861.
65. See EKATERINA YAHYAOU KRIVENKO, GENDER AND HUMAN RIGHTS: EXPANDING CONCEPTS 140-41 (2020).
66. See Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318, 342 (Anne Orford ed., 2009); Rosenblum, *supra* note 9, at 169-70. For more on colonialism’s relationship to victimhood and womanhood, see Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 17-21 (2002).
67. See, e.g., Dreyfus, *supra* note 14, at 41; Dianne Otto, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105, 106, 117-20 (Doris Buss & Ambreena Manji eds., 2005); Otto, *supra* note 17, at 202-03; Rosenblum, *supra* note 9, at 166-73.
68. CEDAW, *supra* note 1, art. 6; see also Dreyfus, *supra* note 14, at 41 (“By defining ‘prostitution’ as the ‘exploitation’ of women CEDAW perpetuates the view that women who sell sex are always victims of patriarchy.” (footnotes omitted)).
69. Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration*, ¶ 4, U.N. Doc.

migration, by maintaining a narrow focus on women and girls as the victims of trafficking and by conflating trafficking with sex trafficking.<sup>70</sup> In addition to obscuring other trafficking victims and other forms of trafficking, the framing adopted by CEDAW and the CEDAW Committee limits women's rights by refusing to acknowledge women's agency in sex work and the complexity of their decisionmaking processes concerning migration.<sup>71</sup> Similarly, CEDAW Article 11(3) limits women's right to work by permitting States to retain "[p]rotective legislation" for women's employment, requiring only that such legislation "be reviewed periodically in the light of scientific and technological knowledge and . . . revised, repealed or extended as necessary."<sup>72</sup> Protectionism has also appeared in CEDAW's framing of reproductive health,<sup>73</sup> State reservations to CEDAW,<sup>74</sup> and more.<sup>75</sup> By casting women as victims, CEDAW and the CEDAW Committee may inadvertently fuel States' efforts to limit women's rights under the guise of women's protection.<sup>76</sup>

At the same time, this trope of women's victimhood fails to reflect the reality of women's engagement in sex- and gender-based discrimination against others.<sup>77</sup> This makes it more difficult for the CEDAW Committee to acknowledge and address the centrality of women's participation in harmful practices such as

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CEDAW/C/GC/38 (Nov. 20, 2020) ("States [P]arties must pursue all appropriate means to eradicate trafficking and exploitation of prostitution . . .").

70. See Noemi Magugliani, *Trafficked Adult Men, Gendered Constructions of Vulnerability, and Access to Protection* 62-64, 215-16 (June 7, 2021) (Doctoral thesis, National University of Ireland Galway), <https://aran.library.nuigalway.ie/bitstream/handle/10379/16804/2021maguglianiiphd.pdf> [<https://perma.cc/Z9PQ-KT84>].
71. See Felipe Jaramillo Ruiz & Lina-María Céspedes-Báez, *El Feminismo de la Gobernanza en la CEDAW: La Cuestión Sobre el Trabajo Sexual y la Prostitución*, 59 *CADERNOS PAGU* 1, 15-17, 19-21 (2020); Otto, *supra* note 67, at 118-19; Otto, *supra* note 66, at 341-42; Rosenblum, *supra* note 9, at 172.
72. CEDAW, *supra* note 1, art. 11, ¶ 3.
73. See *id.* art. 11, ¶¶ 1(f), 2(d).
74. See Comm. on the Elimination of Discrimination against Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/SP/2006/2 (Apr. 10, 2006). A reservation is a "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2, ¶ 1(d), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].
75. See, e.g., Otto, *supra* note 67, at 117-20; Otto, *supra* note 17, at 202; Otto, *supra* note 66, at 341-43.
76. See Moya Lloyd, *(Women's) Human Rights: Paradoxes and Possibilities*, 33 *REV. INT'L STUD.* 91, 101, 103 (2007).
77. See Miller, *supra* note 19, at 859-60; Rosenblum, *supra* note 9, at 172-73.

female genital cutting,<sup>78</sup> the incidence of sexual violence by female perpetrators,<sup>79</sup> and the role women play in perpetuating structural inequalities against other women along lines of race, class, disability, and more.<sup>80</sup> Insisting that CEDAW exclusively protects women threatens to entrench further the stereotypical narrative of women's victimhood to the neglect of women's agency.<sup>81</sup> Inclusive victim standing would enable the CEDAW Committee to develop an understanding of sex- and gender-based discrimination that does not perpetuate wrongful gender stereotypes.

### B. Centering CEDAW in the UN

Inclusive victim standing would also enable the CEDAW Committee to play a more central part at the UN. An exclusive focus on women victims has historically marginalized CEDAW and the CEDAW Committee within the UN human rights regime.<sup>82</sup> CEDAW was adopted in 1979 as part of an effort to center

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78. See Rosenblum, *supra* note 9, at 172.

79. See Lara Stemple, *Human Rights, Sex, and Gender: Limits in Theory and Practice*, 31 PACE L. REV. 824, 833 (2011).

80. See Lloyd, *supra* note 76, at 100-01. Although the CEDAW Committee at times has demonstrated a fluid and expansive approach to intersectional discrimination, it would need to embrace a transformative equality framework more fully to address intersectional discrimination consistently. See Meghan Campbell, *CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination*, 11 REV. DIREITO GV 479, 481 (2015); see also Athena Nguyen, *Through the Eyes of Women? The Jurisprudence of the CEDAW Committee*, OUTSKIRTS (May 2014), <https://www.outskirts.arts.uwa.edu.au/volumes/volume-30/athena-nguyen> [<https://perma.cc/H46N-B3VR>] (“[I]t appears that the [CEDAW] Committee has found it challenging to disentangle the causes and effects of intersectional discrimination . . .”).

81. See Dreyfus, *supra* note 14, at 41.

82. See Andrew C. Byrnes, *The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination against Women*, 14 YALE J. INT’L L. 1, 3 (1989); Laura A. Donner, *Gender Bias in Drafting International Discrimination Conventions: The 1979 Women’s Convention Compared with the 1965 Racial Convention*, 24 CAL. W. INT’L L.J. 241, 254 (1994); Cees Flinterman, Rikki Holtmaat & Fleur van Leeuwen, *Het CEDAW-Comité en de Bovordering en Bescherming van Mensenrechten van Vrouwen*, 2013 TIJDSCHRIFT VOOR GENDERSTUDIES 1, 3-4; Hodson, *supra* note 63, at 578; Otto, *supra* note 67, at 107; Rosenblum, *supra* note 9, at 141, 147; Anu Saksena, *CEDAW: Mandate for Substantive Equality*, 14 INDIAN J. GENDER STUD. 481, 495 (2007); Suzanne A. Spears, *El Comité de las Naciones Unidas para la Eliminación de Todas las Formas de Discriminación contra la Mujer*, in CONVENCIÓN CEDAW Y PROTOCOLO FACULTATIVO: CONVENCIÓN SOBRE LA ELIMINACIÓN DE TODAS LAS FORMAS DE DISCRIMINACIÓN CONTRA LA MUJER 97, 101 (Instituto Interamericano de Derechos Humanos ed., 2d ed. 2004). The woman-dominated membership of the CEDAW Committee, which mirrors the treaty body’s exclusive focus on women victims, might also contribute to the marginalization of its work within the UN system. See SUSANNE ZWINGEL, *TRANSLATING INTERNATIONAL WOMEN’S RIGHTS: THE CEDAW CONVENTION IN CONTEXT* 79 (2016).

women as subjects of human rights.<sup>83</sup> However, soon after the treaty entered into force, feminist activists observed that women's rights remained on the margins of international human rights law.<sup>84</sup> They began a campaign to elevate women's rights to human rights, which increased attention to the issue of violence against women,<sup>85</sup> but impeded long-term, transformative gender-equality efforts by further entrenching narratives of victimhood.<sup>86</sup> Dianne Otto describes the struggle to center women's rights as ongoing and cyclical:

Unless feminist strategies can be re-scripted to disrupt the circular re-staging of women's marginalization, the most that will be achieved will be some uncertain improvements in the conditions of that marginalization, which will always be vulnerable to reversal because the underpinnings of women's inequality will not have been disrupted. It could be argued that such incremental improvements will multiply and constitute eventually a significant challenge to the persistence of male privilege because the 'gendered human rights facts' will have changed, and this may be right. However, feminists have been engaged in this project for at least the past century and the progress to date is not encouraging.<sup>87</sup>

Inclusive victim standing has the potential to interrupt this pattern of marginalization by expanding the CEDAW Committee's mandate and enriching its relational gender analysis.<sup>88</sup>

Inclusive victim standing would also enable the CEDAW Committee to contribute more fully to the UN human rights regime's evolving conversations about

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83. See Otto, *supra* note 6767, at 116-20.

84. *Id.* at 120.

85. See Felice D. Gaer, *And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights*, in *THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE* 3, 22-24 (Carol Elizabeth Lockwood, Daniel Barstow Magraw, Margaret Faith Spring & S.I. Strong eds., 1998).

86. See Alice M. Miller, *Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 *HEALTH & HUM. RTS.* 16, 18-19 (2004); Otto, *supra* note 67, at 120; Otto, *supra* note 17, at 202; Otto, *supra* note 66, at 343; Rosenblum, *supra* note 9, at 105-07.

87. Otto, *supra* note 66, at 351-52; see also Otto, *supra* note 67, at 124 ("[U]nless feminist inclusion strategies find ways to disconcert the continual restaging of women's marginalisation, the most that can be achieved is some improvement in the conditions of that marginalisation.").

88. See Otto, *supra* note 67, at 116-20; Otto, *supra* note 17, at 210-11.

gender and LGBTQ+ rights. Although the UN has faced criticism for its incomplete and inconsistent approach to gender,<sup>89</sup> this approach is beginning to improve, as evidenced by a report released earlier this year by the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, which promotes a comprehensive, inclusive, and intersectional understanding of gender.<sup>90</sup> Other UN mechanisms, including other treaty bodies,<sup>91</sup> have surpassed the CEDAW Committee in their attention to and analysis of discrimination on the basis of sexual orientation and gender identity as they too contribute to the development of a broader concept of gender.<sup>92</sup> The CEDAW Committee's unique expertise from decades of experience monitoring State compliance with obligations to eliminate sex- and gender-based discrimination could make it a vital contributor to these evolving conversations about gender and LGBTQ+ rights. The likelihood of the CEDAW Committee being a full and active participant in these developments would be much

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89. See Glob. Health Just. P'ship, *Why the UN Needs a Broader Concept of Gender*, YALE L. SCH. (June 2016), <https://law.yale.edu/ghjp/projects/gender-sexuality-and-rights/why-un-needs-broader-concept-gender> [<https://perma.cc/7P3P-B5DS>].
90. See Victor Madrigal-Borloz (Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *The Law of Inclusion*, ¶¶ 3-11, U.N. Doc. A/HRC/47/27 (June 2, 2021).
91. In addition to the CEDAW Committee, the United Nations has nine other bodies that monitor the implementation of international human rights treaties: the Committee on the Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Human Rights Committee (which monitors the International Covenant on Civil and Political Rights); the Committee against Torture; the Committee on the Rights of the Child; the Committee on Migrant Workers; the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.
92. For a comprehensive introduction to international and regional human rights mechanisms' approaches to discrimination on the basis of sexual orientation and gender identity, see KERRY O'HALLORAN, *SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS: COMMON LAW PERSPECTIVES* 52-53 (2020), which dedicates only three sentences in a fifty-eight-page chapter to CEDAW, one of which highlights the importance of CEDAW Article 5. See also KRIVENKO, *supra* note 65, at 76 (describing CEDAW as "quite timid" in its approach to intersex and transgender issues); Dianne Otto, *Queering Gender [Identity] in International Law*, 33 *NORDIC J. HUM. RTS.* 299, 309 (2015) (noting that, "[c]ompared with the reluctance of the CEDAW Committee," other UN human rights mechanisms have been more proactive in addressing transgender and nonbinary rights); Kim Vance, Nick J. Mulé, Maryam Khan & Cameron McKenzie, *The Rise of SOGI: Human Rights for LGBT People at the United Nations*, in *ENVISIONING GLOBAL LGBT HUMAN RIGHTS: (NEO)COLONIALISM, NEOLIBERALISM, RESISTANCE AND HOPE* 223, 240-41 (Nancy Nicol, Adrian Jjuuko, Richard Lusimbo, Nick J. Mulé, Susan Ursel, Amar Wahab & Phyllis Waugh eds., 2018) (stating that while transgender and nonbinary rights have "gained gradual recognition at the UN," the CEDAW Committee "needs to acknowledge and address diverse gender forms within itself . . . in which gender identity and expression intersect with traditional notions of gender" (internal citation omitted)).

greater, however, if it did not consider its own mandate to be limited to women's rights. Inclusive victim standing presents an opportunity for the CEDAW Committee to emerge as a leader on cutting-edge issues of gender equality at the UN.

### C. Counterarguments

I argue that inclusive victim standing will not only benefit individual victims but also further CEDAW's larger goal of transformative equality and enable CEDAW to play a more central role in the UN in part because I anticipate that there will be strong resistance to the idea of inclusive victim standing before the CEDAW Committee. The CEDAW Committee is already facing campaigns by trans-exclusionary radical feminists to restrict its mandate not only to discrimination against women, but even more narrowly to discrimination against cisgender women.<sup>93</sup> The reluctance of some women's rights defenders to expand CEDAW's mandate has a history that originates in the decades-long fight to incorporate women's rights into the UN human rights regime in the late twentieth century.<sup>94</sup> These activists fear that making CEDAW more inclusive will result in the diversion of attention and funding away from women.<sup>95</sup> Some feminists also fear that shifting the focus away from the category of "women" will tarnish the credibility or "respectability" of women's rights activists.<sup>96</sup>

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93. A recent example of such advocacy is the *Declaration on Women's Sex-Based Rights*, WOMEN'S HUM. RTS. CAMPAIGN (2019), [https://www.womensdeclaration.com/documents/78/DECLARATION\\_-\\_FINAL\\_VERSION\\_AMENDED.pdf](https://www.womensdeclaration.com/documents/78/DECLARATION_-_FINAL_VERSION_AMENDED.pdf) [<https://perma.cc/J6DB-79EM>] (stating its topic as "the re-affirmation of women's sex-based rights . . . and the elimination of all forms of discrimination against women and girls that result from the replacement of the category of sex with that of 'gender identity'").

94. See Miller, *supra* note 19, at 858-60; Otto, *supra* note 66, at 337-39; Rosenblum, *supra* note 9, at 118-27.

95. See Miller, *supra* note 19, at 854; Otto, *supra* note 66, at 350; Otto, *supra* note 92, at 306.

96. See Otto, *supra* note 17, at 203-06. The fear of losing credibility and "respectability" reflects these activists' internalization of the logic of conservative attacks on sexual rights as well as on the sexuality of the activists themselves. These attacks, according to Cynthia Rothschild, not only "try to divide women from one another" but

also try to divide the indissoluble texture of human rights itself—to assert that rights are not universal, interrelated, and indivisible; that some rights are left behind like lost luggage as one crosses certain national borders; that some rights are "clean" and "respectable" and "important" while others are dirty or despicable or unmentionable; that some rights are essential, while others are a luxury.

CYNTHIA ROTHSCHILD, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING 180 (Scott Long & Susana T. Frieds eds., rev. ed. 2005).

These fears are not baseless: human rights work at the UN suffers both from limited resources and from homophobic and transphobic attacks.<sup>97</sup> These fears are, nevertheless, unconvincing as normative arguments against inclusive standing. First, CEDAW contains an obligation of intersectional analysis that requires the CEDAW Committee never to lose sight of the full and complex array of women's experiences, and this obligation will remain in place even if the CEDAW Committee directs a portion of its attention and funding to processing communications from male, nonbinary, and transgender individuals.<sup>98</sup> It is also possible that the CEDAW Committee will be able to use an expanded mandate as leverage for acquiring additional funding.<sup>99</sup> Second, women's rights defenders will continue to face homophobic and transphobic attacks whether or not they have personal affiliations or alliances with LGBTQ+ communities because conservative actors have already conflated these identities in their efforts to disrupt advances in gender equality at the UN.<sup>100</sup> Because these attacks are inevitable, they are not a compelling reason to limit victim standing before the CEDAW Committee. These attacks also signal that conservative actors are aware of what some women's rights advocates have yet to realize: gender is a common interest and concern of feminist and LGBTQ+ human rights advocates.<sup>101</sup> Thus, inclusive victim standing not only does not pose a threat to the resources and "respectability" of women's rights, but it could even serve as both leverage for additional funding and a basis for strengthening intersectional, coalitional work involving gender and sexuality.

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97. See Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. 26-28 (June 2012), <https://www.refworld.org/pdfid/4fe8291a2.pdf> [<https://perma.cc/9AU3-HB2T>]; Naureen Shameem, *Rights at Risk—Time for Action: Observatory on the Universality of Rights Trends Report*, ASS'N FOR WOMEN'S RTS. IN DEV. 55, 58 (2021), [https://www.awid.org/sites/default/files/atomsv/files/rightsatrisk\\_timeforaction\\_ourstrendsreport2021\\_o.pdf](https://www.awid.org/sites/default/files/atomsv/files/rightsatrisk_timeforaction_ourstrendsreport2021_o.pdf) [<https://perma.cc/TZ5A-2RZS>].
98. See Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).
99. See Rosenblum, *supra* note 9, at 141. For an example of how expanded mandates can serve as the basis for proposals for additional funding for UN mechanisms, including UN treaty bodies, see Advisory Comm. on Admin. & Budgetary Questions, *First Report on the Proposed Programme Budget for the Biennium 2016-2017*, ¶ 14, U.N. Doc. A/70/7 (Aug. 7, 2015).
100. See ROTHSCCHILD, *supra* note 96, at 106-20; Doris E. Buss, *Finding the Homosexual in Women's Rights: The Christian Right in International Politics*, 6 INT'L FEMINIST J. POL. 257, 265-67 (2004).
101. See Buss, *supra* note 100, at 267-71.

### III. INCLUSIVE VICTIM STANDING AS A MATTER OF LAW

Having made the normative case for inclusive victim standing in Part II, I turn, in this Part, to the legal case for inclusive victim standing as a matter of procedure (Section III.A) and substance (Section III.B). I analyze Article 2 of CEDAW's Optional Protocol, the procedural provision allowing victims to submit individual communications to the CEDAW Committee, as well as CEDAW Article 5(a), an anti-gender-stereotyping provision that I will argue has the greatest potential to serve as a substantive foothold for victim standing for individuals who do not identify as women. My aim throughout this Part is to demonstrate that, as a matter of law, the CEDAW Committee could and should embrace and expand on its reasoning in *M.W. v. Denmark* to ensure that victim standing to allege CEDAW violations is available to any individual who has experienced sex- or gender-based discrimination without restriction on the basis of the individual's sex, gender, or gender identity.

#### *A. Article 2 of CEDAW's Optional Protocol: Inclusive Victim Standing as a Matter of Procedure*

This Section explains why the CEDAW Committee was correct in determining, in *M.W. v. Denmark*, that Article 2 of CEDAW's Optional Protocol does not restrict victim standing before the CEDAW Committee to women.<sup>102</sup> Specifically, Section III.A.1 analyzes Article 2 of CEDAW's Optional Protocol within the framework of Article 31 of the Vienna Convention on the Law of Treaties (VCLT),<sup>103</sup> and argues that the ordinary meaning of this provision—both in its context and in light of the object and purpose of CEDAW—does not restrict victim standing on the basis of sex, gender, or gender identity. Section III.A.2 then explains that resorting to supplementary means of interpretation, namely the

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<sup>102.</sup> See *M.W. v. Denmark* (admissibility), *supra* note 2, ¶ 8.3.

<sup>103.</sup> The Vienna Convention on the Law of Treaties (VCLT) is a binding treaty that reflects, and itself constitutes, customary international law (i.e., rules derived from general practice among States and accepted as law among States). The VCLT defines the meaning of the word “treaty” and provides the rules governing the creation, entry into force, amendment, operation, interpretation, and termination of treaties. See Anthony Aust, *Vienna Convention on the Law of Treaties* (1969), OXFORD PUB. INT'L L. [2]-[4] (June 2006), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498> [https://perma.cc/L9R8-N2EH]. Human rights mechanisms commonly apply the VCLT when interpreting human rights treaties. See DINAH L. SHELTON, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW* 74, 107-09 (2014).

*travaux préparatoires* (i.e., records documenting a treaty's negotiation, discussions, and drafting),<sup>104</sup> within the framework of VCLT Article 32 would not generate a contrary result. Section III.A.3 clarifies that this Note's interpretation of the English text of Article 2 of CEDAW's Optional Protocol is not contradicted by the wording of this provision in the five other equally authentic languages of the treaty (i.e., Arabic, Chinese, French, Russian, and Spanish), which could become relevant to the provision's interpretation under VCLT Article 33.

I rely on the VCLT not as an alternative to the evolutionary interpretation of human rights treaties (described by the International Court of Justice<sup>105</sup> as an approach "founded on the idea that, where the parties have used generic terms in a treaty . . . and where the treaty has been entered into for a very long period or is 'of continuing duration[,] the parties must be presumed . . . to have intended those terms to have an evolving meaning"<sup>106</sup>), but as an avenue through which the CEDAW Committee could reach an evolutionary interpretation of Article 2 of CEDAW's Optional Protocol.<sup>107</sup>

#### 1. VCLT Article 31(1): Ordinary Meaning, Context, and Object and Purpose

Article 2 of CEDAW's Optional Protocol does not restrict victim standing on the basis of sex, gender, or gender identity when interpreted in accordance with VCLT Article 31, the general rule of treaty interpretation. VCLT Article 31(1) states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>108</sup> This Section analyzes each of the three interrelated components<sup>109</sup> of this general rule of interpretation—(1) ordinary

104. See Marylin J. Raisch, *Travaux Préparatoires and United Nations Treaties or Conventions: Using the Web Wisely*, 30 INT'L J. LEGAL INFO. 324, 325 (2002); Dag Hammarskjöld Library, *What Are Travaux Préparatoires and How Can I Find Them?*, UNITED NATIONS, <https://ask.un.org/faq/14541> [<https://perma.cc/S6TY-VU3C>].

105. The International Court of Justice is the principal judicial organ of the UN. See U.N. Charter art. 92.

106. *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J. 213, ¶ 66 (July 13).

107. Cf. SHELTON, *supra* note 103, at 109-15 ("VCLT Article 31 has played a critical role in the development of a dynamic, evolutionary approach to treaty interpretation that is widely applied by human rights bodies."). For more on the complementary relationship between the VCLT rules of treaty interpretation and the evolutionary approach to treaty interpretation, see EIRIK BJORGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* (2014). For the CEDAW Committee's attitude toward the evolutionary approach to treaty interpretation, see *General Recommendation No. 25*, *supra* note 55, ¶ 3.

108. VCLT, *supra* note 74, art. 31, ¶ 1.

109. See RICHARD K. GARDINER, *TREATY INTERPRETATION* 181-222 (2d ed. 2015).

meaning, (2) context, and (3) object and purpose – and argues that none of these three elements of Article 2 of CEDAW’s Optional Protocol, taken separately or together, restricts victim standing before the CEDAW Committee to women. Moreover, the object and purpose of CEDAW – which is the most important element to consider when advancing an evolutionary interpretation of human rights treaties<sup>110</sup> – requires that victim standing be granted without restriction on the basis of sex, gender, or gender identity.

The ordinary meaning of Article 2 of CEDAW’s Optional Protocol, the procedural provision allowing victims to submit individual communications to the CEDAW Committee, does not restrict victim standing to women. The text of Article 2 provides that “[c]ommunications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party.”<sup>111</sup> A person who seeks standing before the CEDAW Committee must therefore be (1) an individual, submitting a communication either alone or as part of a group, and (2) an alleged victim of a rights violation within the CEDAW Committee’s jurisdiction *ratione materiae*<sup>112</sup> and *ratione personae*.<sup>113</sup> Neither of these categories specifies the sex, gender, or gender identity of the potential victim.

The text of Article 2 would have to be altered for the ordinary meaning of this provision to restrict victim standing to women. For example: “Communications may be submitted by or on behalf of ~~individuals~~ [a woman] or groups of ~~individuals~~ [women], under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party.”<sup>114</sup> In contrast with the words “woman” and “women,” the ordinary meaning of “individual” is not gendered, and although the word “victim” is layered with gendered and imperial connotations,<sup>115</sup> its ordinary meaning is likewise not restricted to women.

Nor does Article 2 restrict victim standing to women when understood in the context of CEDAW’s Optional Protocol as a whole, which is the second element

110. See SHELTON, *supra* note 103, at 110.

111. CEDAW’s Optional Protocol, *supra* note 26, art. 2.

112. Jurisdiction *ratione materiae* is the set of “conditions regarding the tribunal’s jurisdiction over the subject matter of the dispute.” Luis Jardón, *The Interpretation of Jurisdictional Clauses in Human Rights Treaties*, 13 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 99, 125 (2013).

113. Jurisdiction *ratione personae* is “the capacity of the court to exercise jurisdiction over a particular person.” *Id.*

114. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (alterations added).

115. See generally Kapur, *supra* note 66 (arguing that the use of the “victim subject” in international human rights law and, particularly, in campaigns targeting violence against women, reinforces gender and cultural essentialism).

of treaty interpretation under the VCLT.<sup>116</sup> Article 2 does not restrict victim standing to women either. CEDAW's Optional Protocol consistently refers to those persons capable of submitting communications as "individuals" or "victims."<sup>117</sup> The word "women" appears only once in the provisions of CEDAW's Optional Protocol, when the CEDAW Committee is named in full.<sup>118</sup> A female pronoun likewise appears only once in these provisions, alongside a male pronoun and in reference to the identity of the UN Secretary-General.<sup>119</sup> Although the word "women" does appear more frequently in the preamble, which for purposes of interpretation is included in the context,<sup>120</sup> this is consistently in reference not to questions of procedure but to the goal of gender equality, which inclusive victim standing would further,<sup>121</sup> and once even appears alongside the terms "human person" and "men" (in the phrase "[n]oting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women").<sup>122</sup> The context of CEDAW's Optional Protocol thus does not indicate that individuals submitting communications to the CEDAW Committee must be women to have standing.

Most importantly, the object and purpose of CEDAW, in light of which the ordinary meaning of Article 2 of CEDAW's Optional Protocol must be interpreted,<sup>123</sup> makes it clear that this provision should not bar individuals who do not identify as women from gaining victim standing. In its General Recommendation No. 25, the CEDAW Committee described "the overall object and purpose of the Convention" as the "eliminat[ion of] all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms."<sup>124</sup> At first blush, the General Recommendation's description of CEDAW's object and purpose suggests that women might be the only imagined victims under CEDAW. But the paragraphs of the General Recommendation that immediately follow this statement of object and purpose indicate that the CEDAW Committee understands the elimination of all forms of discrimination to require not only the promotion of women's rights, but also broader, transformative efforts toward

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116. VCLT, *supra* note 74, art. 31, ¶ 2.

117. CEDAW's Optional Protocol, *supra* note 26, arts. 5-7, 11.

118. *Id.* art. 1.

119. *Id.* art. 18, ¶ 1.

120. VCLT, *supra* note 74, art. 31, ¶ 2.

121. *See supra* Section II.A.

122. CEDAW's Optional Protocol, *supra* note 26, pmb.

123. VCLT, *supra* note 74, art. 31, ¶ 1.

124. *General Recommendation No. 25*, *supra* note 55, ¶ 4.

the achievement of gender equality.<sup>125</sup> The CEDAW Committee identified three principal obligations of States under CEDAW:

Firstly, States [P]arties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States [P]arties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States [P]arties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.<sup>126</sup>

While the CEDAW Committee privileges a focus on women's rights, especially in examining the first two obligations of formal equality and substantive equality, the third obligation confirms that the CEDAW Committee also conceives of CEDAW as a gender-equality treaty more broadly because CEDAW requires States to modify gender relations and gender-based stereotypes. This third obligation of transformative equality is integral to CEDAW's object and purpose.<sup>127</sup> Interpreting Article 2 of CEDAW's Optional Protocol to categorically restrict victim standing to women would not further CEDAW's object and purpose because the obligation of transformative equality cannot be met without addressing discrimination against people of all genders.<sup>128</sup> Interpreting Article 2 of CEDAW's Optional Protocol to restrict victim standing to women would, therefore, not only be contrary to the ordinary meaning of the terms of the treaty and unnecessary based on their context, but would also frustrate the object and purpose of CEDAW.

## 2. VCLT Article 32: Travaux Préparatoires

The *travaux préparatoires* for Article 2 of CEDAW's Optional Protocol do not indicate that this provision should be interpreted to restrict victim standing on the basis of sex, gender, or gender identity. It is unnecessary to resort to the *travaux préparatoires*, a supplementary means of interpretation under VCLT Article 32, unless the general rule of interpretation under Article 31 as applied to

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<sup>125.</sup> *Id.* ¶ 10.

<sup>126.</sup> *Id.* ¶ 7 (footnotes omitted).

<sup>127.</sup> *See id.* ¶ 6.

<sup>128.</sup> *See supra* Section II.A.

Article 2 of CEDAW's Optional Protocol "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable."<sup>129</sup> As the analysis in Section III.A.1 demonstrates, Article 2 does not suffer from such ambiguity.

Nevertheless, were recourse to the *travaux préparatoires* necessary, they would not contradict the finding that Article 2 of CEDAW's Optional Protocol does not impose restrictions on victim standing before the CEDAW Committee based on sex, gender, or gender identity. Such a restriction does not appear to have been discussed or suggested during the drafting of CEDAW's Optional Protocol, even though Article 2 was one of its most controversial and debated provisions.<sup>130</sup> Additionally, the *travaux préparatoires* for Article 2 indicate that this provision was deliberately patterned after the nongendered language in the victim-standing provisions regulating other human rights mechanisms' individual-communications procedures,<sup>131</sup> such as Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>132</sup> Article 14 of the Convention on

129. VCLT, *supra* note 74, art. 32.

130. See Felipe Gómez 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*, 20 ARIZ. J. INT'L & COMPAR. L. 291, 311-12 (2003).

131. See U.N. Secretary-General, *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, ¶¶ 10-11, U.N. Doc. E/CN.6/1996/10 (Jan. 10, 1996) [hereinafter *Elaboration of a Draft Optional Protocol to CEDAW*]; see also Mireille G.E. Bijnsdorp, *The Strength of the Optional Protocol to the United Nations Women's Convention*, 18 NETH. Q. HUM. RTS. 329, 337 (2000) ("In comparison with the standing under communications procedures belonging to other treaties, Article 2 could be seen as a combination of different treaty texts and a codification of the practices of the treaty bodies involved."); Cees Flinterman & Ginney Liu, *CEDAW and the Optional Protocol: First Experiences*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JACOB TH. MÖLLER 91, 92-93 (Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan & Alfred de Zayas eds., 2d rev. ed. 2009) (noting that CEDAW's Optional Protocol "is modeled after similar existing individual communication procedures" with some modifications). This is in keeping with one of the overall goals of the drafters of CEDAW's Optional Protocol: to imitate other human rights treaties and mechanisms in order to make CEDAW's implementation more effective. See Andrew Byrnes, *Slow and Steady Wins the Race?: The Development of an Optional Protocol to the Women's Convention*, 91 ASIL PROC. 383, 385 (1997); Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679, 698-99 (1996).

132. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, adopted Dec. 19, 1966, 999 U.N.T.S. 302 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.").

the Elimination of All Forms of Racial Discrimination,<sup>133</sup> and Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>134</sup> The process of drafting CEDAW's Optional Protocol was also informed by the simultaneous drafting and entry into force of the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights<sup>135</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>136</sup> which are similarly nongendered. Given that the most the *travaux préparatoires* can demonstrate is that Article 2 of CEDAW's Optional Protocol reproduces the nongendered wording of other human rights mechanisms' victim-standing provisions, they do not support an interpretation of Article 2 that restricts victim standing before the CEDAW Committee to women.

### 3. VCLT Article 33: Equally Authentic Languages

This Note's interpretation of the English text of Article 2 of CEDAW's Optional Protocol as not restricting victim standing to women is not contradicted by the Chinese, Russian, Arabic, French, or Spanish texts of CEDAW's Optional

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133. International Convention on the Elimination of All Forms of Racial Discrimination art. 14, ¶ 1, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (“A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.”).
134. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22, ¶ 1, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (“A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.”).
135. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights art. 2, *adopted* Dec. 10, 2008, 2922 U.N.T.S. 29 (“Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.”).
136. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 77, ¶ 1, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 (“A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party.”); *see Elaboration of a Draft Optional Protocol to CEDAW*, *supra* note 131, ¶¶ 10-11.

Protocol, all of which, along with the English text, are equally authentic.<sup>137</sup> VCLT Article 33 provides that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text,” but acknowledges the possibility of “divergence” among treaties of different languages, in which case “a particular text shall prevail.”<sup>138</sup>

In the interpretation of Article 2 of CEDAW’s Optional Protocol, there is no divergence: victim standing is not restricted based on sex, gender, or gender identity in any of the texts. This is true even though some of the authentic languages have grammatical gender<sup>139</sup> because a grammatically feminine noun does not necessarily signify women to the exclusion of other individuals. This Section identifies whether each language has grammatical gender and which terms in that language’s text of Article 2 of CEDAW’s Optional Protocol are equivalent to “individuals” and “victims” in the English text, before finding that the meaning of Article 2 does not restrict victim standing to women in any of these languages.

That Article 2 of CEDAW’s Optional Protocol does not restrict victim standing to women is most apparent in the Chinese text of this provision, since Chinese, like English, does not have grammatical gender for common nouns.<sup>140</sup> Whether the meaning of this provision restricts victim standing to women thus clearly depends not on any gendered classification of the Chinese nouns that are equivalent to the words “individuals” or “victims” in English, but on whether the definitions of the equivalent words themselves specify sex, gender, or gender identity. The Chinese text of Article 2 of CEDAW’s Optional Protocol provides:

来文可由声称因为一缔约国违反公约所规定的任何权利而受到伤害的该缔约国管辖下的个人或个人联名或其代表提出。

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137. See CEDAW’s Optional Protocol, *supra* note 26, art. 21, ¶ 1. For a discussion of the necessary and routine nature of comparing equally authentic languages, as well as historic examples in which VCLT Article 33 has played a key role in treaty interpretation, see GARDINER, *supra* note 109, at ch. 9. All translations were reviewed by native speakers on the *Yale Law Journal*, as well as Ife Desamours Adeyeri, Anya Allen, Jad Bataha, Wijnie de Groot, Jiho Park, and Andy Secondine.

138. VCLT, *supra* note 74, art. 33.

139. Grammatical gender is a linguistic term meaning “[g]ender that depends on the form of a word and not primarily on its meaning.” BRYAN A. GARNER, *GARNER’S MODERN ENGLISH USAGE* 1005-06 (4th ed. 2016).

140. See Catherine S. Farris, *Gender and Grammar in Chinese: With Implications for Language Universals*, 14 *MOD. CHINA* 277, 278 (1988).

(Lái wén kěyóu shēngchēng yīnwèi yī diyuēguó wéifǎn gōngyuē suǒ guīdìng de rènhé quánlì ér shòudào shānghài de gāi diyuēguó guǎnxiá xià de gèrén huò gèrén liánmíng huò qí dài biào tíchū.)<sup>141</sup>

The key concepts here are “个人” (gèrén), meaning “individual,”<sup>142</sup> and “受害人” (shòuhàirén), meaning “human being” that has “be[en] injured or killed”<sup>143</sup> (the equivalent of “victim[.]” in the English text). Because Chinese does not have grammatical gender and the definitions of the key terms do not specify any sex, gender, or gender identity (i.e., semantic gender), the Chinese text of Article 2 of CEDAW’s Optional Protocol, like the English text, does not restrict victim standing to women.

Even in the languages that do have grammatical gender, Article 2 does not operate to restrict victim standing to women. Russian, for example, has grammatical gender, classifying all nouns as masculine, feminine, or neuter,<sup>144</sup> but this does not alter the meaning of Article 2 of CEDAW’s Optional Protocol. The Russian text of Article 2 states:

Сообщения могут направляться попадающими под юрисдикцию Государства-участника лицами или группами лиц или от их имени, которые утверждают, что они являются жертвами нарушения этим Государством-участником какого-либо из прав, изложенных в Конвенции.

(Soobshcheniia mogut napravliat’sia popadaushchimi pod iurisdiktsiiu Gosudarstva-uchastnika litsami ili gruppami lits ili ot ikh imeni, kotorye utverzhdaiut, chto oni iavliaiutsia zhertvami narusheniia etim Gosudarstvom-uchastnikom kakogo-libo iz prav, izlozhennykh v Konventsii.)<sup>145</sup>

The key words here are “лицо” (litso), a neuter noun meaning, among other things, “person” or “individual,”<sup>146</sup> and “жертва” (zhertva), a feminine noun meaning “victim.”<sup>147</sup> Although “жертва” is grammatically feminine, it can apply

141. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (Chinese).

142. See 个人 (gèrén), OXFORD CHINESE DICTIONARY: CHINESE-ENGLISH 146 (Wu Jingrong, Mei Ping, Ren Xiaoping & Shi Qinan eds., 2003).

143. See 受害 (shòuhài), *id.* at 418; 人 (rén), *id.* at 374.

144. See Greville G. Corbett, *Gender in Russian: An Account of Gender Specification and Its Relationship to Declension*, 6 RUSSIAN LINGUISTICS 197, 197 (1982).

145. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (Russian).

146. Лицо (litso), OXFORD RUSSIAN DICTIONARY: RUSSIAN-ENGLISH 208 (Marcus Wheeler & Boris Unbegaun eds., 3d ed. 2000).

147. Жертва (zhertva), *id.* at 118.

to anyone, regardless of gender. Additional context would be required to indicate that the victim is a woman, as illustrated by the addition of “женщины” (zhenshchiny), the plural form of a noun meaning “woman,”<sup>148</sup> to “жертвы” (zhertvy) (the plural form of “жертва” (zhertva)) in an article entitled “Средства репрезентации образа мужчины-насильника и женщины-жертвы в медийных текстах” (Sredstva reprezentatsii obraza muzhchiny-nasil'nika i zhenshchiny-zhertvy v mediynnykh tekstah), or *Means of Representing a Male Rapist and a Female Victim in Media Texts*.<sup>149</sup> Since the Russian equivalents of the English text’s “individuals” and “victims” do not specify sex, gender, or gender identity (i.e., semantic gender), they do not restrict victim standing under Article 2 of CEDAW’s Optional Protocol to women.

Arabic, like Russian, has grammatical gender, although with only two classes of nouns (masculine and feminine),<sup>150</sup> and the meaning of the Arabic text of Article 2 of CEDAW’s Optional Protocol likewise does not restrict victim standing to women. The Arabic text of Article 2 provides:

يجوز أن تقدّم الرسائل من قبل، أو نيابة عن، أفراد أو مجموعات خاضعة لولاية دولة طرف، ويدعون أنهم ضحايا انتهاك تلك الدولة الطرف لأي من الحقوق المحددة في الاتفاقية.

(Yajowz ‘ina taqdm al-risa’il min qibl, ‘ow niyabat an, ‘afrad ‘ow majmuat khadaeen lulatory dowla taraf, wa yadaoon ‘inahum dahaya intehak telka a-dowla a-taraf la’ee min al-haquq al-mahduda fi al-’itfaqiyya.)<sup>151</sup>

The key words here are “أفراد” (afrad), the plural of the masculine noun meaning “a single person” or “individual,”<sup>152</sup> and “ضحايا” (dahaya), the plural of the feminine noun meaning “victim.”<sup>153</sup> The word “ضحايا” (dahaya) can apply to any victim, regardless of gender. For example, MideastWire.com, which translates news articles from Arabic to English, translated an interviewee’s statement that a goal of his organization was

148. Женщина (zhenshchina), *id.*

149. Alina Mikhailovna Filatova, *Means of Representing a Male Assaulter and a Female Victim in Media Texts*, 6 LANGUAGE. TEXT. SOC’Y 1 (2019).

150. See Fatima A. Alkohani, *The Problematic Issue of Grammatical Gender in Arabic as a Foreign Language*, 4 J. LANGUAGE & CULTURAL EDUC. 17, 19 (2016).

151. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (Arabic).

152. أفراد (afrad), HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC (ARABIC-ENGLISH) 823 (J. Milton Conan ed., 4th ed. 1979).

153. ضحايا (dahaya), *id.* at 627.

تحقيق العدالة لضحايا التعذيب في الإمارات، الذين من بينهم زميلنا، مدافع حقوق الإنسان البارز أحمد منصور، الذي يقضي حكماً بالسجن لمدة عشر سنوات بسبب نشاطه السلمي والشرعي عبر الإنترنت.

(tahqeeq al-adala li-dahaya al-ta'adheeb fi al'imarat ala-dheena min bay-nehem zameeluna modafah hoquq al'insan al-barez Ahmed Mansour al-ladhee yaqdee hukman bil-sajin li-muda asher senawat bisebub nishatuhu a-selmi wa al-sharai abr al-internet)

as “to achieve justice for the victims of torture in the Emirates, including that of our colleague, prominent human rights activist Ahmed Mansour, who is spending a ten-year prison sentence due to his peaceful and legitimate online activities.”<sup>154</sup> In this sentence, Ahmed Mansour, a man, is counted among a group of victims, or “ضحايا” (dahaya), demonstrating that this word is not applied exclusively to women. The meaning of the Arabic text of Article 2 of CEDAW’s Optional Protocol therefore does not limit victim standing on the basis of sex, gender, or gender identity.

French, like Russian and Arabic, has grammatical gender,<sup>155</sup> and the French text of Article 2 of CEDAW’s Optional Protocol, like the Russian and Arabic texts, is nevertheless nongendered in its semantic meaning. Article 2 of CEDAW’s Optional Protocol, in French, states:

Des communications peuvent être présentées par des particuliers ou groupes de particuliers ou au nom de particuliers ou groupes de particuliers relevant de la juridiction d’un État Partie, qui affirment être victimes d’une violation par cet État Partie d’un des droits énoncés dans la Convention.<sup>156</sup>

The key words here are “particuliers,” the plural of the masculine noun meaning “private individual,”<sup>157</sup> and “victimes,” the plural of the feminine noun “victime,” meaning “victim” or “casualty.”<sup>158</sup> Although “victimes” is grammatically feminine, it can apply to any victim, regardless of gender. The *Concise Oxford-Hachette French Dictionary* provides the example “[victime] d’une panne, il a abandonné

154. *Human Rights Official to Arabi 21: Attempts to Prevent UAE Candidate from Heading Interpol*, MIDEASTWIRE.COM (July 9, 2021), <https://www.mideastwire.com/page/article.php?id=75655> [https://perma.cc/6JWJ-9L9F].

155. See, e.g., Dalila Ayoun, *Corpus Data: Shedding the Light on French Grammatical Gender . . . Or Not*, 10 EUROSLA Y.B. 119, 119-21 (2010).

156. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (French).

157. *Particulier*, CONCISE OXFORD-HACHETTE FRENCH DICTIONARY: FRENCH-ENGLISH, ENGLISH FRENCH 425-26 (Marie-Hélène Corrèard & Valerie Grundy eds., 2d ed. 1998).

158. *Victime*, *id.* at 626.

la course,” which it translates as “hit by mechanical problems, he abandoned the race.”<sup>159</sup> “Victime” in this example describes “il,” the French masculine third-person singular subject pronoun, or “he.” Thus, the meaning of the French text of Article 2 of CEDAW’s Optional Protocol does not restrict victim standing to women.

Spanish, like Russian, Arabic, and French, has grammatical gender,<sup>160</sup> and the meaning of the Spanish text of Article 2 of CEDAW’s Optional Protocol does not restrict victim standing to women. The Spanish text differs from the Russian, Arabic, and French texts in that both the noun used for “individuals” and the noun used for “victims” are grammatically feminine. The Spanish text of Article 2 of CEDAW’s Optional Protocol states:

Las comunicaciones podrán ser presentadas por personas o grupos de personas que se hallen bajo la jurisdicción del Estado Parte y que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de los derechos enunciados en la Convención, o en nombre de esas personas o grupos de personas.<sup>161</sup>

The key words here are “personas,” the plural of the feminine noun “persona,” meaning “person,”<sup>162</sup> and “víctimas,” the plural of the feminine noun “víctima,” meaning “victim.”<sup>163</sup> Although these nouns are grammatically feminine, “persona” and “víctima” can apply to anyone.<sup>164</sup> They are two rare exceptions to the rule in Spanish that nouns describing humans have both a masculine and feminine form.<sup>165</sup> Illustrating the capacity of “persona” to signify a person of any gender, the *Oxford Spanish Dictionary* alternates genders in its example sentences. It first translates “es una [persona] muy educada/simpática” as “she’s a very polite/likable person” and then translates “como [persona] no me gusta” as “I don’t like him as a person,” arbitrarily assigning a semantic gender where the context does not provide any.<sup>166</sup> The *Oxford Spanish Dictionary* also provides an example

159. *Id.*

160. See James W. Harris, *The Exponence of Gender in Spanish*, 22 LINGUISTIC INQUIRY 27, 36-37 (1991).

161. CEDAW’s Optional Protocol, *supra* note 26, art. 2 (Spanish).

162. *Persona*, OXFORD SPANISH DICTIONARY: SPANISH-ENGLISH/ENGLISH-SPANISH 564 (2d ed. rev. & Supp. 2001).

163. *Víctima*, *id.* at 765.

164. See Harris, *supra* note 160, at 53 (“*Criatura*, *persona*, and *víctima*, whose meaning has no component referring to sex, have lexical entries that contain a specification for (feminine) gender . . . . No grammatical device exists that can delete this specification; hence, no masculine mate can be generated.”).

165. *Id.* at 37-40.

166. *Persona*, OXFORD SPANISH DICTIONARY, *supra* note 162, at 564.

illustrating that “víctima” can apply to individuals who are not women when it translates “fue [víctima] de una emboscada” as “he was the victim of an ambush.”<sup>167</sup> The translation of the elided subject pronoun as “he” demonstrates that “víctima” does not exclusively apply to women. Therefore, although both of the key nouns in the Spanish text of Article 2 of CEDAW’s Optional Protocol are grammatically feminine, their semantic meaning does not restrict victim standing under this provision to women.

In sum, the wording of the victim-standing provision in CEDAW’s other authentic languages does not contradict the interpretation of Article 2 of CEDAW’s Optional Protocol presented in Sections III.A.1-2, which established that victim standing before the CEDAW Committee is not restricted to women based on the application of the VCLT’s rules of interpretation to the treaty’s English text. Victims of sex- and gender-based discrimination who do not identify as women can thus gain standing before the CEDAW Committee as a matter of procedure through Article 2 of CEDAW’s Optional Protocol.

*B. Article 5(a) of CEDAW: Inclusive Victim Standing as a Matter of Substance*

Having established that Article 2 of CEDAW’s Optional Protocol does not restrict victim standing as a matter of procedure, I now turn to the task of locating a substantive provision of and through which individuals who do not identify as women can assert standing under CEDAW. The CEDAW Committee used CEDAW Article 16(1)(d) as one such foothold in *M.W. v. Denmark*,<sup>168</sup> but that provision is of limited use because it focuses on the rights of children. This Section, instead, argues that CEDAW Article 5(a) has the greatest potential to serve as a substantive foothold for victim standing for all individuals, regardless of family relationship, and for a broad range of rights violations.<sup>169</sup> Using the VCLT framework, Section III.B.1 interprets CEDAW Article 5(a) as protecting all individuals from acts of wrongful gender stereotyping without restriction based on sex, gender, or gender identity. Section III.B.2 then explains how individuals can use CEDAW Article 5(a) to acquire victim standing to allege violations of other substantive provisions of CEDAW. As in Section III.A, I rely on the VCLT as a means of arriving at an evolutionary interpretation of CEDAW, not as an alternative to an evolutionary interpretation.<sup>170</sup>

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167. *Víctima*, *id.* at 765.

168. *M.W. v. Denmark* (admissibility), *supra* note 2, ¶ 8.3.

169. See Cusack, *supra* note 64, at 124-25 (“[M]uch of the potential of the CEDAW for advancing women’s human rights has yet to be realised. One area of considerable untapped potential is the obligations of States Parties in Articles 2(f) and 5 of the CEDAW to modify or transform gender stereotypes and eliminate wrongful gender stereotyping.” (footnotes omitted)).

170. See *supra* note 107 and accompanying text.

1. *Asserting Violations of CEDAW Article 5(a)*

Victim standing to allege violations of CEDAW Article 5(a) should not be restricted to women. This Section first explains that the ordinary meaning of CEDAW Article 5(a)'s terms in their context and in light of the object and purpose of CEDAW does not limit potential victims of wrongful gender stereotyping to women. It then argues that the *travaux préparatoires* for this provision demonstrate that the drafters of CEDAW Article 5(a) replaced language narrowly focused on how gender stereotypes harm women with language that broadly rejects wrongful gender stereotyping, allowing the provision to cover men as potential victims of gender stereotyping's harms. Although this Section focuses on the appearance and function of the word "men" in the text of CEDAW Article 5(a) to prove that victim standing under this provision is not restricted to women, my argument remains that victim standing to allege CEDAW violations should extend to everyone, including nonbinary and transgender individuals. The very lack of conformity with the sex/gender binary that made these individuals invisible to CEDAW's drafters also makes them particularly vulnerable to violence and discrimination based on gender stereotypes.<sup>171</sup>

The ordinary meaning and context of CEDAW Article 5(a)'s terms do not restrict victim standing to women. CEDAW Article 5(a) provides:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>172</sup>

The phrasing of Article 5(a) is distinct from other provisions of CEDAW in that it treats men not as comparators for women's equality or as perpetrators of discrimination against women but as potential victims of prejudice and stereotyping together with women.<sup>173</sup> The ordinary meaning and context of Article 5(a)

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171. See Victor Madrigal-Borloz, *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶¶ 33, 39-40, 48, 52, 97(c), U.N. Doc. A/HRC/38/43 (May 11, 2018); see also Holtmaat & Post, *supra* note 22, at 325 (explaining that "[g]ender stereotypes . . . directly affect the lives of all persons who renounce traditional heterosexual and patriarchal feminine and masculine gender identities and gender roles" and suggesting that "an expansive interpretation of [A]rticle 5(a)" can bring individuals who are so affected "under the scope of the Convention").

172. CEDAW, *supra* note 1, art. 5(a).

173. See Rosenblum, *supra* note 9, at 181.

thus suggests that, even if women were thought to have exclusive victim standing under all of CEDAW's other provisions, victim standing to allege violations of CEDAW Article 5(a) is not restricted to women.

An inclusive interpretation of CEDAW Article 5(a) is, moreover, required in light of the object and purpose of CEDAW. Transformative equality, a core obligation of States under CEDAW, requires the elimination of wrongful gender stereotyping that affects all individuals.<sup>174</sup> In the case of CEDAW Article 5(a), as in the case of Article 2 of CEDAW's Optional Protocol, imposing a restriction on victim standing that excludes individuals who do not identify as women would run counter to CEDAW's goal of transformative equality.<sup>175</sup> Therefore, interpreting CEDAW Article 5(a) in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of CEDAW means granting victim standing to allege violations of this provision to people who do not identify as women.

That individuals who do not identify as women have victim standing to allege violations of CEDAW Article 5(a) is also supported by the *travaux préparatoires* for this provision. Rosenblum has argued that the *travaux préparatoires* for CEDAW indicate that the inclusion of individuals other than women within the scope of CEDAW Article 5(a) was apparent to at least some of the provision's drafters:

[D]ebate over Article 5 reflects that some parties to the Convention were aware of the possibility that men may be victims of sex-based discrimination. Sweden proposed that the language related to “the elimination of prejudices based on ideas of inferiority and superiority” be altered to reference the “inferiority or superiority of either sex.” Sweden's intervention on behalf of language that references “either sex” marks the potential that existed for the Convention.<sup>176</sup>

Sweden's suggested language was incorporated almost verbatim into the final text of Article 5(a), which references “the idea of the inferiority or the superiority of either of the sexes.”<sup>177</sup> This represents a move away from the narrow language of Article 3 of the Declaration on the Elimination of Discrimination against Women (DEDAW), in which CEDAW Article 5(a) has its origins and which

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174. See COOK & CUSACK, *supra* note 23, at 4-6, 74, 112; *supra* Section II.A.

175. See *supra* Section III.A.1.

176. Rosenblum, *supra* note 9, at 181 (footnote omitted); see also Cecilia M. Baillet, *A Nordic Approach to Promoting Women's Rights Within International Law: Internal v. External Perspectives*, 85 NORDIC J. INT'L L. 368, 371-73 (2016) (explaining Sweden's recognition that gender equality could not be achieved by measures only affecting women).

177. CEDAW, *supra* note 1, art. 5(a).

provides that “[a]ll appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women.”<sup>178</sup> By suggesting the phrasing “inferiority or . . . superiority of either of the sexes” in CEDAW Article 5(a),<sup>179</sup> Sweden included both men and women where DEDAW mentions only women. Since the language restricting potential victims of gender stereotyping to women was replaced in the drafting of CEDAW Article 5(a), it would be wrong to interpret the provision as though this rejected restriction on victim standing were still present. The *travaux préparatoires* thus support the argument that victim standing to allege violations of CEDAW Article 5(a) is not restricted to women.<sup>180</sup>

## 2. Asserting Violations Through CEDAW Article 5(a)

Individuals who do not identify as women could allege violations of other substantive provisions of CEDAW by using Article 5(a) as an interpretive lens. This Section explains that CEDAW Article 5(a), in addition to creating a free-standing obligation to eliminate wrongful gender stereotyping, is a general provision that can be used to interpret other provisions – greatly increasing its potential to facilitate an evolutionary interpretation of the treaty.<sup>181</sup> A violation of a substantive provision of CEDAW should not be restricted to women when the discrimination alleged is rooted in or perpetuates wrongful gender stereotyping, which the CEDAW Committee is increasingly linking to a range of other rights violations.<sup>182</sup>

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178. G.A. Res. 2263 (XXII), Declaration on the Elimination of Discrimination against Women, at 36 (Nov. 7, 1967) (emphasis added).

179. CEDAW, *supra* note 1, art. 5(a).

180. Moreover, even if the *travaux préparatoires* were silent or contradictory on this issue, the CEDAW Committee could still interpret CEDAW Article 5(a) inclusively because the *travaux préparatoires* are a supplemental means of interpretation subordinate to the object and purpose of the treaty. See SHELTON, *supra* note 103, at 109.

181. See RIKKI HOLTMAAT, TOWARDS DIFFERENT LAW AND PUBLIC POLICY: THE SIGNIFICANCE OF ARTICLE 5A CEDAW FOR THE ELIMINATION OF STRUCTURAL GENDER DISCRIMINATION 74-75 (2004) (“Article 5a CEDAW can also be used as a ‘hat peg provision’: that is, an interpretative framework on the basis of which the scope of the Convention might be extended . . . . Article 5a CEDAW therefore plays an important role in a dynamic interpretation of the Convention and helps render it into a living instrument.”).

182. See Elizabeth Sepper, *Confronting the “Sacred and Unchangeable”: The Obligation to Modify Cultural Patterns Under the Women’s Discrimination Treaty*, 30 U. PA. J. INT’L L. 585, 590, 601-07 (2008).

In addition to imposing a free-standing obligation on States to eliminate wrongful gender stereotyping, CEDAW Article 5(a) can serve as a tool for interpreting other provisions of the treaty.<sup>183</sup> The CEDAW Committee has described CEDAW Article 5(a), along with several other provisions of the treaty, as “form[ing] the general interpretative framework for all of the substantive [A]rticles of the Convention.”<sup>184</sup> Rosenblum has suggested that CEDAW Article 5(a) could go so far as to drive a reinterpretation of the entire treaty as prohibiting discrimination against any individual on the basis of sex, gender, gender identity, and sexual orientation.<sup>185</sup> If CEDAW Article 5(a) were, in the future, to be employed in this manner, the argument for this Section would be straightforward: as CEDAW Article 5(a) does not limit victim standing to women, all other articles of the treaty should be interpreted accordingly and not limit victim standing to women.

A reinterpretation of the treaty on this scale is not required, however, for individuals who do not identify as women to allege violations of other provisions of CEDAW through Article 5(a). That is, another way for individuals who do not identify as women to assert violations of other substantive provisions of CEDAW is to highlight how the rights violation at issue is rooted in or perpetuates wrongful gender stereotyping in violation of Article 5(a).

Gender stereotyping has been especially pronounced in the CEDAW Committee’s analyses of gender-based violence, which thus can serve to illustrate the current interpretive techniques of the CEDAW Committee. The CEDAW Committee first explained in General Recommendation No. 19 that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion” because “such prejudices and practices may justify gender-based violence as a form of protection or control of women,” making CEDAW Article 5(a) relevant to cases of gender-based violence.<sup>186</sup> The CEDAW Committee later followed

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183. *See id.* at 598.

184. *General Recommendation No. 25*, *supra* note 55, ¶ 6.

185. Rosenblum, *supra* note 9, at 194 (suggesting reinterpreting CEDAW Article 5(a) as “a dominant method of interpreting CEDAW” such that its mandate will expand to include discrimination on the basis of sexual orientation and gender identity as well as discrimination against individuals who do not identify as women).

186. Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against Women*, ¶ 11, U.N. Doc. A/47/38 (1993) [hereinafter *General Recommendation No. 19*].

through on this General Recommendation by finding violations of CEDAW Article 5(a) in a series of cases relating to gender-based violence.<sup>187</sup> In the first of these cases, *Vertido v. Philippines*, the CEDAW Committee observed that a rape victim's access to justice was impeded by the confluence of several gender stereotypes, including stereotypes about who commits rape, who is raped, and how victims should react to an assault.<sup>188</sup> The CEDAW Committee also issued a more general warning to States not to allow gender stereotyping to "create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general."<sup>189</sup> The CEDAW Committee ultimately found a violation of CEDAW Article 5(a) in this case, which it "read in conjunction with [A]rticle 1 of the Convention and [G]eneral [R]ecommendation No. 19 of the Committee."<sup>190</sup> In other words, the CEDAW Committee acknowledged that the content of CEDAW Article 5(a) had

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187. See, e.g., Comm. on the Elimination of Discrimination against Women, *O.N. & D.P. v. Russian Federation*, ¶ 7.11, U.N. Doc. CEDAW/C/75/D/119/2017 (Mar. 27, 2020); Comm. on the Elimination of Discrimination against Women, *S.L. v. Bulgaria*, ¶ 7.14, U.N. Doc. CEDAW/C/73/D/99/2016 (Sept. 10, 2019); Comm. on the Elimination of Discrimination against Women, *X. & Y. v. Russian Federation*, ¶ 9.10, U.N. Doc. CEDAW/C/73/D/100/2016 (Aug. 9, 2019); Comm. on the Elimination of Discrimination against Women, *S.T. v. Russian Federation*, ¶ 9.9, U.N. Doc. CEDAW/C/72/D/65/2014 (Apr. 8, 2019); Comm. on the Elimination of Discrimination against Women, *O.G. v. Russian Federation*, ¶ 7.6, U.N. Doc. CEDAW/C/68/D/91/2015 (Nov. 20, 2017); Comm. on the Elimination of Discrimination against Women, *González Carreño v. Spain*, ¶ 9.7, U.N. Doc. CEDAW/C/58/D/47/2012 (Aug. 15, 2014); Comm. on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, ¶ 9.15, U.N. Doc. CEDAW/C/49/D/20/2008 (Sept. 27, 2011); Comm. on the Elimination of Discrimination against Women, *Vertido v. Philippines*, ¶ 8.9, U.N. Doc. CEDAW/C/46/D/18/2008 (Sept. 22, 2010) [hereinafter *Vertido v. Philippines*]; see also RAMONA BIHOLAR, TRANSFORMING DISCRIMINATORY SEX ROLES AND GENDER STEREOTYPING: THE IMPLEMENTATION OF ARTICLE 5(A) CEDAW FOR THE REALISATION OF WOMEN'S RIGHT TO BE FREE FROM GENDER-BASED VIOLENCE IN JAMAICA 4 (2013) (citing CEDAW Article 5(a) as "mak[ing] demands of social and cultural transformation"); Anna Śledzińska-Simon, *Making Progress in Elimination of Gender Stereotypes in the Context of Gender-Based Violence: The Role of the CEDAW Committee*, 2013 TIJDSCHRIFT VOOR GENDERSTUDIES 41 (discussing the CEDAW Committee's recognition of gender-based violence as a form of discrimination); Gema Fernández Rodríguez de Liévana, *Los Estereotipos de Género en los Procedimientos Judiciales por Violencia de Género: El Papel del Comité CEDAW en la Eliminación de la Discriminación y de la Estereotipación*, 5 OÑATI SOCIO-LEGAL SERIES 498 (2015) (analyzing how CEDAW could establish an obligation for States to address gender-based violence as a form of gender discrimination).

188. *Vertido v. Philippines*, *supra* note 187, ¶¶ 3.5.1-.8, 8.4-.6; Simone Cusack & Alexandra S. H. Timmer, *Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v. The Philippines*, 11 HUM. RTS. L. REV. 329, 335-36 (2011).

189. *Vertido v. Philippines*, *supra* note 187, ¶ 8.4.

190. *Id.* ¶ 8.9.

informed its interpretation of the implicit prohibition on violence in CEDAW Article 1<sup>191</sup> and of the explicit analysis of violence that the Committee had previously elaborated in General Recommendation No. 19.

Although the CEDAW Committee's first in-depth gender-stereotyping case fit squarely in the realm of civil and political rights, the reach of gender stereotyping expands also into the realm of economic, social, and cultural rights. The CEDAW Committee's jurisprudence has linked wrongful gender stereotyping to violations of the rights to employment<sup>192</sup> and health,<sup>193</sup> and the text of CEDAW itself addresses gender stereotyping in education.<sup>194</sup> In *S.F.M. v. Spain*, for example, the most recent case in which the CEDAW Committee found a violation of CEDAW Article 5(a), a woman alleged not only that she had experienced obstetric violence during childbirth but also that this violence was rooted in gender stereotypes, specifically that "women should follow doctors' orders because they are incapable of making their own decisions" and that women are "hysterical, mad and prone to exaggeration and whining."<sup>195</sup> The CEDAW Committee agreed, observing that gender stereotypes had created an environment in which health providers could deny S.F.M. the ability to make decisions about her care, neglect to provide her with information about her care, and later not be held accountable for these actions by administrative or judicial authorities.<sup>196</sup>

CEDAW Article 5(a) thus can reach instances of gender stereotyping across a wide range of substantive rights and cultural contexts, from sexual violence in *Vertido v. Philippines* to reproductive health in *S.F.M. v. Spain*. As the CEDAW

191. Although there is no express mention of violence in the text of CEDAW, the CEDAW Committee has interpreted the definition of discrimination in CEDAW Article 1 to encompass gender-based violence. See *General Recommendation No. 19*, *supra* note 186, ¶ 6.

192. See, e.g., Comm. on the Elimination of Discrimination against Women, *Belousova v. Kazakhstan*, ¶ 10.10, U.N. Doc. CEDAW/C/61/D/45/2012 (Aug. 25, 2015); Comm. on the Elimination of Discrimination against Women, *R.K.B. v. Turkey*, ¶ 8.7, U.N. Doc. CEDAW/C/51/D/28/2010 (Apr. 13, 2012).

193. See, e.g., Comm. on the Elimination of Discrimination against Women, *L.C. v. Peru*, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (Nov. 25, 2011); see also Simone Cusack & Rebecca J. Cook, *Stereotyping Women in the Health Sector: Lessons from CEDAW*, 16 WASH. & LEE J. C.R. & SOC. JUST. 47 (2009) (examining how wrongful gender stereotyping can impair access to reproductive healthcare).

194. CEDAW, *supra* note 1, arts. 10, 10(c) (requiring States to "eliminate discrimination against women in order to ensure to them equal rights with men in the field of education" in part through the "elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods").

195. Comm. on the Elimination of Discrimination against Women, *S.F.M. v. Spain*, ¶ 3.7, U.N. Doc. CEDAW/C/75/D/138/2018 (Feb. 28, 2020).

196. *Id.* ¶ 7.5.

Committee continues to elaborate its theories of wrongful gender stereotyping as rooted in and perpetuating discrimination prohibited by other substantive provisions of the treaty, individuals who do not identify as women should have increasingly expanding opportunities to gain victim standing when they allege violations of their rights to education, employment, health, a life free of violence, and more, if they link these violations to gender stereotyping and ask the CEDAW Committee to read the pertinent substantive provisions of CEDAW in conjunction with CEDAW Article 5(a).

#### IV. ILLUSTRATIVE EXAMPLES OF POTENTIAL CASES

The inclusive interpretation of victim standing advanced in Parts II and III of this Note—that is, that victim standing before the CEDAW Committee should be available to any individual who has experienced sex- or gender-based discrimination without restriction on the basis of sex, gender, or gender identity—could facilitate a transformative approach to gender equality for many issues, including parental leave, school bathrooms, and gender recognition. This Part argues that the CEDAW Committee’s work on these issues thus far has been limited by its narrow focus on sex- and gender-based discrimination against women but could advance rapidly if the CEDAW Committee were to consider communications from victims who do not identify as women. These examples illustrate the range of possible cases that could be brought before the CEDAW Committee by male, nonbinary, and transgender individuals who are victims of sex- and gender-based discrimination both to remedy individual wrongs and to further the broader goal of transformative gender equality.

##### *A. Parental Leave*

An inclusive interpretation of victim standing would allow the CEDAW Committee to elaborate a transformative approach to parental leave under CEDAW. The transformation of gender roles in parenting is envisioned in CEDAW Article 5(b), which emphasizes the “common responsibility of men and women in the upbringing and development of their children.”<sup>197</sup> Although the treaty specifically mentions only maternity leave, in CEDAW Article 11(2)(b),<sup>198</sup> a right to paternity leave—or, more broadly, to parental leave—seems to exist

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197. CEDAW, *supra* note 1, art. 5(b).

198. *Id.* art. 11(2)(b).

implicitly in CEDAW Article 5(b)'s expectation of shared parenting.<sup>199</sup> In its Concluding Observations, the CEDAW Committee has recommended that States create, extend, encourage, or require paternity leave to combat wrongful gender stereotyping and promote shared responsibilities in parenting.<sup>200</sup> The

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199. Elisabeth Håkansson, *Paternity Leave as a Human Right: The Right to Paternity Leave, Parental Leave for the Father, as a Way to Actual Gender Equality in the View of CEDAW and Other International Instruments* 54-56 (2005) (LL.M. thesis, University of Lund), <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1558449> [<https://perma.cc/6QUU-QF6P>].

200. See, e.g., Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of the Republic of Moldova*, ¶ 33(e), U.N. Doc. CEDAW/C/MDA/CO/6 (Mar. 10, 2020); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Kazakhstan*, ¶ 24(d), U.N. Doc. CEDAW/C/KAZ/CO/5 (Nov. 12, 2019) [hereinafter *Concluding Observations on the Fifth Periodic Report of Kazakhstan*]; Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Austria*, ¶ 33(e), U.N. Doc. CEDAW/C/AUT/CO/9 (July 30, 2019); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Guyana*, ¶ 24(b), U.N. Doc. CEDAW/C/GUY/CO/9 (July 30, 2019); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Second Periodic Report of Qatar*, ¶ 38(d), U.N. Doc. CEDAW/C/QAT/CO/2 (July 30, 2019) [hereinafter *Concluding Observations on the Second Periodic Report of Qatar*]; Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of Samoa*, ¶ 32(a), U.N. Doc. CEDAW/C/WSM/CO/6 (Nov. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of the Former Yugoslav Republic of Macedonia*, ¶ 36(f), U.N. Doc. CEDAW/C/MKD/CO/6 (Nov. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Turkmenistan*, ¶ 35(e), U.N. Doc. CEDAW/C/TKM/CO/5 (July 25, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Suriname*, ¶ 37(f), U.N. Doc. CEDAW/C/SUR/CO/4-6 (Mar. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Saudi Arabia*, ¶ 46(a), U.N. Doc. CEDAW/C/SAU/CO/3-4 (Mar. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Third to Fifth Periodic Reports of Malaysia*, ¶ 20(b), U.N. Doc. CEDAW/C/MYS/CO/3-5 (Mar. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of the Republic of Korea*, ¶ 39(c), U.N. Doc. CEDAW/C/KOR/CO/8 (Mar. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Fiji*, ¶ 40(f), U.N. Doc. CEDAW/C/FJI/CO/5 (Mar. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Second and Third Periodic Reports of Oman*, ¶ 38(a), U.N. Doc. CEDAW/C/OMN/CO/2-3 (Nov. 22, 2017); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic People's Republic of Korea*, ¶ 36(e), U.N. Doc. CEDAW/C/PRK/CO/2-4 (Nov. 17, 2017) [hereinafter *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic People's Republic of Korea*]; Comm. on

Committee even once spoke of a “right to paternity leave.”<sup>201</sup> Recommendations in Concluding Observations, however, are limited in their analysis,<sup>202</sup> and the CEDAW Committee has yet to detail the content of a right to paternity leave under CEDAW; discuss the relationship between paternity leave and maternity leave; or address the role of parental leave in the perpetuation of gender stereotypes and, ultimately, sex- and gender-based discrimination.

An inclusive interpretation of victim standing would allow men to allege violations of their right to parental leave under CEDAW, thereby prompting the CEDAW Committee to elaborate on the analysis it began in its Concluding Observations. Many variations of this case could be compelling: a man who is the primary caretaker for his family but who is prevented from taking parental leave available only to his wife, the family’s primary earner; a man whose wife died in childbirth and who has insufficient time to devote to his newborn child because the State offers little or no paternity leave; men in a same-sex relationship, neither of whom is given parental leave to care for a child of adoption or surrogacy; and a man challenging the disparity between paternity and maternity leave because he wishes to be as involved in the upbringing of his child as is his wife.

Such challenges to sex- and gender-based discrimination would not only address the concerns of victims neglected thus far by CEDAW and the CEDAW Committee, but would also benefit women. Discrepancies between maternity and paternity leave perpetuate the assumption that women are the primary caretakers in their families, privileging them in the private sphere while penalizing them in the public sphere.<sup>203</sup> If men alleged violations to their right to parental leave under CEDAW, they could push the CEDAW Committee to consider this issue in greater depth and to adopt a more transformative approach.

### *B. School Bathrooms*

An inclusive interpretation of victim standing could similarly encourage a transformative approach to school bathrooms. The CEDAW Committee has been inconsistent in its approach to sex segregation, discouraging the practice in employment and education while encouraging it in other areas, such as prisons

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the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Singapore*, ¶ 29(d), U.N. Doc. CEDAW/C/SGP/CO/5 (Nov. 21, 2017); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Seventh Periodic Report of Costa Rica*, ¶ 29(d), U.N. Doc. CEDAW/C/CRI/CO/7 (July 24, 2017).

201. Comm. on the Elimination of Discrimination against Women, *Report on Its Fourteenth Session*, ¶¶ 484, 486, U.N. Doc. A/50/38 (May 31, 1995).

202. See *supra* note 25 and accompanying text.

203. See Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 100 (2012).

and school bathrooms.<sup>204</sup> In its General Recommendation No. 36 concerning the right to education, the CEDAW Committee recommended that States “[i]mprove sanitation facilities by providing sex-segregated toilets and washrooms in all schools.”<sup>205</sup> The CEDAW Committee likewise suggested that sex-segregated bathrooms are key to “an enabling school environment” for girls who have reached the “age of menarche,” and that the absence of sex-segregated bathrooms would “contribute to social exclusion, reduced participation in and focus on learning and decreased school attendance.”<sup>206</sup> The CEDAW Committee has also recommended sex-segregated school bathrooms in its Concluding Observations.<sup>207</sup>

Sex-segregated bathrooms, however, are at best a proxy for menstrual-hygiene management<sup>208</sup> that is both underinclusive (i.e., neglecting menstruators

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204. See Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Bulgaria*, ¶¶ 31(b), 32(b), U.N. Doc. CEDAW/C/BGR/CO/8 (Mar. 10, 2020) (employment); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of the Republic of Moldova*, ¶ 32(a), U.N. Doc. CEDAW/C/MDA/CO/6 (Mar. 10, 2020) (employment); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fourth Periodic Report of Andorra*, ¶ 34(c), U.N. Doc. CEDAW/C/AND/CO/4 (Nov. 13, 2019) (employment); *ComConcluding Observations on the Second Periodic Report of Qatar*, *supra* note 200, at ¶¶ 35(b), 36(c) (education); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Fourth Periodic Report of Serbia*, ¶¶ 33(a), 34(c), U.N. Doc. CEDAW/C/SRB/CO/4 (Mar. 14, 2019) (education); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Cyprus*, ¶ 34(b), U.N. Doc. CEDAW/C/CYP/CO/8 (July 25, 2018) (education); *Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic People’s Republic of Korea*, *supra* note 200, ¶ 34(c) (education); *General Recommendation No. 36*, *supra* note 18, ¶ 31(f) (bathrooms); Comm. on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil*, ¶ 33(c), U.N. Doc. CEDAW/C/BRA/CO/7 (Mar. 23, 2012) (prisons).

205. *General Recommendation No. 36*, *supra* note 18, ¶ 31(f).

206. *Id.* ¶ 30.

207. See, e.g., Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Report of Nepal*, ¶ 33(b), U.N. Doc. CEDAW/C/NPL/CO/6 (Nov. 14, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India*, ¶ 27(a), U.N. Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014).

208. See Hilary O.D. Critchley, Elnur Babayev, Serdar E. Bulun, Sandy Clark, Iolanda Garcia-Grau, Peter K. Gregersen, Aoife Kilcoyne, Ji-Yong Julie Kim, Missy Lavender, Erica E. Marsh, Kristen A. Matteson, Jacqueline A. Maybin, Christine N. Metz, Inmaculada Moreno, Kami Silk, Marni Sommer, Carlos Simon, Ridhi Tariyal, Hugh S. Taylor, Günter P. Wagner & Linda G. Griffith, *Menstruation: Science and Society*, 223 AM. J. OBSTETRICS & GYNECOLOGY 624, 654 (2020); Marni Sommer, Chantal Figueroa, Christina Kwauk, Meredith Jones & Nora Fyles, *Attention to Menstrual Hygiene Management in Schools: An Analysis of Education Policy Documents in Low- and Middle-Income Countries*, 57 INT’L J. EDUC. DEV. 73, 74 (2017).

who do not identify as women) and overinclusive (i.e., encompassing women who do not menstruate).<sup>209</sup> They also perpetuate the stigma of menstruation that they are intended to address.<sup>210</sup> Although addressing the effect of menstruation on the right to education is crucial to achieving gender equality,<sup>211</sup> the CEDAW Committee's narrow focus on women diverts its attention from the root of the problem—the gendered culture of secrecy and shame around menstruation—and prevents it from analyzing the broader implications for gender equality of recommending sex segregation in school bathrooms. Limiting the CEDAW Committee's mandate to sex- and gender-based discrimination against women and girls thus weakens the transformative potential of its approach to school bathrooms.

With victim standing before the CEDAW Committee, transgender individuals can encourage a more transformative approach to gender equality by alleging that sex-segregated school bathrooms violate their rights under CEDAW. Sex-segregated school bathrooms perpetuate the gender binary, acknowledging only two essentialized, opposing genders instead of a spectrum of gender identities.<sup>212</sup> Compelling cases could include: a transgender student who is forced to use a bathroom that does not correspond to their gender identity; a transgender man who menstruates and who does not have access to menstrual products or a trash can when using his school's male-assigned bathrooms; a transgender student who is barred, in law or in practice, from the use of any school bathroom; and a transgender student who is instructed to use a bathroom entirely separate from other students. Similar cases could be brought over school changing rooms and shower facilities.<sup>213</sup>

Bringing these claims of discrimination to the CEDAW Committee would also benefit women because all forms of sex segregation inherently harm women

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209. See Sarah E. Frank, *Queering Menstruation: Trans and Non-Binary Identity and Body Politics*, 90 SOCIO. INQUIRY 371, 396 (2020) (“Menstruation is socially defined and filed within women’s spheres, but the relationship between menstruation and ‘womanhood’ is evidently inept, not only for trans and non-binary people who menstruate, but also trans women who do not. Additionally, intersex women, menopausal women, and women post-hysterectomy are still women even in the absence of menstruation.”).

210. See Christine Overall, *Public Toilets: Sex Segregation Revisited*, 12 ETHICS & ENV'T 71, 77 (2007); Laura Portuondo, Note, *The Overdue Case against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 517-21 (2018).

211. See Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 18-19 (2014).

212. See David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 167, 178-79 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); Frank, *supra* note 209, at 376.

213. See Anniken Sørli, *Transgender Children's Right to Non-Discrimination in Schools: The Case of Changing-Room Facilities*, 28 INT'L J. CHILD.'S RTS. 221 (2020).

by perpetuating gender stereotypes and gender hierarchy.<sup>214</sup> Women-only bathrooms, for example, are sites of violence and harassment against women who do not conform to stereotypes of femininity, while men-only bathrooms grant men an opportunity to consolidate negative attitudes about women and limit women's access to historically male power and knowledge.<sup>215</sup> Transgender individuals could inspire the CEDAW Committee to see these broader implications of sex segregation by bringing cases that urge the Committee to think of segregating school bathrooms by sex not as a solution to other rights violations, but as a rights violation itself.

### C. Gender Recognition

Finally, an inclusive interpretation of victim standing could facilitate a transformative approach to the right to legal gender recognition. The CEDAW Committee's specific focus on women has artificially limited its promotion of this right. In Concluding Observations, the CEDAW Committee has expressed concern about the lengthy bureaucratic processes and invasive medical procedures States sometimes require as a precondition for recognizing a transgender or intersex individual as a woman.<sup>216</sup> The CEDAW Committee has not, however, recommended the elimination of identical barriers facing individuals who seek legal gender recognition as men, nor has it observed that transgender, intersex, and other individuals sometimes prefer to be legally recognized as nonbinary. The CEDAW Committee has also not yet engaged with the relatively new idea, most prominently found in Principle 31 of the Yogyakarta Principles Plus 10,<sup>217</sup> that

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214. See David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 135-40 (2011).

215. See Kath Browne, *Genderism and the Bathroom Problem: (Re)materialising Sexed Sites, (Re)creating Sexed Bodies*, 11 GENDER, PLACE & CULTURE 331, 336-40 (2004); David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 540-52 (2010).

216. See, e.g., Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, ¶ 50(e), U.N. Doc. CEDAW/C/AUS/CO/8 (July 25, 2018); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Second Periodic Report of Montenegro*, ¶¶ 46, 47(b), U.N. Doc. CEDAW/C/MNE/CO/2 (July 24, 2017); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland*, ¶ 39(d), U.N. Doc. CEDAW/C/CHE/CO/4-5 (Nov. 25, 2016); Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Seventh Periodic Report of Belgium*, ¶¶ 44-45, U.N. Doc. CEDAW/C/BEL/CO/7 (Nov. 14, 2014); *Concluding Observations on the Fifth Periodic Report of Kazakhstan*, *supra* note 200, ¶ 48(b)(i).

217. Drafted in 2006 by a group of experts, the Yogyakarta Principles are a guide to international human rights law as it should be applied to sexual orientation and gender identity that has

the right to legal recognition includes the eventual elimination of sex and gender categories in identification documents.<sup>218</sup> It is of limited use for the CEDAW Committee to recommend that States respect individuals' right to legal gender recognition – a departure from the sex/gender binary – when the CEDAW Committee itself continues to restrict its own analysis to women in accordance with the sex/gender binary.

With victim standing before the CEDAW Committee, nonbinary individuals could challenge the Committee to adopt a transformative approach to legal gender recognition by asserting that their States' gender-registration practices violate their rights under CEDAW. Compelling cases could include: parents who are struggling to register the birth of an intersex child; nonbinary individuals who seek to change their sex or gender classification on official documents;<sup>219</sup> and nonbinary individuals who are prevented from marrying in countries that have not recognized same-sex marriage.

Asking the CEDAW Committee to interpret CEDAW as requiring States to recognize nonbinary individuals' right to legal recognition would, moreover, benefit women by contributing to the understanding of gender as a spectrum and reducing the role of gender classification in the organization of society.<sup>220</sup> It would also create space for the Committee to clarify how the future elimination of sex and gender categories in identification documents could occur without harm to the interests of women and girls. This issue reflects an unresolved tension in the Yogyakarta Principles Plus 10 that the CEDAW Committee is

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attracted attention and acquired authority even though it is not legally binding. See Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUMAN RIGHTS L. REV. 207, 232-47 (2008); Ryan Richard Thoreson, *Queering Human Rights: The Yogyakarta Principles and the Norm that Dare Not Speak Its Name*, 8 J. HUMAN RIGHTS 323, 323-24, 333 (2009). The Yogyakarta Principles Plus 10, drafted in 2017, supplement this document by addressing changes in international law, State practice, and LGBTQ+ priorities since 2006. See Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223, 243-47 (2019).

218. THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION, AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES, princ. 31(A) (2017), [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) [<https://perma.cc/GUC5-JLZP>].

219. See, e.g., Mattias Decoster & Sarah Schoentjes, *Legal Sex/Gender Recognition Beyond the Binary: Human Rights Centre Submits Third Party Intervention*, STRASBOURG OBSERVERS (Dec. 16, 2020), <https://strasbourgobservers.com/2020/12/16/legal-sex-gender-recognition-beyond-the-binary-human-rights-centre-submits-third-party-intervention> [<https://perma.cc/J564-DQSJ>].

220. See Peter Robert Dunne, *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation 352* (2018) (Ph.D. dissertation, Trinity College Dublin, School of Law), <http://www.tara.tcd.ie/bitstream/handle/2262/84084/PETER%20DUNNE%20-%20THESIS.pdf> [<https://perma.cc/LB5U-47HS>].

uniquely qualified to address.<sup>221</sup> The CEDAW Committee has already interpreted CEDAW to protect the right to legal gender recognition, but bringing nonbinary individuals within the scope of its analysis would unleash the transformative potential of this right while ensuring that any proposed solution furthers gender equality for everyone, including women.

## CONCLUSION

This Note has argued that the case of *M.W. v. Denmark* represents a significant breakthrough in the CEDAW Committee's jurisprudence because it signals that victim standing to allege violations of rights under CEDAW is not restricted to women. Advocates could rely on the arguments in this Note to submit individual communications to the CEDAW Committee that ask it to expand beyond its reasoning in *M.W. v. Denmark* by granting standing to direct victims of sex- and gender-based discrimination who do not identify as women. States could also contribute to the reimagining of victimhood under CEDAW by refraining from challenging the victim standing of individuals alleging violations of CEDAW on the basis of those individuals' sex, gender, or gender identity, and by taking positive action to demonstrate an understanding that CEDAW protects all individuals from sex- and gender-based discrimination. Some Scandinavian countries, for example, have invoked CEDAW Article 5(a) in their adoption of affirmative action measures for men in sectors such as the care industry.<sup>222</sup> The inclusive interpretation of victim standing elaborated in this Note would not only allow male, nonbinary, and transgender persons access to a forum for their claims of discrimination, but could also shape the interpretation and evolution of CEDAW itself and facilitate the work of transformative gender equality that benefits everyone, including women. Parental leave, school bathrooms, and gender recognition are but a few examples of issues that the CEDAW Committee could approach in a more transformative way if it reinterpreted its mandate to include all instances of sex- and gender-based discrimination, regardless of the sex, gender, or gender identity of the victim. No longer at the margins, the CEDAW Committee could become a trailblazer in transformative gender equality.

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221. See Lena Holzer, *Smashing the Binary? A New Era of Legal Gender Registration in the Yogyakarta Principles Plus 10*, 1 INT'L J. GENDER, SEXUALITY & L. 98, 123 (2020).

222. See Alec Knight, *An Asymmetric Comparative International Law Approach to Treaty Interpretation: The CEDAW Committee's Tolerance of the Scandinavian States' Progressive Deviation*, in COMPARATIVE INTERNATIONAL LAW 419, 429-35 (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg eds., 2018).