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## Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women

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# Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women

Elise Meyer

## Abstract

*This Comment begins by noting the indeterminacy of the term “woman” in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), arguing that the term, as it is used in CEDAW, is inclusive of trans\* individuals, thus extending CEDAW’s protections to this historically marginalized group. The Comment dissects the term “woman” in CEDAW, based in part on the Vienna Convention on the Law of Treaties, examining the ordinary meaning, the object and purpose, and the supplementary materials of CEDAW to argue that CEDAW protects trans\* individuals against discrimination and other abuses outlined in the treaty. The Comment also draws on the expansive interpretation of the protected classes in other U.N. treaties to argue that a similar interpretive approach to the term “woman” in CEDAW is necessary.*

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J.D. Candidate, 2016, The University of Chicago Law School. The author of this student Comment is a ciswoman and welcomes critiques and comments she may not have investigated. She would also like to thank the *CJIL* staff, Professor Abebe, and Professor Citro for their perceptive feedback and suggestions.

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## I. INTRODUCTION

The most well-known photograph of Nazi book burning during World War II captures the burning of Magnus Hirschfeld's library from the Institute for Sexual Science in 1933 Berlin.<sup>1</sup> Hirschfeld was one of the earliest advocates of what is called trans\* rights today.<sup>2</sup> In 1910, he coined the term "transvestite" and wrote "the first book length treatment of transgender phenomena."<sup>3</sup> Like many trans\*<sup>4</sup> advocates today, Hirschfeld worked with the police "to end the harassment and targeting for arrest of transgender people."<sup>5</sup>

In the modern West, conditions in the 1850s began to give shape to a social movement based on trans\* rights that would not take complete coherent form until after World War II.<sup>6</sup> At this time, another movement was beginning to take place: human rights. The modern history of human rights begins shortly after World War II when major countries of the world were coming together to form the U.N. to prevent future atrocities like those committed in the War.<sup>7</sup> Yet surprisingly, the human rights regime has never extended its protections to sexual minorities or the trans\* community,<sup>8</sup> despite the fact that trans\* people are present in almost every culture and society in the world and have been subject to transphobic violence "in all regions."<sup>9</sup>

While protections specifically tailored for trans\* individuals are virtually nonexistent in the human rights world,<sup>10</sup> there are predominant human rights

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<sup>1</sup> SUSAN STRYKER, *TRANSSEXUAL HISTORY*, 40 (2008).

<sup>2</sup> *See id.* at 39.

<sup>3</sup> *Id.* at 38–39.

<sup>4</sup> I choose to use "trans\*" because I think it is the most inclusive term of the group I am trying to describe. Unfortunately, I will sometimes use the word trans\* in a way that includes people who might not use it to describe themselves. This is especially true since I will be talking about the gender nonconformists in every culture throughout world. For more discussion on this choice of terminology, please see Section II.A.

<sup>5</sup> STRYKER, *supra* note 1, at 39.

<sup>6</sup> *See id.* at 31.

<sup>7</sup> U.N. Charter Preamble ("... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...").

<sup>8</sup> Kerstin Braun, *Do Ask, Do Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 29 AM. U. INT'L L. REV. 871, 872–73 (2014).

<sup>9</sup> U.N. High Comm'r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the U.N. High Comm'r for Human Rights*, ¶ 1, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

<sup>10</sup> *See The Human Rights of Lesbians, Gay, Bisexual, and Transgender Individuals*, in HUMAN RIGHTS 1208 (Louis Henkin, Sarah H. Cleveland, Gerald L. Neuman, Diane F. Orentlicher, eds., 2d ed. 2009).

treaties protecting women.<sup>11</sup> The most wide-reaching international human rights treaty tailored to women is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>12</sup> The term “woman,” however, is left undefined in CEDAW. The lack of a specific definition begs the question: What makes a woman? Is a woman defined by her anatomy? Her biology? Her genetics? All three? Is a woman defined by her gender identity? Her gender performance or her perceived gender? The answer to these questions will determine who may bring claims under CEDAW and who are the proper rights holders in this context. Interestingly, each of the above aspects of “woman” would include some trans\* individuals.<sup>13</sup>

I argue the term “woman” as used in CEDAW means all of the above: biological, anatomical, genetic, gender performance, and/or gender identity—meaning any of the listed categories standing alone would be sufficient as would a combination of two or more categories. When “woman” is used in ordinary speech it very often means a combination of some or all of the above definitions. This definition is inclusive of butch women, women who have undergone female genital mutilation (FGM), hysterectomy, sex reassignment surgery, and menopausal women. It includes ciswomen<sup>14</sup> and trans\* individuals, both transwomen and transmen. As will be shown in this Comment, any of these factors alone do not make a reasonable definition of woman. However, these factors taken together, not connected through the restrictive “and” but rather through “and/or,” creates the definition of woman that is dictated by CEDAW.

This conclusion is made by applying Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) to the text of CEDAW.<sup>15</sup> First, the “ordinary meaning” of the term “woman” as it appears in CEDAW supports this definition. Second, the term “woman,” when viewed in light of the object and purpose of CEDAW, and international human rights treaties in general,

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<sup>11</sup> See generally, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, OAU Doc. CAB/LEG/66.6.

<sup>12</sup> United Nation Convention on the Elimination of All Forms of Discrimination Against Women art. 29, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>13</sup> These terms are defined and discussed in more detail in Section II.A below.

<sup>14</sup> Cisgender “[d]enot[es]...a person whose self-identity conforms with the gender that corresponds to their biological sex.” *Cisgender Definition*, OXFORD ONLINE DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/cisgender](http://www.oxforddictionaries.com/us/definition/american_english/cisgender) (last visited Oct. 23, 2015).

<sup>15</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, arts. 2(d), 19–23 [hereinafter Vienna Convention].

requires a definition inclusive of trans\* people. Third, supplementary material allowed by Article 31 that comprises the context requirement bolsters this argument. Section II provides background on transgender feminism, gender in international human rights law, and the international protections for trans\* individuals, or the lack thereof. Section III argues for a broader definition of the term “woman” in CEDAW. This section begins with a brief background of the treaty and its particularly unique provisions. Next, it lays out the rules for treaty interpretation as put forth in the Vienna Convention. Lastly, it applies those rules to the interpretation of the term “woman” in CEDAW. In Section IV, potential consequences, both negative and positive, of such a definition are explored. Finally, Section V will contain concluding thoughts on moving forward.

## II. BACKGROUND

### A. Terms and Definitions

As my argument centers on the lack of a definition, I find it imperative to define the terms I will be using throughout this Comment at the outset. While my argument centers on the arduous questions “what makes a woman a woman” or “who is a woman,” the following definitions will be, I hope, more straightforward. However, just as defining “woman” is complicated and multifaceted, so too are defining the following terms.

#### 1. Sex and gender.

Sex and gender are frequently confused and used interchangeably, not only in everyday speech, but also in academic, legal, and official writing.<sup>16</sup> The importance of this distinction is key to my argument.

Sex has three possible conceptions that can be used together or separately. First, sex can be considered biological, as it “refers to reproductive capacity or potential.”<sup>17</sup> Those bodies that produce sperm are considered male while those that produce eggs are considered female.<sup>18</sup> Second, sex can be considered anatomical or morphological. A body that has labia and a clitoris, and/or breasts is considered female, whereas a body that has a penis, testicles, and a flat chest is considered male.<sup>19</sup> However, these conceptions of sex “should not be taken to mean that there are only two kinds of bodies (male and female) or that all bodies

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<sup>16</sup> STRYKER, *supra* note 1, at 7, 11.

<sup>17</sup> *Id.* at 7–8.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* at 9.

are either one or the other of only two possible kinds of bodies.”<sup>20</sup> Third, sex can be considered as genetics. A person with XX chromosome is female, while a person with an XY chromosome is male.<sup>21</sup>

In the U.S. and other Western traditions, it is still widely believed that gender . . . is also determined by physical sex—meaning that a person with a male body is automatically considered a man and person with a female body is automatically considered a woman—hence the common tendency to use the words ‘sex’ and ‘gender’ interchangeably.<sup>22</sup> Gender, however, is considered cultural or social, meaning our ideas about how a man or woman should act are learned through socialization.<sup>23</sup> Consequently, gender varies depending on temporal, cultural, and geographic contingencies.<sup>24</sup> However, it is important to bear in mind that “how a society organizes its members into categories based on their unchosen physical differences is never politically neutral.”<sup>25</sup> Moreover, a person’s gender identity and gender performance may not always be consistent and can easily bend and blend.<sup>26</sup> I will discuss the concepts of sex and gender and how they relate to each other and to the legal theories in Section III of this Comment.

Gender identity is “a subjective sense of fit with a particular gender category.”<sup>27</sup> Because gender identity is subjective, it is not always outwardly known.<sup>28</sup> As trans\* individuals have demonstrated for years, people can identify with the “opposite” gender, or simply not identify with the gender they were assigned.<sup>29</sup> Gender comportment or performance is how one acts out or performs their gender.<sup>30</sup> For many people, “the body is an expression, possibly *the* expression of” gender.<sup>31</sup> Gender comportment can be expressed through

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<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Cf. id.* at 12–16.

<sup>27</sup> *Id.* at 13.

<sup>28</sup> NAT’L CTR. FOR TRANSGENDER EQUALITY, *Transgender Terminology*, <http://transequality.org/issues/resources/transgender-terminology> (last updated Jan. 15, 2014).

<sup>29</sup> STRYKER, *supra* note 1, at 13.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> HENRY RUBIN, *SELF-MADE MEN: IDENTITY AND EMBODIMENT AMONG TRANSEXUAL MEN* 145–46 (2003) (emphasis in original).

“how we use our voices, cross our legs, hold our heads, wear our clothes, dance around the room, throw a ball, walk in high heels.”<sup>32</sup>

## 2. Transgender.

Transgender is a gender identity or comportment that does not reflect common gender constructions of the culture and time.<sup>33</sup> Transgender describes “any and all kinds of variation from gender norms and expectations . . . . What counts as *transgender* varies as much as gender itself, and it always depends on historical and cultural context.”<sup>34</sup> However, “the difference between gender and transgender in any given situation . . . involves the difference between a dominant or common construction of gender and a marginalized or infrequent one.”<sup>35</sup>

## 3. Trans\*.

Trans\* is a term used “to capture all the identities—from drag queen to genderqueer—that fall outside traditional gender norms.”<sup>36</sup> The asterisk “stems from common computing usage wherein it represents a wildcard.”<sup>37</sup> This means the suffix following trans\* could range from gender to sexual to vestite. Therefore, trans\* includes transgendered people, transsexuals, and transvestites. It is the term used most in this Comment to refer to those people who do not conform to traditional ideas of gender.

The term “trans\*” seems to be the best fit as it applies across cultures.<sup>38</sup> There is always a tension in international human rights law that a term or phrase will be either under- or overinclusive.<sup>39</sup> If the term is underinclusive, states will claim there is no such phenomenon in their culture. If the term is overinclusive,

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<sup>32</sup> STRYKER, *supra* note 1, at 12.

<sup>33</sup> *See id.* at 19.

<sup>34</sup> *Id.* (emphasis in original).

<sup>35</sup> *Id.*

<sup>36</sup> Hugh Ryan, *What Does Trans\* Mean, and Where Did It Come From?*, SLATE (Jan. 10, 2014, 12:37 PM), [http://www.slate.com/blogs/outward/2014/01/10/trans\\_what\\_does\\_it\\_mean\\_and\\_where\\_did\\_it\\_come\\_from.html](http://www.slate.com/blogs/outward/2014/01/10/trans_what_does_it_mean_and_where_did_it_come_from.html).

<sup>37</sup> *Id.*

<sup>38</sup> *Cf. id.* (“When communities are no longer limited by physical proximity, people are more likely to look for words that invoke broad inclusion, out of sheer necessity.”).

<sup>39</sup> *See, for example*, Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Summary Rep. on the Expert Group Meeting on Gender-Motivated Killings of Women*, U.N. Doc. A/HRC/20/16/Add.4 (May 16, 2012), (an example of the difficulties of choosing a term in international human rights law, which illustrates the U.N. Special Rapporteur on Violence Against Women’s choice to use the term “gender related killings” instead of “femicide” in her thematic report on the topic).

the specific problem to be addressed risks being lost. I choose “trans\*” because I think it is the most inclusive term for the group I am trying to describe.

Unfortunately, I will sometimes use the word trans\* in a way that includes people who might not use it to describe themselves. This is especially true since the Comment will cover gender nonconformists in every culture across the globe. For example, I will use the term “trans\*” to encompass the “hijra” in India, the “two-spirit” in some Native American cultures, and the “travesti” in some South American cultures, among others.<sup>40</sup>

#### 4. Transmen, transwomen, and cisgender.

The phrase “transmen” is used when “talking about people who were born with female bodies but consider themselves to be men and live socially as men.”<sup>41</sup> Similarly, the term “transwomen” refers “to people born with male bodies who consider themselves to be women and live socially as women.”<sup>42</sup> Cisgender is used as “[d]enoting or relating to someone whose sense of personal identity corresponds with the gender assigned to them at birth.”<sup>43</sup> The prefix “cis” means “on the same side as,” which, of course, is the opposite of the prefix “trans.”

### B. Gender in International Human Rights Law

Generally, in the international human rights legal world, and in the interpretations used by the U.N. in particular, there is “an increasingly painful fault line visible in gender advocacy and policy . . . . The fault line divides gender either into short-hand for attention to ‘women’ deemed a unified, single category; or gender into shorthand for an aspect of gay (male), or more recently transgender, identity.”<sup>44</sup> Scholars stress the importance of “strategic coalitions among the sub-groups facing the common gendered repression,” but this exclusionary and superficial fault line often prevents such coalitions.<sup>45</sup> A trans\* inclusive interpretation of the term “woman” in CEDAW, however, would create an exception to the superficial gender division in international human

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<sup>40</sup> For a general background on some gender nonconforming communities, *see, for example*, SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* (1990); *TWO-SPIRIT PEOPLE: NATIVE-AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY* (Sue-Ellen Jacobs, Wesley Thomas, & Sabine Lang, eds. 1997); DON KULICK, *TRAVESTI: SEX, GENDER, AND CULTURE AMONG BRAZILIAN TRANSGENDERED PROSTITUTES* (1998).

<sup>41</sup> STRYKER, *supra* note 1, at 20.

<sup>42</sup> *Id.*

<sup>43</sup> *Cisgender Definition*, *supra* note 14.

<sup>44</sup> Ali Miller, *Fighting Over the Figure of Gender*, 31 *PACE L. REV.* 837, 838 (2011).

<sup>45</sup> *Id.* at 841.

rights law.<sup>46</sup> Such a definition would “unfreeze the rigidity of [gender identity]’s attachment to bio-male bodies” while still including them in the meaning of gender identity.<sup>47</sup>

### C. Lack of International Protection for Trans\* People

Interestingly, the development of the human rights idea and the transgender activist movement can be traced to the same moment in history: World War II.<sup>48</sup> Yet while concern for the LGBT community has been expressed by international human rights entities in recent years,<sup>49</sup> no major international treaty has been adopted that specifically protects LGBT people, much less trans\* people.<sup>50</sup> Moreover, while trans\* people are included in the acronym “LGBT,” they are frequently forgotten or ignored in many mainstream LGBT movements.<sup>51</sup> The LGBT movement is often criticized as prioritizing lesbian and gay rights over those of the other groups they claim to represent, like trans\* people.<sup>52</sup>

The closest the international human rights movement has come to including trans\* individuals is through the Yogyakarta Principles.<sup>53</sup> These principles articulate how existing international human rights instruments apply to LGBT people and are accompanied by recommendations to national, regional, and international organizations.<sup>54</sup> For example, the authors recommend that “[t]he United Nations Human Rights Council endorse these Principles and

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<sup>46</sup> See *id.* at 843.

<sup>47</sup> *Id.* at 864.

<sup>48</sup> Compare STRYKER, *supra* note 1, at 7, with Louis Henkin, *The Age of Rights*, in HUMAN RIGHTS, *supra* note 10, at 42.

<sup>49</sup> Press Release, Organization of American States, IACHR Expresses Concern over Pervasiveness of Violence against LGBTI Persons and Lack of Data Collection by OAS Member States, O.A.S. Press Release No. 153/14 (Dec. 17, 2014).

<sup>50</sup> See generally, Braun, *supra* note 8.

<sup>51</sup> See 4 WOMEN’S RIGHTS IN THE UNITED STATES: A COMPREHENSIVE ENCYCLOPEDIA OF ISSUES, EVENTS, AND PEOPLE 212 (Tiffany K. Wayne ed., 2014).

<sup>52</sup> Lisa Mottet & Justin Tanis, *Opening the Door to the Inclusion of Transgender People: The Nine Keys to Making Lesbian, Gay, Bisexual and Transgender Organizations Fully Transgender-Inclusive*, 36, 45 NAT’L GAY AND LESBIAN TASK FORCE POLICY INSTITUTE (2008), [http://transequality.org/sites/default/files/docs/resources/opening\\_the\\_door.pdf](http://transequality.org/sites/default/files/docs/resources/opening_the_door.pdf).

<sup>53</sup> Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6–9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) [hereinafter Yogyakarta Principles].

<sup>54</sup> Sheila Quinn, *An Activist’s Guide to the Yogyakarta Principles*, 19 INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N (Nov. 9, 2010), [http://iglhrc.org/sites/default/files/Activists\\_Guide\\_Yogyakarta\\_Principles.pdf](http://iglhrc.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf).

give substantive consideration to human rights violations based on sexual orientation or gender identity, with a view to promoting State compliance with these Principles.”<sup>55</sup> The principles are non-binding and have not been signed by any states; however, they may have had an effect on pushing international organizations to recognize and promote the interpretations.

The trans\* social movement has been utilizing human rights more and more.<sup>56</sup> There have been some international court decisions supporting trans\* rights<sup>57</sup> and even a U.N. Resolution requesting “the High Commissioner for Human Rights to commission a study . . . documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end” such violence and discrimination.<sup>58</sup> In the same resolution, the Human Rights Council announced it would “convene a panel discussion . . . informed by the facts contained in the study . . . [and] have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.”<sup>59</sup> Both the study<sup>60</sup> and the panel<sup>61</sup> have come to fruition. The study revealed that trans\* individuals are subject to much of the same kind of violence as women. For example, trans\* individuals face gender-based violence like honor killings and rape.<sup>62</sup> In fact, the study specifically mentions Article 2 of CEDAW as proscribing such violence and applies it to trans\* individuals.<sup>63</sup> Still, not much action has been taken on the issue since. However, near the end of 2014, the Human Rights Council issued a second resolution, requesting “the High Commissioner to update the report . . . with a

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<sup>55</sup> *Yogyakarta Principles*, *supra* note 53, at 32.

<sup>56</sup> *See generally, for example, Transgender*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/topics/transgender> (last visited Oct. 23, 2015).

<sup>57</sup> *See, for example*, Case C-13/94, P. v. S. and Cornwall County Council, 1996 E.C.R. I-2159, 2164–66 (holding that sex discrimination included discrimination of a person based on sex/gender reassignment surgery).

<sup>58</sup> Human Rights Council Res. 17/19, Human Rights, Sexual Orientation and Gender Identity, 17th Sess., U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

<sup>59</sup> *Id.*

<sup>60</sup> *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, *supra* note 9.

<sup>61</sup> Human Rights Council, Panel on Ending Violence and Discrimination Against Individuals Based on Their Sexual Orientation and Gender Identity: Summary of Discussion (Mar. 7, 2012) <http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>.

<sup>62</sup> *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, *supra* note 9, at 8–12.

<sup>63</sup> *Id.* at 8 & n.25.

view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.”<sup>64</sup>

While such progress is noteworthy, these norms have not yet been codified into any legally binding documents. Moreover, as this brief overview has shown, trans\* issues are frequently lumped together with matters of sexual orientation. While coordinating with other minorities may be a necessary strategy for advocacy,<sup>65</sup> it is important that trans\* individuals have more expansive and legally enforceable protections.

### III. INTERPRETING CEDAW TO INCLUDE TRANS\* PEOPLE

This Section argues for a broader definition of the term “woman” in CEDAW. It begins with a brief background of the treaty and its particularly unique provisions, showing how CEDAW would work to protect trans\* individuals. Next, it lays out the rules for treaty interpretation as put forth in the Vienna Convention. Lastly, it applies those rules to the interpretation of the term “woman” in CEDAW.

#### A. Background on CEDAW

CEDAW is a multilateral international human rights treaty adopted by the U.N. General Assembly in 1979.<sup>66</sup> The treaty currently has 189 states parties, more than 90 percent of U.N. member states.<sup>67</sup> As the title of the treaty indicates, its major objective is to protect women against discrimination. CEDAW is made up of sixteen substantive articles outlining obligations of states parties. There are four major sets of rights delineated in the treaty: (1) non-discrimination,<sup>68</sup> (2) disruption of sociocultural patterns of sex and sex trafficking,<sup>69</sup> (3) education, employment, health, and economic/social life,<sup>70</sup> and (4) equality before the law and marriage.<sup>71</sup>

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<sup>64</sup> Human Rights Council Res 27/32, Human Rights, Sexual Orientation and Gender Identity, 27th Sess., U.N. Doc. A/HRC/RES/27/32 (Oct. 2, 2014).

<sup>65</sup> See Miller, *supra* note 44, at 841.

<sup>66</sup> CEDAW, *supra* note 12.

<sup>67</sup> Compare CEDAW, *supra* note 12, with About the UN: Overview, <http://www.un.org/en/sections/about-un/overview/index.html> (last visited Oct. 23, 2015) (noting that the U.N. is currently made up of 193 Member States).

<sup>68</sup> CEDAW, *supra* note 12, arts. 1–2, 7–9.

<sup>69</sup> *Id.* arts. 5–6.

<sup>70</sup> *Id.* arts. 10–13.

<sup>71</sup> *Id.* arts. 15–16.

First, in terms of non-discrimination, states parties agree to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation . . . and to ensure, through law and other appropriate means, the practical realization of this principle.”<sup>72</sup> This includes taking “appropriate measures . . . to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>73</sup> CEDAW is unique because states parties must not only refrain from discriminating against women themselves<sup>74</sup> but must also “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>75</sup> In addition, states parties “shall take in all fields . . . all appropriate measures, including legislation, to ensure the full development and advancement of women.”<sup>76</sup>

Second, in terms of disrupting sociocultural patterns of sex and sex trafficking, the states parties must

take all appropriate measures . . . [t]o modify the social and cultural patterns of conduct . . . with a view to achieving the elimination of prejudices . . . 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>77</sup>

This obligation essentially translates to disrupting proscribed gender roles, as those roles are necessarily based on stereotypes. States parties also commit to including in family education “the recognition of the common responsibility of men and women in the upbringing and development of their children.”<sup>78</sup> Additionally, states parties “shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>79</sup>

Third, in the realm of employment, health, and economic/social life, CEDAW guarantees women equal access to education in terms of quality and services.<sup>80</sup> States parties also agree to “take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on

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<sup>72</sup> *Id.* art. 2(a).

<sup>73</sup> *Id.* art. 2(f).

<sup>74</sup> *Id.* art. 2(d).

<sup>75</sup> *Id.* art. 2(e).

<sup>76</sup> *Id.* art. 3.

<sup>77</sup> *Id.* art. 5(a).

<sup>78</sup> *Id.* art. 5(b).

<sup>79</sup> *Id.* art. 6.

<sup>80</sup> *Id.* art. 10.

a basis of equality of men and women, the same rights.”<sup>81</sup> In addition, states parties “shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”<sup>82</sup> Moreover, states parties must “take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights.”<sup>83</sup>

Fourth, in terms of equality before the law and marriage, states “shall accord to women equality with men before the law,” including “a legal capacity identical to that of men and the same opportunities to exercise that capacity . . . . [And] equal rights to conclude contracts and to administer property.”<sup>84</sup> CEDAW also guarantees women

the same right to enter into marriage; the same right freely to choose a spouse and to enter into marriage only with their free and full consent; the same rights and responsibilities during marriage and at its dissolution; the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children . . . [and t]he same rights to decide freely and responsibly on the number and spacing of their children.<sup>85</sup>

CEDAW has several unique aspects that create strong protections. First, discrimination is not required to be proven by discriminatory intent, like what is required to receive heightened scrutiny in an equal protection claim under the U.S. Constitution.<sup>86</sup> Rather, a law or action that has discriminatory effect is enough to prove a CEDAW violation.<sup>87</sup> For example, a health law that is gender neutral on its face may disproportionately affect women in certain areas, such as HIV-related care where women are frequently at higher risks of contracting the virus than men.<sup>88</sup> Second, states are required to take affirmative steps to ensure “the practical realization” of the principle of sex equality, including what may be conceptualized as affirmative action.<sup>89</sup> Third, CEDAW requires states to take

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<sup>81</sup> *Id.* art. 11(1).

<sup>82</sup> *Id.* art. 12(1).

<sup>83</sup> *Id.* art. 13.

<sup>84</sup> *Id.* art. 15(1)–(2).

<sup>85</sup> *Id.* art. 16(a)–(e).

<sup>86</sup> *See* *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact, even against a suspect class, is not enough to prompt strict scrutiny).

<sup>87</sup> CEDAW, *supra* note 12, art. 1.

<sup>88</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation 24: Women and Health, 20th Sess., Jan. 19–Feb. 5, 1999, U.N. Doc. A/54/38/Rev.1, GAOR, 54th Sess., Supp No. 38 (1999).

<sup>89</sup> CEDAW *supra* note 12, art. 2(a).

positive steps to modify cultural patterns that impair equality.<sup>90</sup> For example, the Committee has recommended the use of “affirmative action . . . for predominantly male fields of study or professions” and the implementation of media regulations “to combat negative gender roles and stereotypes.”<sup>91</sup> Fourth, CEDAW prohibits discrimination in private and public life, meaning states parties are responsible for private actors who violate the treaty.<sup>92</sup>

There is currently one optional protocol to CEDAW to which 106 states have become parties.<sup>93</sup> The Optional Protocol does not lay out any additional rights but rather grants two additional interpretive and enforcement mechanisms to the governing body of CEDAW: (1) an individual complaint procedure<sup>94</sup>; and (2) an investigative authority.<sup>95</sup> I will address the interpretative aspects of this authority in greater detail below.<sup>96</sup> However, it is important to note that the investigatory authority granted to the Committee by the Optional Protocol makes it one of only three currently operating treaty bodies at the global level that have similar investigative authority.<sup>97</sup>

These four features of CEDAW, combined with its widespread acceptance and comparatively strong enforcement mechanisms,<sup>98</sup> make CEDAW especially robust and appealing for advocates. However, CEDAW is not without its downfalls. Most notably, violence against women is not addressed in CEDAW. Still, the Committee has stated, in General Recommendation No. 19, that the “definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>99</sup> A second downfall of CEDAW is that “[o]f the UN

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<sup>90</sup> See *id.* art. 5(a).

<sup>91</sup> 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, 617 (2008).

<sup>92</sup> See CEDAW, *supra* note 12, art. 2(e).

<sup>93</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (Oct. 15, 1999) [hereinafter *Optional Protocol*].

<sup>94</sup> *Id.* arts. 2–7.

<sup>95</sup> *Id.* arts. 8–9.

<sup>96</sup> See *infra* Subsection B(2).

<sup>97</sup> *The Convention on Discrimination Against Women*, in HUMAN RIGHTS, *supra* note 10, at 817. See also *The Convention on Discrimination Against Women*, in HUMAN RIGHTS at 77 (Supp. 2012) (As of July 2012, CEDAW is joined by only two other treaty bodies “at the global level [that] have authority to conduct confidential inquiries into situations of ‘grave or systematic’ violations.”).

<sup>98</sup> *Optional Protocol*, *supra* note 93.

<sup>99</sup> Rep. of the Comm. on the Elimination of Discrimination Against Women, General Recommendation 19: Violence Against Women, 11th Sess., Jan. 20–30, 1992, U.N. Doc. A/47/38 (1993) (setting forth General Recommendation 19), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F47%2F38\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F47%2F38(SUPP)&Lang=en). See also Andrew

human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.”<sup>100</sup> A reservation is “a unilateral statement . . . 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.”<sup>101</sup> Whether these reservations are valid or contradict the object and purpose of the treaty is another question.<sup>102</sup>

However, despite the pitfalls, the protections guaranteed by CEDAW would be helpful to the trans\* community. First, trans\* individuals often become the victims of discrimination both officially by the State and by private actors.<sup>103</sup> Second, trans\* individuals face discrimination because of socially imposed gender roles—the very roles they attempt to defy.<sup>104</sup> They also disproportionately suffer from sexual traffic and exploitation.<sup>105</sup> Third, trans\* individuals face discrimination in education,<sup>106</sup> employment,<sup>107</sup> and healthcare.<sup>108</sup> Finally, trans\* individuals are often subject to inequality as a legal person. They also face discrimination in marriage laws, including issues with access to their children.<sup>109</sup>

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Byrnes and Eleanor Bath, *Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women—Recent Developments*, 8 HUMAN RIGHTS LAW REVIEW 517, 519 (2008) (“[V]iolence that is directed disproportionately against women or is experienced overwhelmingly by women is gender-based, and thus a form of discrimination against women.”).

<sup>100</sup> Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT’L L. 281, 317 (1991).

<sup>101</sup> Vienna Convention, *supra* note 15.

<sup>102</sup> *Id.* arts. 18–23.

<sup>103</sup> See *supra* notes 9, 60, and accompanying text.

<sup>104</sup> Cf. STRYKER, *supra* note 1, at 5–6.

<sup>105</sup> Office to Monitor and Combat Trafficking in Persons, *Topics of Special Interest from the Trafficking in Persons Report 2014: The Vulnerability of LGBT Individuals to Human Trafficking*, U.S. DEP’T OF STATE (2014), <http://www.state.gov/j/tip/rls/tiprpt/2014/226646.htm#>.

<sup>106</sup> See, for example, Stephen Whittle, Lewis Turner & Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination*, PRESS FOR CHANGE 17, 62–67 (2007), <http://www.pfc.org.uk/pdf/engenderedpenalties.pdf>.

<sup>107</sup> *Id.* at 15, 31–40.

<sup>108</sup> See, for example, Andrew M. Seaman, *Transgender People Face Discrimination in Healthcare*, REUTERS (Mar. 13, 2015, 2:32 PM), <http://www.reuters.com/article/2015/03/13/us-transgender-healthcare-discrimination-idUSKBN0M928B20150313>.

<sup>109</sup> Whittle, et al., *supra* note 106, at 8.

## B. International Treaty Interpretation

### 1. General principles of interpreting treaties.

Typically, the Vienna Convention governs the interpretation of international treaties.<sup>110</sup> Although not all states are parties to the Vienna Convention<sup>111</sup> (most notably, the U.S. has signed but not ratified the document), it is considered a codification of customary international law.<sup>112</sup> As a codification of customary international law, states may be bound to the Vienna Convention even without signing the actual document.<sup>113</sup> Hence, the U.S., for example, accepts most of the provisions in the Vienna Convention, and these principles have appeared in the Restatements of the Foreign Relations Law.<sup>114</sup>

Article 31 of the Vienna Convention provides the general rule of treaty interpretation. Section 1 reads, “[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>115</sup> Section 2 lists all of the supplementary material that may be used to determine context aside from the text.<sup>116</sup> These materials are limited to:

- (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>117</sup>

Finally, Section 3 lists other sources an interpreter may use to determine the meaning of treaty terms.<sup>118</sup> These supplementary sources are limited to:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.<sup>119</sup>

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<sup>110</sup> Vienna Convention, *supra* note 15.

<sup>111</sup> The Vienna Convention has 114 states parties and 45 signatories.

<sup>112</sup> HUMAN RIGHTS, *supra* note 10, at 199.

<sup>113</sup> *Cf.*, Stephen C. McCaffrey, *Understanding International Law*, in HUMAN RIGHTS, *supra* note 10, at 194.

<sup>114</sup> *See, for example*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325 cmt. a (1987).

<sup>115</sup> Vienna Convention, *supra* note 15, art. 31(1).

<sup>116</sup> *Id.* art. 31(2).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* art. 31(3).

The general consensus is that Article 31 dictates a textualist approach to treaty interpretation.<sup>120</sup> Textualism is a theory of interpretation that views “the text [as] the starting point of interpretation and [ ] if the text is clear, no further interpretation is necessary.”<sup>121</sup> Some scholars have argued that different types of international treaties warrant different interpretive approaches.<sup>122</sup> For example, “[a]greements involving a single transaction between governments, such as a transfer of territory or a grant of economic assistance should be construed like similar private contracts between private parties.”<sup>123</sup> The majority of international tribunals and review bodies conceive of human rights treaties warranting differential treatment due to their distinctions from other international agreements.<sup>124</sup> Yet some scholars argue a less restrictive approach is not warranted for human rights treaties and that, rather, treaty interpretation should be and is the same across all types of treaties.<sup>125</sup>

Article 32 of the Vienna Convention dictates that in order to use supplementary material other than what is allowed under Article 31, an interpreter must first show that after applying Article 31 the treaty term is still “ambiguous or obscure” or “[ ]leads to a result which is manifestly absurd or unreasonable.”<sup>126</sup> However, application of this rule is less strict when applied by the International Court of Justice, which sometimes allows supplementary material to be brought in before establishing ambiguity.<sup>127</sup> The International Court of Justice has the authority to interpret CEDAW when two states parties

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<sup>119</sup> *Id.*

<sup>120</sup> Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1266 (2005) (“[T]he Vienna Convention cemented the idea that the customary international law of treaty interpretation was based in textualism.”).

<sup>121</sup> *Id.* at 1256 & n.74 (citing *Maximo v. U.S.*, 373 U.S. 49, 54 (1963)).

<sup>122</sup> For an analysis of different approaches to treaty interpretation, see, for example, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 963 *et. seq.* (1994). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325 cmt. d (1987).

<sup>123</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325 cmt. d (1987).

<sup>124</sup> See generally *Interpretation of Treaties: Human Rights Agreements*, in HUMAN RIGHTS, *supra* note 10, at 206; Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN Y.B. INT’L L. 11, 14 (1999) (arguing “[t]reaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty”); *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 29 (Sept. 24, 1982) (arguing the object and purpose of modern human rights treaties are not aligned with traditional multilateral treaties because of their protection “of individual human beings”).

<sup>125</sup> EIRIK BJORGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* 35–36 (2014).

<sup>126</sup> Vienna Convention, *supra* note 15, art. 32.

<sup>127</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 325 cmts. e, g (1987).

disagree.<sup>128</sup> The role of the International Court of Justice is discussed in more detail in the next subsection.

## 2. Interpreting CEDAW.

While the Vienna Convention provides the rules for interpreting treaties, the question remains as to who are the actors that interpret treaties, and CEDAW in particular. States parties, typically through their domestic courts, are the primary interpreters of CEDAW. Should disputes arise between states parties as to the meaning of the treaty, they will be resolved by negotiation.<sup>129</sup> However, if negotiation is unsuccessful, the dispute “shall . . . be submitted to arbitration.”<sup>130</sup> And if the dispute is not resolved within six months, “any one of those parties may refer the dispute to the International Court of Justice.”<sup>131</sup> Essentially, what the International Court of Justice decides would be the official interpretation of CEDAW. However, the procedure invoking the International Court of Justice has not yet been used by any state party to CEDAW.<sup>132</sup> Moreover, the most reserved article of CEDAW is Article 29, which provides the International Court of Justice with the authority to resolve disputes.<sup>133</sup>

In addition to the above process of interpretation, CEDAW, like many international human rights treaties, created a governing body, the Committee on the Elimination of Discrimination against Women (Committee).<sup>134</sup> While the purpose of the Committee is to “consider[] the progress made in the implementation of [CEDAW],”<sup>135</sup> it also “may make suggestions and general recommendations based on the examination of reports and information received from the States Parties.”<sup>136</sup>

Under the Optional Protocol to CEDAW, adopted in 1999, two further grants of authority were provided to the Committee, which contribute to CEDAW’s overall interpretation.<sup>137</sup> First, the Optional Protocol established an

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<sup>128</sup> CEDAW, *supra* note 12, art. 29.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> HUMAN RIGHTS, *supra* note 10, at 817.

<sup>133</sup> U.N. Women, Declarations, Reservations and Objections to CEDAW, *available at* <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Sept. 25, 2015). *See also*, CEDAW, *supra* note 12, art. 29 (explicitly authorizing states parties to “opt-out” of the International Court of Justice’s jurisdiction).

<sup>134</sup> CEDAW, *supra* note 12, art. 17.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* art. 21.

<sup>137</sup> Optional Protocol, *supra* note 93, arts. 2–9.

individual complaint procedure wherein individuals claiming to be victims of a violation of CEDAW can submit communications to the Committee.<sup>138</sup> The Committee, after receiving an explanation from the state party, will transmit views and recommendations based on the communication and explanation to the state party.<sup>139</sup> The state party “shall give due consideration to the views” and recommendations of the Committee and submit a written response within six months including any action taken in light of the views and recommendations.<sup>140</sup> These decisions can be used as additional interpretive material.

Second, the Optional Protocol also provides the Committee broad investigatory power. The Committee may designate members “to conduct an inquiry and to report” back to the Committee if it receives information as to “grave or systematic violations by a [s]tate [p]arty” of CEDAW.<sup>141</sup> The Committee then transmits the findings of the investigation to the state party with comments and recommendations giving the state party six months to submit its observations to the Committee.<sup>142</sup> The Committee can also invite the state party to indicate “measures taken in response to an inquiry.”<sup>143</sup> The comments and recommendations provided by the Committee also serve as interpretive material.

Of course, the Optional Protocol is only applicable to those states that are parties to it. Therefore, those interpretive statements apply to the parties to the Optional Protocol but still provide persuasive authority in general CEDAW interpretation. As mentioned above, at the time of the writing of this Comment, the Optional Protocol has 106 states parties.<sup>144</sup>

### C. Interpreting the Term “Woman” in CEDAW

As shown above, interpretation of a treaty term begins by applying Article 31 of the Vienna Convention.<sup>145</sup> The Comment will first examine the “ordinary meaning” of the term “woman” as it appears in CEDAW. Second, it will show the term “woman,” when viewed in light of the object and purpose of CEDAW and international human rights treaties in general, requires a definition inclusive of trans\* people. Third, the Comment will examine supplementary material

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<sup>138</sup> *Id.*, art. 2.

<sup>139</sup> *Id.* arts. 6–7.

<sup>140</sup> *Id.* art. 7.

<sup>141</sup> *Id.* art. 8.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* art. 9.

<sup>144</sup> Optional Protocol, *supra* note 93.

<sup>145</sup> *See supra* Subsection (B)(1).

allowed by Article 31 that comprises the context requirement to bolster this argument. Finally, the Comment will look at the ways in which other treaties similar to CEDAW have been interpreted in an expansive way.

### 1. Ordinary meaning.

The term “woman” in CEDAW is ambiguous and undefined. Although the Vienna Convention mandates a treaty term be interpreted in its ordinary meaning,<sup>146</sup> with no definition, the term “woman” could have a myriad of “ordinary meanings.” A question of temporal significance may arise, but this argument could have been understood even in 1979 when the treaty was opened for signature.<sup>147</sup> People were transgressing gender binaries and taking political action regarding such transgressions in 1979, and well before in some cases.<sup>148</sup>

In South Asia, for example, the tradition of the *hijras*, a group of trans\* individuals “who combine kinship-based social organization with Islamic and Hindu religious practices,”<sup>149</sup> has long been recognized. This particular trans\* phenomenon can be traced back to at least the seventeenth century.<sup>150</sup> Moreover, during the time of CEDAW’s drafting and ratification, “*hijra* was reclaimed as a prominent non-western ‘third gender’ or transgender group resisting the western schema of sexual dimorphism.”<sup>151</sup> In post-colonial India, beginning in the late 1940s, *hijras* were well-known to the public as British-era laws criminalizing the tradition were revoked.<sup>152</sup> Today, *hijras* have been recognized as a third gender under Indian law following a Supreme Court case in 2014.<sup>153</sup> Indeed, *hijras* are an important part of India and other South Asian nations’ histories. There is little question that the drafters and ratifiers of

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<sup>146</sup> Vienna Convention, *supra* note 15, art. 31(1).

<sup>147</sup> Even so, the evolutionary interpretation of treaties would support a more modern definition. See BJORGE, *supra* note 125, at 59 (arguing “that a treaty term is capable of evolving . . . so that allowance is made for, among other things, developments in international law”).

<sup>148</sup> See STRYKER, *supra* note 1, at 54–55.

<sup>149</sup> Aniruddha Dutta, *An Epistemology of Collusion: Hijras, Kothis and the Historical (Dis)continuity of Gender/Sexual Identities in Eastern India*, 24 GENDER & HIST. 825, 826 (2012) (citing Lawrence Cohen, *The Pleasures of Castration: The Postoperative Status of Hijras, Jankebas and Academics*, in SEXUAL NATURE, SEXUAL CULTURE 276–304 (Paul R. Abramson & Steven D. Pinkerton eds., 1995); GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 2–16 (Univ. of Chicago Press 2005).

<sup>150</sup> *Id.* (citing GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 9 (2005)).

<sup>151</sup> *Id.* (citing NANDA, *supra* note 40; GILBERT HERDT, THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (1994)).

<sup>152</sup> *See id.* at 827–28.

<sup>153</sup> Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 S.C.C. 438 (India).

CEDAW had general knowledge of this centuries-old tradition that had been, in many respects, fully integrated into contemporary Indian society.

Another, more contemporary example could be found in the U.S. where, during the 1960s, the first modern transgender organizations were formed.<sup>154</sup> Additionally, historical moments like the Compton's Cafeteria Riot of 1966<sup>155</sup> and the Stonewall Riots of 1969<sup>156</sup> reveal that the U.S. government and its citizens were well aware of the transgender phenomenon.<sup>157</sup> Between 1966 and 1969, the U.S. saw its "most militant phase of the transgender movement for social change."<sup>158</sup> Trans\* individuals and gender bending styles were represented in the popular culture of the time by the likes of the New York Dolls, David Bowie, and John Waters.<sup>159</sup> Indeed, the question of "who/what is a woman" was a question not so easily answered in 1979, and differing conceptions of sex and gender were prevalent even in the legal world.<sup>160</sup>

The multiple potential meanings outlined below all have support in the text of CEDAW. Moreover, investigating the confines of a term like "woman" quickly becomes an intimate pursuit, one which may favor a more expansive definition. The potential ordinary meanings of "woman" can be separated into two broad categories: sex and gender.

a) "*Woman*" as sex. The term "woman" could refer to the female sex. Indeed, CEDAW makes reference to sex throughout its text.<sup>161</sup> Moreover,

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<sup>154</sup> STRYKER, *supra* note 1, at 54–55.

<sup>155</sup> The Compton's Cafeteria Riot occurred in San Francisco's Tenderloin neighborhood. A protest by trans\* individuals after police attempted to physically evict a table of trans\* individuals from Compton's Cafeteria erupted as one of the women threw her coffee in an officer's face. The patrons destroyed the interior of the cafeteria and violently confronted police. For a more in depth history of the riot, see *id.* at 63–66.

<sup>156</sup> Similar to the riots occurring on the West Coast, the Stonewall Riots in New York City erupted into a violent clash between trans\* (and other queer) individuals and the police. Officers were conducting a raid on the Stonewall Inn, a bar that many trans\* and queer individuals frequented. The confrontation was huge as roughly two thousand people joined the rioting and police were forced to barricade themselves in the bar. The rioting recurred for the next several nights. For a more in depth history of the riots, see *id.* at 82–86.

<sup>157</sup> *Id.* at 63, 82–87.

<sup>158</sup> *Id.* at 64.

<sup>159</sup> *Id.* at 91.

<sup>160</sup> Indeed, the law struggled with the question of who is a woman and sometimes concluded transwomen fell into the woman category. See, for example, *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that the marriage between a cisman and transwoman was valid). *But see, for example*, *In re Estate of Gardiner*, 42 P.3d 120, 196 (Kan. 2002) (discussing the two lines of cases ruling on the validity of a marriage involving a post-operative transsexual, and noting that the "essential difference between the two approaches is the latter's crediting a mental component, as well as an anatomical component, to each person's sexual identity").

<sup>161</sup> CEDAW, *supra* note 12, arts. 1, 5.

CEDAW defines “discrimination against women,” the closest it ever comes to defining “woman” in the treaty, as “any distinction, exclusion or restriction made on the basis of sex . . . .”<sup>162</sup> Sex, as noted above, can be considered as one or more of the following: (1) sex as biology, (2) sex as anatomy, and/or (3) sex as genetics. Sex can even refer to gender, as the terms are so often used interchangeably.<sup>163</sup> Therefore, the use of the term “sex” in the definition of discrimination does not limit the inquiry to the three aspects just outlined, but requires deeper investigation into “woman” as gender.<sup>164</sup>

If the ordinary meaning is “woman” as biological construct, then only women who produce eggs would be covered by the treaty. This interpretation has support in the text of the treaty as it makes mention of maternity several times throughout. For example, Article 11 “prohibit[s] . . . dismissal on the grounds of pregnancy or of maternity leave.”<sup>165</sup> Article 4 makes the statement that “measures . . . aimed at protecting maternity shall not be considered discriminatory.”<sup>166</sup> This, however, would create the absurd result of distinguishing among women via the functionality of their reproductive organs. Women who do not produce eggs either because of menopause, sterilization, or a hysterectomy, for example, would not be protected by CEDAW.

There is no rational way to distinguish between women based on their body’s ability to produce an egg. Moreover, because it would be exceedingly difficult to know whether a woman’s body can produce an egg in almost all interactions with her, the rights protected by the treaty would be severely limited. Under this conception, some trans\* people would likely be able to take refuge under the treaty’s protections while others could not. A transman, for example, who was born biologically female and has not subsequently changed his reproductive ability, can produce eggs. A transwoman, by contrast, would not be covered.

If the ordinary meaning is “woman” as anatomical construct, then only women with labia and a clitoris, or only women with labia, a clitoris, and breasts, would be protected by the treaty. Again, this would create an absurd result as women who have undergone mastectomies, for example, could be excluded

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<sup>162</sup> *Id.* art. 1.

<sup>163</sup> For an analysis of sex as gender, see the analysis of gender in Subsection (C)(1)(b) below. I have chosen to limit my exploration of woman as sex to the three concepts outlined here, and as gender, because these are the three the legal realm most often invokes. *See* ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF THE LAW* 137–55 (2002).

<sup>164</sup> This is especially true due to the fact that the CEDAW utilizes the term “woman,” which usually refers to the gendered aspect, throughout the treaty instead of the term “female,” which tends to refer to the sex aspect. *See generally* CEDAW, *supra* note 12.

<sup>165</sup> *Id.* art. 11(2)(a).

<sup>166</sup> *Id.* art. 4(2).

from the protections of the treaty. Similarly, a woman who had undergone FGM or female circumcision<sup>167</sup> could be excluded from the treaty protections. Yet again, there is no reasonable way to distinguish between persons based on such a construct. Anatomical approaches to sex “typically fail to capture discriminator motivation for [o]nly in very rare cases can sex discrimination be reduced to a question of body parts.”<sup>168</sup> Under this conception, however, transwomen, for example, who have undergone sex reassignment surgery would be protected by the treaty.

Finally, if the ordinary meaning of the term “woman” is to mean sex as genetics, then women living with Turner Syndrome<sup>169</sup> or Triple-X Syndrome,<sup>170</sup> for example, would not be allowed to take refuge in the treaty’s protections. Again, this interpretation cannot function as the meaning of “woman” as it is found in CEDAW. It is impossible, except in exceptional circumstances, for a person to understand the content of another’s genetic makeup in everyday interactions. Under this interpretation, some trans\* people would be protected while others would not. For example, a transman who was born with XX chromosomes would be protected but a transwoman would not.

In all of these conceptions of “woman” as sex, there are trans\* people who would be included in the definition of “woman” and ciswomen who would not.

b) *“Woman” as gender.* Another interpretation may take “woman” to refer to gender. This interpretation, as the “woman as sex” interpretation, is supported by the text. For example, Article 10 mandates that states parties “take all appropriate measures to eliminate . . . any stereotyped concept of the roles of men and women” in education.<sup>171</sup> Since gender is defined as encompassing the societally proscribed roles and stereotypes used to differentiate males and females, eliminating such roles and stereotypes would necessarily include a reference to gender. Like sex, gender is a difficult concept to nail down. Gender could be one or more of the following: (1) gender comportment or

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<sup>167</sup> For background information on female genital mutilation, see *Female Genital Mutilation*, WORLD HEALTH ORG. (Feb. 2014), <http://www.who.int/mediacentre/factsheets/fs241/en/>.

<sup>168</sup> SHARPE, *supra* note 163, at 137 (citing Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 36 (1995)).

<sup>169</sup> Turner syndrome is a condition wherein a person is born with a missing or partially missing X chromosome. For more information on Turner syndrome, see *Turner Syndrome: Definition*, MAYO CLINIC (Aug. 23, 2014), <http://www.mayoclinic.org/diseases-conditions/turner-syndrome/basics/definition/con-20032572>.

<sup>170</sup> Triple X syndrome occurs when a person is born with three X chromosomes. For more information on Triple X syndrome see *Triple X Syndrome: Definition*, MAYO CLINIC (Nov. 8, 2012), <http://www.mayoclinic.org/diseases-conditions/triple-x-syndrome/basics/definition/con-20033705>.

<sup>171</sup> CEDAW, *supra* note 12, art. 10(c).

performance; and/or (2) gender identity. Gender can even refer to sex, as the terms are so often confused.

“Woman” as gender performance seems to be getting closer to a rational and reasonable ordinary meaning. This would be the “if it quacks like a duck” theory: if a person appears to be or acts like a woman, she is a woman under CEDAW. When determining what it means to “act like a woman,” typically what comes to mind is traditional gender stereotypes. For example, a person who wears dresses or skirts or who wears her hair long appears to be performing femininity or encompassing a feminine gender role. This definition of “woman” has support in CEDAW, as it mandates states parties to “take all appropriate measures [t]o modify the social and cultural patterns of conduct of men and women” and eliminate “prejudices and customary and all other practices which are based on . . . stereotyped roles for men and women.”<sup>172</sup>

However, this definition is still rough around the edges. For example, a butch woman would be considered a woman by most accounts, but she may not perform femininity in the traditional sense. Indeed, sometimes a butch woman is mistaken for a man.<sup>173</sup> Some may argue this definition is appropriate because women who pass as men do not need the protections outlined in CEDAW. Passing connotes privilege. The privilege comes from “[a]voiding the disproportionate levels of violence and intimidation” as well as general discrimination ciswomen and trans\* individuals suffer from.<sup>174</sup> But this argument ultimately fails because “to pass to keep one’s self safe isn’t privilege.”<sup>175</sup> Passing, even unintentionally, is dangerous, and living with the fear of being outed produces anxiety.<sup>176</sup> If a man is outed for passing as a woman, even if the passing was unintentional, severe and violent consequences frequently follow, some including death.<sup>177</sup> Ultimately, “woman” as gender performance alone fails as an ordinary meaning as it arbitrarily distinguishes between feminine-acting women and masculine-acting women. Under this interpretation, however, many trans\* people, most transwomen, for example, would be covered by the treaty.

An ordinary meaning of “woman” could be “woman” as gender identity. Again, this conception seems closer to a rational or reasonable meaning. According to this conception, if a person considers herself a woman, she is a

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<sup>172</sup> *Id.* art. 5(a).

<sup>173</sup> S. BEAR BERGMAN, BUTCH IS A NOUN 15–19 (2010).

<sup>174</sup> Chris Godfrey, *Transgender Men and Women Discuss the Politics of ‘Passing’*, VICE (Mar. 25, 2015), <http://www.vice.com/read/passing-when-youre-transgender>.

<sup>175</sup> BERGMAN, *supra* note 173, at 17.

<sup>176</sup> KELBY HARRISON, SEXUAL DECEIT: THE ETHICS OF PASSING, 14–17, 188–92 (2013).

<sup>177</sup> See, for example, Nick Adams, *Gwen Araujo Murdered Ten Years Ago Today* (Oct. 3, 2012), <http://www.glaad.org/blog/gwen-araujo-murdered-ten-years-ago-today>.

woman. However, because a person's gender identity is internal, it is not always known to others. This definition would mean that a person who self-identifies as a man but performs gender as a woman would not be covered by CEDAW. But if a person performs as a woman, he is often treated as a woman and thus would be subject to the forms of discrimination described in the treaty. Hence, the definition of "woman" as gender identity cannot work as the ordinary meaning of "woman" as it appears in CEDAW because, if it were, the treaty would not protect some people who endure the very type of discrimination CEDAW is meant to combat. This definition, however, would include all transwomen.

c) *A solution: "Woman" as all of the above.* The term "woman" as used in CEDAW should be interpreted to mean all of the above: biological, anatomical, genetic, gender performance, and/or gender identity working with any combination or standing alone. That is, the term "woman" should encapsulate each of the potential definitions outlined above. When "woman" is used in ordinary speech, it very often means a combination of some or all of the definitions included in sex and gender. This definition is inclusive of butch women, women who have undergone FGM, hysterectomy, sex reassignment surgery, and menopausal women. It includes ciswomen and trans\* people, both transwomen and transmen. Not only does this meaning of "woman" make sense, it is the only meaning of woman that makes sense as it is used in CEDAW. As was shown above, any of these factors alone do not make a reasonable definition of woman. However, these factors taken together, not connected through the restrictive "and" but rather through "and/or," creates the definition of "woman" that is ordinarily used in everyday life.

Invoking this definition is not unheard of in the legal realm. Indeed, in the U.S., the term "sex" is considered biological sex and gender comportment for the purposes of federal anti-discrimination law.<sup>178</sup> In *Schwenk v. Hartford*, the Ninth Circuit stated, "'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."<sup>179</sup> Similarly, the European Court of Human Rights rejected the argument that the terms of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms' right to marry "must refer to a

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<sup>178</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). *See also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (holding that the term "sex" in Title VII barred discrimination based on the fact that plaintiff was a woman and that she failed "to act like a woman"). *But see* *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2520 (2013) (noting that *Price Waterhouse v. Hopkins* was superseded on other grounds by the Civil Rights Act of 1991).

<sup>179</sup> *Schwenk*, 204 F.3d at 1202.

determination of gender by purely biological criteria.”<sup>180</sup> And in some parts of Australia, sex discrimination claims can be brought by trans\* individuals.<sup>181</sup>

Some may question why, if CEDAW protects trans\* individuals, it does not make reference to them. There may be many reasons for this absence. For example, the parties may not have been able to agree on whether trans\* individuals should be included or not, resulting in the framers punting the issue to the interpreters. Or the parties may have understood the term “woman” as encompassing trans\* individuals in some form or another. Of course the absence of the term “trans\*” could also be due to a deliberate wish to exclude such persons. However, even if the framers intended to exclude trans\* individuals, a definition of “woman” exclusive of *all* trans\* individuals, as argued above, is impossible. Because CEDAW presents the world in terms of a binary—men and women—trans\* individuals must be placed somewhere within that binary. Therefore, no logical way to exclude all trans\* individuals exists when interpreting CEDAW.

While a non-binary definition—meaning a definition not defined in opposition to another category of “man”—would be the ideal definition for trans\* advocates and activists,<sup>182</sup> CEDAW’s presentation of a binary world precludes such an interpretation. Still, I argue the expansive definition is the common and ordinary meaning of the term “woman.” However, even if this expansive interpretation of “woman” is not the ordinary meaning of the term, the object and purpose and the context of CEDAW support this interpretation.

## 2. Object and purpose.

The object and purpose of a treaty is “a unitary concept referring to the goals that the drafters of the treaty hoped to achieve.”<sup>183</sup> The Vienna Convention’s mandate to interpret a treaty “in light of its object and purpose” suggests determining the goals by examining “the normative logic that presents itself when the entirety of the treaty’s provisions are considered together.”<sup>184</sup>

The goals of CEDAW depend on the level of generality used in making such an inquiry.<sup>185</sup> CEDAW is a human rights treaty and “[t]he overarching object and purpose of human rights treaties is the protection of the rights of individuals, although certain other values . . . are safeguarded through derogation

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<sup>180</sup> *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 29.

<sup>181</sup> SHARPE, *supra* note 163, at 170.

<sup>182</sup> *See id.* at 154–55.

<sup>183</sup> David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 578 (2010).

<sup>184</sup> *Id.* at 579.

<sup>185</sup> BJORGE, *supra* note 125, at 61–63.

and limitation clauses.”<sup>186</sup> In a general sense, CEDAW, and human rights treaties more generally, “are geared toward third-party beneficiaries,” requiring that they be “interpreted in a manner sufficiently favorable to the effective protection of individual rights.”<sup>187</sup> The most expansive reading of individual rights suggests the treaty should be interpreted using an expansive definition of who are the rights holders. In the case of CEDAW, the rights holders are women. The definition I have forwarded as the ordinary meaning is also an expansive definition of “woman,” thus comporting with an expansive reading that affords greater protection of individual rights.

More specifically though, CEDAW’s object and purpose is likely twofold: the “elimination of all forms of discrimination against women”<sup>188</sup> and gender equality.<sup>189</sup> This interpretation stems from the title as well as Article 2 of CEDAW, which “[t]he Committee holds . . . is central to the objects and purpose of [CEDAW].”<sup>190</sup> First, the elimination of “*all forms* of discrimination against women” necessarily includes discrimination based on biology, anatomy, genetics, gender identity, and/or gender performance. Indeed, the Committee has stated that “all forms” includes those “not explicitly mentioned in the Convention or that may be emerging.”<sup>191</sup> Each of the categories outlined above is associated with a form of discrimination against women. Second, gender equality, as it is purported in the treaty, necessitates a gender/sex binary where the comparator is man/male. This goal of gender equality is what limits my definition to an expansive binary definition and which does not allow a non-binary definition of sex/gender. This means the only persons excluded from CEDAW are cisgender men.

Either conception of the goals of the treaty, broad or narrow, comports with the definition of “woman” as a combination of one or more of the categories of biology, anatomy, genetics, gender identity, and gender

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<sup>186</sup> Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT’L L. 905, 912 (2009).

<sup>187</sup> *Id.*

<sup>188</sup> *See, for example*, 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, ¶ 4, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) (citing “the elimination of all forms of discrimination against women on the basis of sex” as the objective of CEDAW) [hereinafter General Recommendation No. 28].

<sup>189</sup> *See, for example*, CEDAW, *supra* note 12, art. 2(c).

<sup>190</sup> U.N. Women, Reservations to CEDAW, *available at* <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

<sup>191</sup> General Recommendation No. 28, *supra* note 188, ¶ 15.

performance. Thus the definition, while expansive but not unlimited, is supported by the object and purpose of the treaty.

### 3. Supplementary materials.

Under Sections 2–3 of Article 31, the Vienna Convention lists five supplementary materials that an interpreter of a treaty may look to in determining meaning.<sup>192</sup> These are:

- (1) [a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (2) [a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty; . . .
- (3) [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (4) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and
- (5) [a]ny relevant rules of international law applicable in the relations between the parties.<sup>193</sup>

Each of these types of supplementary materials is permissible to examine when determining the meaning of a treaty term.

Because there have not been any subsequent agreements or instruments between the parties to CEDAW regarding interpretation, the only supplementary material under Article 31 that is relevant in the case of CEDAW is “subsequent practice.”<sup>194</sup> In human rights treaties, treaty bodies are “the principal generators of ‘subsequent practice’ in the sense of . . . the Vienna Convention.”<sup>195</sup> However, through “their participation in the supervisory mechanisms, where they have the opportunity to express their views on the interpretation of a treaty by a committee,” states parties have a limited role in determining subsequent practice as well.<sup>196</sup>

a) *General Recommendations*. Subsequent practice is almost entirely encompassed through both states parties’ reports to the Committee and the Committee’s concluding observations and General Recommendations,<sup>197</sup> which are “addressed to States parties and usually elaborate the Committee’s view of the obligations assumed under [CEDAW].”<sup>198</sup> General Recommendations, while

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<sup>192</sup> Vienna Convention, *supra* note 15, art. 31(2)–(3).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* art. 31(3)(b).

<sup>195</sup> Mechlem, *supra* note 186, at 920.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 912.

<sup>198</sup> U.N. Women, General Recommendations, *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

non-binding, are given “particular normative significance . . . strongly call[ing] for the use of legal means of interpretation.”<sup>199</sup> While the Committee names its comments “recommendations,” they are not recommendations in the traditional sense. Rather, they are statements providing the Committee’s authoritative interpretation of the CEDAW.<sup>200</sup>

The CEDAW Committee is thinking about trans\* individuals in its interpretation of the treaty. In 2010, the Committee issued two General Recommendations, Nos. 27 and 28, mentioning “gender identity.”<sup>201</sup> In General Recommendation No. 27, the Committee mentioned gender identity as one of multiple factors that, when combined with older age, makes women especially targeted for discrimination.<sup>202</sup> In General Recommendation No. 28, the Committee again mentions gender identity as one of several factors that intersect with “gender and sex” to make women particular targets for discrimination.<sup>203</sup> The Committee notes the “compounded negative impact” such intersecting forms of discrimination—that is, intersectional discrimination—has upon women and calls upon states to legally prohibit it.<sup>204</sup> This intersectional discrimination of gender identity with gender/sex highlights the fact that trans\* individuals face discrimination both on grounds of gender nonconformity and on grounds of perceptions of their sex and/or gender. According to General Recommendation No. 28, such discrimination is prohibited by CEDAW.<sup>205</sup>

In addition, in General Recommendation No. 28, the Committee emphasizes that CEDAW covers gender-based discrimination as well as sex-based discrimination.<sup>206</sup> Indeed, it describes gender as including “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for . . . biological differences.”<sup>207</sup> This authoritative interpretation by the Committee supports the claim that trans\* individuals are part of the protected class that CEDAW seeks to cover as it expressly includes

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<sup>199</sup> Mechlem, *supra* note 186, at 927.

<sup>200</sup> General Recommendations, *supra* note 198.

<sup>201</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010) [hereinafter, General Recommendation No. 27]; General Recommendation No. 28, *supra* note 188.

<sup>202</sup> General Recommendation No. 27, *supra* note 201, art. 13.

<sup>203</sup> General Recommendation No. 28, *supra* note 188, ¶ 18.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* ¶ 5.

<sup>207</sup> *Id.*

gender discrimination, which, as argued above, would include both discrimination based on gender identity and on gender performance.

In both of these recommendations, the Committee treats gender identity as “a factor that affects women.”<sup>208</sup> This is also, in a way, how I treat gender identity in the definition of “woman” I argue for. While the Committee lumps gender identity with other factors affecting women like age, class, and ethnicity, I argue gender identity transcends these factors in making up part of the core definition of “woman.” Thus, the Committee’s interpretation does not exclude my argument, but rather lends support to it.

b) *States parties’ reports and concluding observations.* Moreover, in its correspondence with states parties, the Committee has brought up issues of gender identity, suggesting an inclusive interpretation.<sup>209</sup> For example, the Committee expressed concern that in Panama “certain groups of women . . . face multiple forms of discrimination and violence on grounds such as . . . gender identity.”<sup>210</sup> The Committee also urged Russia “to intensify its efforts to combat discrimination against . . . transgender women.”<sup>211</sup> Most notably, the Committee, in expressing concern about Paraguay’s lack of a comprehensive discrimination law, referred to “groups of women, including . . . transsexuals, who are particularly vulnerable to discrimination.”<sup>212</sup>

States parties themselves include trans\* individuals in their country reports to CEDAW.<sup>213</sup> In the past five years, at least thirteen states parties have included trans\* individuals in their country reports.<sup>214</sup> Additionally, non-governmental

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<sup>208</sup> *Id.*; General Recommendation No. 27, *supra* note 201, art. 13.

<sup>209</sup> U.N. Treaty-Based Bodies CEDAW, Human Rights Committee, CESCR, CRC, and CAT: *Concluding Observations, General Recommendations and General Comments Related to Sexual Orientation and Gender Identity*, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (Jan. 24, 2013), [http://iglhrc.org/sites/iglhrc.org/files/UNTreaty%20Bodies\\_RefSOGI.pdf](http://iglhrc.org/sites/iglhrc.org/files/UNTreaty%20Bodies_RefSOGI.pdf).

<sup>210</sup> Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Panama*, 45th Sess., Jan 18–Feb. 5, 2010, U.N. Doc. CEDAW/CO/PAN/7 (Feb. 5, 2010).

<sup>211</sup> Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Russian Federation*, 46th Sess. July 12–July 30 2010, U.N. Doc. CEDAW/C/USR/CO/7 (Aug. 16, 2010).

<sup>212</sup> Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Paraguay*, 50th Sess., Oct. 3–Oct. 21, 2011, U.N. Doc. CEDAW/C/PRY/CO/6 (Nov. 8, 2011).

<sup>213</sup> *See, for example*, Comm. on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined Eighth and Ninth Periodic Reports of States Parties Due in 2014*, U.N. Doc. CEDAW/C/SWE/8-9 (Nov. 17, 2014).

<sup>214</sup> These include France, Portugal, Bolivia, Ecuador, Seychelles, the U.K., Hungary, Greece, New Zealand, Norway, Brazil, Italy, and South Africa.

organizations (NGOs) have issued shadow reports that use a definition of “woman” that includes trans\* individuals.<sup>215</sup> Shadow reports are prepared by NGOs to “highlight issues not raised by their governments or point out where the government may be misleading the committee.”<sup>216</sup> In fact, the International Gay and Lesbian Human Rights Commission published a handbook on how to write shadow reports to CEDAW incorporating trans\* individuals.<sup>217</sup>

#### 4. Comparative treaty interpretation.

In addition to the rules of the Vienna Convention, it is useful to examine how other U.N. human rights treaties are interpreted. In particular, it is instructive to see whether the protected classes in other treaties are interpreted in an expansive manner. As I detail below, both the Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD) have been interpreted expansively in the same manner I argue CEDAW should be interpreted.

a) *Defining “race” in CERD.* CERD, adopted in 1965, has 177 states parties and is one of the oldest group-based treaties in the U.N. system.<sup>218</sup> Just as CEDAW, which was modeled after CERD, does not define “woman,” CERD does not define “race.” Instead, it provides a definition for “racial discrimination.” Article 1 states that “‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”<sup>219</sup>

The CERD Committee has made statements regarding the definition of race discrimination that make it more expansive rather than restrictive. First, in General Recommendation No. 8, the Committee allows for a person to self-identify into a racial category so long as “no justification exists to the

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<sup>215</sup> See, for example, Women’s Support Group, Sri Lanka, *The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka: NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women* (Jan. 2011), [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG\\_SriLanka48.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf).

<sup>216</sup> *Shadow Reporting to UN Treaty Bodies*, INT’L WOMEN’S RIGHTS ACTION WATCH, <http://www1.umn.edu/humanrts/iwraw/reports.html> (last visited Sept. 27, 2015).

<sup>217</sup> *Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW*, INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N (2009), <https://www.outrightinternational.org/sites/default/files/287-1.pdf>.

<sup>218</sup> International Convention on the Elimination of all Forms of Racial Discrimination, *adopted on* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]. See also International Convention on the Elimination of all Forms of Racial Discrimination: Status, *available at* [https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg\\_no=iv-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en) (last visited on Oct. 23, 2015).

<sup>219</sup> CERD, *supra* note 218, art. 1(1).

contrary.”<sup>220</sup> If this were the case for CEDAW, trans\* individuals would be protected and could bring cases through the individual complaint mechanism if they self-identified as a woman.

Second, in General Recommendation No. 29, the CERD Committee notes that “discrimination on the basis of caste and analogous systems of inherited status” violate CERD, expanding the term “descent” to mean not only race but also other “inherited statuses.”<sup>221</sup> The CERD Committee points to “contributions from a great number of concerned non-governmental organizations and individuals” as part of the impetus for creating a General Recommendation concerning the expansion.<sup>222</sup>

Third, in General Recommendation No. 30, the CERD Committee adds to the list of protected individuals under CERD “undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory.”<sup>223</sup> Thus, the CERD Committee continues to push for an expansive reading of the term “race” as it appears in the treaty.

In addition to the Committee’s own expansion of the term “racial discrimination,” scholars have done the same. For example, William Felice notes that for the purposes of CERD, “race, most certainly, cannot be understood simply in terms of skin color.”<sup>224</sup> Rather, Felice argues, “this broad concept of race . . . includes subjective and social components” and “is not limited to objective, mainly physical elements.”<sup>225</sup> Indeed the term “race” in CERD has taken a much more expansive definition than one may expect, fully supporting an expansive reading of the definition of “woman” in CEDAW. As with “race,” the term “woman” cannot be relegated to a physical trait—meaning, as shown above, it cannot be strictly a biological, anatomical, or genetic-based definition. Indeed, a definition of the term “woman,” as with the definition of “race” in CERD, should include some sociocultural components.

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<sup>220</sup> Rep. of the Comm. on the Elimination of Racial Discrimination, General Recommendation 8: Membership of Racial or Ethnic Groups Based on Self-identification, 38th Sess., Aug. 21, 1990, U.N. Doc. A/45/18, GAOR, 45th Sess., Supp. No. 18, at 79 (1991).

<sup>221</sup> Rep. of the Comm. on the Elimination of Racial Discrimination, General Recommendation 29: On Article 1, Paragraph 1 of the Convention (Descent), U.N. Doc. HRI/GEN/1/Rev.6, 61st Sess. (2002).

<sup>222</sup> *Id.*

<sup>223</sup> Rep. of the Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Membership of Racial or Ethnic Groups Based on Self-Identification, U.N. Doc. CERD/C/64/Misc.11/rev.3, 65th Sess. (2004).

<sup>224</sup> William F. Felice, *The UN Committee on the Elimination of all Forms of Racial Discrimination: Race, Economic and Social Human Rights*, 24 HUM. RTS. Q. 205, 206 (2002).

<sup>225</sup> *Id.* at 205.

b) *Defining “disability” in CRPD.* CRPD, adopted in 2006 has 159 states parties.<sup>226</sup> The treaty does not provide a definition of the term “disability” or “persons with disabilities.”<sup>227</sup> Because CRPD is relatively new, the Committee on the Rights of Persons with Disabilities has only issued two General Comments, neither of which address the definition of the terms.<sup>228</sup> However, there appears to be an anticipated expansion of the term “disability” as described below.

Article 1 states that “[p]ersons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>229</sup> The use of the word “include,” according to the Secretariat for the Convention on the Rights of Persons with Disabilities, “need not restrict the application of the Convention and States parties could also ensure protection to others, for example, persons with short-term disabilities or who are perceived to be part of such groups.”<sup>230</sup>

Furthermore, the preamble of CRPD recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society.”<sup>231</sup> According to the Secretariat for the Convention on the Rights of Persons with Disabilities, this means “the notion of ‘disability’ is not fixed and can alter, depending on the prevailing environment from society to society.”<sup>232</sup> CRPD, like CERD, thus approaches the definition of its protected class in an expansive manner. In fact, the treaty explicitly anticipates that the definition will expand over time to encompass more individuals in the protected class.

As these examples show, U.N. human rights treaties typically provide a more expansive definition of the protected class. In CERD and CRPD, the

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<sup>226</sup> Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD]. See also Convention on the Rights of Persons with Disabilities: Status, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en) (last visited on Oct. 23, 2015).

<sup>227</sup> Secretariat for the Convention on the Rights of Persons with Disabilities, *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/default.asp/images/default.asp?id=151#sqc3>.

<sup>228</sup> Comm. on the Rights of Persons with Disabilities, *General Comments*, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>.

<sup>229</sup> CRPD, *supra* note 226, art. 1 (emphasis added).

<sup>230</sup> *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, *supra* note 227.

<sup>231</sup> CRPD, *supra* note 226, Preamble(e).

<sup>232</sup> *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, *supra* note 227.

focus is less on physical or biological traits and more on the social meaning or perceived idea of who should be included in the protected class. Yet both aspects—the physical and the social—are covered by the treaties. In particular, CERD, which was enacted to eliminate discrimination against a specific group, like CEDAW, has allowed for a robust expansion of who is included in that group over time. The interpretations of CERD and CRPD, taken together, bolster the claim that the term “woman” should be defined more expansively and should take both physical and social attributes into account.

#### D. Implementation

Including trans\* individuals within the meaning of “woman” in CEDAW could take hold a number of different ways. First, the Committee could promote the interpretation by adopting a General Recommendation espousing the definition. This would be the most effective way to garner support for the expansive definition and thus provide the most robust protection for trans\* individuals.

Second, states parties could advocate for the expansive definition.<sup>233</sup> States parties can advocate or implement this definition either through domestic court decisions, reflecting the understanding in reports, or officially making a statement supporting it. Some advocates have already taken to the definition as third party watchdogs have used it in reports to the Committee. Even individuals from nations that are parties to the Optional Protocol may advocate for such a meaning through the individual complaint mechanism.

### IV. IMPLICATIONS OF A BROADER DEFINITION

States parties, individuals, and the Committee may feel the need to weigh the costs and benefits of such a definition before officially adopting it. In this section, I explore the positive and negative consequences of adopting the definition outlined above.

#### A. Positive Consequences

First, I will explore some of the positive consequences of adopting this expansive interpretation. The consequences examined below are not the only positive consequences, and others should be taken into account.

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<sup>233</sup> Although the official adoption of such definition is likely inevitable as the term “woman” increasingly needs defining.

The purpose of human rights generally is to expand protections and rights to all human beings.<sup>234</sup> When an individual treaty, like CEDAW, as well as an entire legal regime, like the human rights regime, treats gender and sex as a binary, it is necessary to place trans\* individuals in one or both of those categories. The definition outlined in this Comment does exactly this in a way that better protects the human rights of more trans\* individuals.

Human rights are meant to protect the inherent value and dignity in all persons.<sup>235</sup> Adoption of the definition proffered in this Comment expands and extends a set of human rights to a group whose value and dignity as human beings are often attacked. As scholars and advocates have pointed out, “most people have great difficulty recognizing the humanity of another person if they cannot recognize that person’s gender.”<sup>236</sup> Hence, the trans\* person “can evoke in others a primordial fear of monstrosity, or loss of humanness.”<sup>237</sup> With human rights protections, how people treat and see trans\* individuals can be changed.

While the inclusion of trans\* individuals in the protections guaranteed by CEDAW may be resisted at first by some states parties, many will welcome the inclusion. For some states parties, this inclusion may solve a first actor problem. There may be some states parties that wish to protect trans\* individuals but are afraid to be the first in their region to do so. By providing them with this interpretation, CEDAW would allow them to shift the blame away from the government’s action toward the international community. In addition, this interpretation will put pressure on states parties to provide domestic legislation protecting trans\* individuals, just as it does for legislation targeting other groups protected in international human rights treaties. This unique aspect of international human rights treaties would seem to alleviate, to some extent, the concern of backlash some scholars argue occurs when judicial decisions impose certain conceptions of controversial social issues.<sup>238</sup>

## B. Negative Consequences

In this section, some potential negative consequences to states adopting this Comment’s definition of woman in CEDAW will be explored. The arguments include potential state evasion and tradeoffs between cisgender

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<sup>234</sup> See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III)[A] (Dec. 10, 1948) [hereinafter UDHR].

<sup>235</sup> *Id.* at 71.

<sup>236</sup> STRYKER, *supra* note 1, at 6.

<sup>237</sup> *Id.*

<sup>238</sup> See generally, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2008).

women and trans\* individuals. However, such arguments do not outweigh the positive consequences discussed above nor do they pose much of a threat.

1. State evasion.

Even though history reveals “many non-Western cultures have long recognized and accommodated [trans\*] people,”<sup>239</sup> it is possible that states parties would try to shirk their treaty obligations under CEDAW should the term “woman” become accepted as applying to trans\* people. In response to such an interpretation, states parties may simply claim trans\* people do not exist within their borders. For example, officials in India may claim there are no trans\* individuals but admit there are *hijras*, arguing that trans\* is a Western phenomenon that does not occur elsewhere. However, as mentioned in Section II, the careful definition of the term “trans\*” in this Comment would combat such an argument. Trans\* is a term used “to capture all the identities—from drag queen to genderqueer—that fall outside traditional gender norms,”<sup>240</sup> including transgendered people, transsexuals, and transvestites.

2. Avoidance of trans\*-specific treaty.

If a trans\* focused treaty were introduced, states may avoid signing by claiming CEDAW already protects trans\* individuals. This is the most compelling argument to avoid advocacy of the definition argued for here. Because trans\* individuals have particularized problems in society and because the definition of “woman” argued for in this Comment is necessarily binary, CEDAW is not the ideal instrument of protection for the global trans\* community.<sup>241</sup> However, this does not change the fact that trans\* individuals are without a specialized treaty at the moment and that they may legally obtain protections from other sources including CEDAW.

3. Tradeoff between cisgender women and trans\* rights.

Some may argue that an official statement including trans\* individuals in the protections of CEDAW would result in some states parties withdrawing from the treaty altogether. Such action would leave ciswomen unprotected where they were protected before. However, withdrawal is unlikely to occur,

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<sup>239</sup> Lynn Conway, *Differences in the Situations of TG and TS People in Different Countries Around the World*, UNIVERSITY OF MICH. (Apr. 19, 2006), <http://ai.eecs.umich.edu/people/conway/TS/TG-TS%20World.html>.

<sup>240</sup> Ryan, *supra* note 36.

<sup>241</sup> For ideal antidiscrimination laws including trans\* individuals, see Paisley Currah and Shanon Minter, *Transgender Equality: A Handbook for Activists and Policy Makers*, Nat'l Ctr. for Lesbian Rights at 45–50 (2000), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/TransgenderEquality.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/TransgenderEquality.pdf).

even if the Committee put out a General Recommendation applying the term “woman” to trans\* individuals. First, withdrawal from international human rights agreements is uncommon.<sup>242</sup> As a matter of practice, states parties to human rights treaties simply do not try to withdraw from such agreements with any frequency.<sup>243</sup>

Second, it may not be legally possible for a state party to withdraw from CEDAW.<sup>244</sup> In general, nothing in international human rights law as a whole seems to imply a right to withdraw. When a treaty is silent as to withdrawal, the Vienna Convention indicates withdrawal is not permitted unless “(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.”<sup>245</sup> Currently, nothing has been established as to the possibility of denunciation or withdrawal. Moreover, it does not seem that the nature of CEDAW, that is, the extension of human rights protections to women, implies a right to withdraw.<sup>246</sup>

In particular, denunciation and withdrawal procedures are conspicuously absent from CEDAW. In contrast, the Optional Protocol to CEDAW includes a denunciation procedure,<sup>247</sup> making the lack of such procedure in CEDAW seem quite intentional. Moreover, precedent exists indicating withdrawal from human rights treaties is not possible. The Human Rights Committee—the treaty body for the International Covenant on Civil and Political Rights (ICCPR), which is also silent on withdrawal and denunciation—adopted a General Comment indicating that the ICCPR does not allow denunciation or withdrawal.<sup>248</sup> The General Comment came in response to North Korea’s attempt to withdraw from the treaty in 1997.

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<sup>242</sup> HUMAN RIGHTS, *supra* note 10, at 210 (Withdrawals from “human rights agreements are rare but not unprecedented.”).

<sup>243</sup> *Id.*

<sup>244</sup> *See, for example, id.*

<sup>245</sup> Vienna Convention, *supra* note 15, art. 56(a)–(b).

<sup>246</sup> While a state party could potentially attempt to create a reservation to opt out of a trans\*-inclusive definition, this would most certainly go against the object and purpose of the treaty as the term “woman” is so central.

<sup>247</sup> Optional Protocol, *supra* note 93, art. 19.

<sup>248</sup> Human Rights Comm., General Comment No. 26: Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

## V. CONCLUSION

When examined closely, a definition of the term “woman” in CEDAW as a “unified” category excluding trans\* individuals is impossible. When all humans must be divided into two categories, trans\* individuals will have to be placed in one or the other. I argue for a definition of woman that upholds the gender binary, as required by CEDAW, but which accepts that trans\* individuals must fit into the scheme. While a nonbinary legal definition is more preferable in my view, such a definition is not possible with the existing text of CEDAW.

I argue for the definition of the term “woman” as any person who is biologically, anatomically, and/or genetically female and/or who performs and/or identifies as a woman. Not only is this definition progressive, it is also fully consistent with the current treaty interpretation rules and with the interpretation of similar U.N. human rights treaties. With this definition, CEDAW is expanded to trans\* individuals who have been waiting since the dawn of the modern human rights regime to have their humanity recognized.