

SPECIAL PROTECTION OF MOTHERS IN ICESCR AND CEDAW: THE ANALYSIS OF *TRAVAUX PRÉPARATOIRES* AND A PROPOSAL FOR THE FUTURE

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I. INTRODUCTION

In the scholarly literature on human rights, the protection of groups who face particular vulnerabilities, either permanently or in specific periods of their lives, constantly receives increasing attention – and rightly so. Surprisingly, however, very little has been said about the rights of mothers. All of us know them well – in fact, each of us came into existence only because a particular woman became a mother. Busy with unpaid care work and often focused primarily on the needs of others, mothers have little time to organize themselves and get involved in any kind of political struggle or activism for their rights. They are also obviously very different, and their challenges vary on the basis of their geographical location, desired family size, professional plans, age, health status, and other circumstances. Many mothers who face multiple and intersecting forms of discrimination become “invisible women,” and their suffering is perceived as the alleged “normal” consequences of becoming pregnant and bearing a child. Yet, there are binding laws and corresponding State obligations that should prevent discrimination and address their vulnerabilities.

Mothers are entitled to special protection based on Article 10.2 of the International Covenant on Economic, the Social and Cultural Rights (ICESCR), and the relevant provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 10.2 of ICESCR states that “*Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*”²

In the case of CEDAW, Articles 4, 5, 11, and 12 are most relevant to the rights and protection of mothers. Article 4 speaks of special

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² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3, art. 10.2 [hereinafter ICESCR].

measures aimed at protecting maternity,³ and Article 5 describes maternity as a social function.⁴ Article 11 introduces maternity leave with pay or comparable social benefits and prohibits, “subject to the imposition of sanctions,” dismissal on the grounds of pregnancy or maternity leave.⁵ Article 12 requires the States to ensure appropriate services to women in connection with pregnancy, confinement, and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.⁶

Interestingly, the Universal Declaration of Human Rights (UDHR), in Article 25.2, also recognizes that “motherhood and childhood are entitled to special care and assistance.”⁷ Given the preceding paragraph (Article 25.1) already spoke about the right of everyone to a standard of living adequate for the health and well-being of himself and of his family, singling out motherhood as requiring *special* care and assistance—understood as extraordinary means—is highly significant and has a profound impact on the construction and the rationale for the special protection included in the subsequent binding treaties, the ICESCR and CEDAW.⁸

This paper focuses specifically on the *travaux préparatoires* of both the ICESCR and CEDAW treaties for two major reasons.⁹ Firstly, the related jurisprudence and scholarship remains very scarce and mostly touches upon maternity leave and the question of maternal health, primarily in relation to maternal mortality. However, the required protection is not limited to these issues, and the comments of delegates made in the course of treaty negotiations point to additional services, underlying reasons for granting them, and the meaning of “reasonable” periods of protection. Secondly, it is crucial to analyze the original intentions of the drafters, and *travaux préparatoires*, pursuant to the Vienna Convention on the Law of Treaties, to supplement the

³ Convention on the Elimination of All Forms of Discrimination Against Women art. 4 Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁴ *Id.* at 17.

⁵ *Id.* at 18.

⁶ *Id.* at 10.

⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 76 (Dec. 10, 1948) [hereinafter UDHR].

⁸ *Id.*

⁹ *Travaux préparatoires* are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. They may be consulted and taken into consideration when interpreting treaties. *Collected Travaux Préparatoires*, Yale Law School, Lillian Goldman Law Library, <https://library.law.yale.edu/research-guides/collected-travaux-preparatoires>.

interpretation of the provisions when their meaning is ambiguous or obscure.¹⁰

The first part of this paper analyzes the negotiation processes of Article 10.2 of ICESCR, dividing statements and amendments according to the particular issues that were discussed. The second part focuses on the States’ comments to Articles 4, 5, 11, and 12 of CEDAW, described consecutively as each refers to different measures of protection. The last part reflects on the main issues discussed, identifying possible gaps and drawing attention to the importance of the holistic interpretation of the provisions, in light of the social and scientific knowledge of the specific needs of the mothers.

II. BACKGROUND

A. International Covenant on Economic, Social, and Cultural Rights (ICESCR)

The main issues discussed in the *travaux préparatoires* were the right to paid leave along with its scope and method of financing, the relation of paid leave to other services that should be granted to mothers, and the meaning of the term “reasonable” with respect to either protection or assistance, which should not be used as synonyms.¹¹ Much attention was also devoted to the question of whether this potential protection should be granted to the status of “maternity” or “mothers,” and— if the latter— whether protection should be limited to the period of pregnancy and nursing, the time when a mother is responsible for nursing and/or care and education of dependent children, or generally accorded to mothers because of their status as such.

i. Paid leave

During negotiations on the Draft Covenant on Human Rights in 1950, Yugoslavia sought to include “the duty of the State to guarantee to mothers the right to paid leave before and after confinement.”¹² In the *travaux préparatoires* of ICESCR, the States generally agreed that women need leave before and after childbirth; yet the concretization of

¹⁰ Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

¹¹ U.N. GAOR, 11th Sess., 3rd comm. 737th mtg. at 283, U.N. Doc A/C.3/SR.737 (Jan. 22, 1957) (hereinafter 737th meeting).

¹² U.N. ESCOR, 6th Sess., U.N. Doc. E/CN.4/436 (Apr. 20, 1950).

this conclusion generated many controversies.¹³ The method of financing the leave did not appear to be sufficiently settled. The Union of Soviet Socialist Republics (USSR) proposed to insert provisions related to “paid leave for the period before and after childbirth,” which should be “accorded to employed women at the expense of the State or the employer.”¹⁴ The 1952 ILO Maternity Protection Convention (No. 103) stated only that “[t]he cash and medical benefits shall be provided either by means of compulsory social insurance or public funds.”¹⁵ According to Uruguay, the amendment of the USSR providing that no part of the cost should be borne by the workers contradicted the 1952 Convention based on the principle that maternity benefits should be part of the social security systems.¹⁶ Venezuela could not agree with the provision either, as in their country paid leave was covered by social security law.¹⁷ Similarly, Yugoslavia pointed to the inconsistency between the 1952 ILO Maternity Protection Convention (No. 103) and the USSR amendment.¹⁸

El Salvador disagreed with the phrasing that paid leave should be granted “at the expense of the State or the employer,” noting that the method of financing maternity leave varied from country to country, and the detailed provisions should be drawn up by various States.¹⁹ For example, the United Kingdom (U.K.) emphasized that in their jurisdiction it was a matter of settlement through collective bargaining between trade unions and employers.²⁰ The USSR was not convinced by this line of reasoning, noting that Article 10 would be incomplete without reference to the way of financing social benefits and further noted that

¹³ See e.g., Graciela Quan, (Rapporteur), *Draft International Covenants on Human Rights, Report of the Third Committee*, ¶ 90, U.N. Doc. A/3525 (Feb. 9, 1957); 1952 ILO Maternity Protection Convention, art. 4.4, June 28, 1952, 40 ILM 1; U.N. GAOR, 11th Sess., 3rd comm., 730th mtg. at ¶45, U.N. Doc. A/C.3/SR.730 (Jan. 14, 1957); U.N. GAOR, 11th Sess., 3rd comm., 733rd mtg. at ¶27, U.N. Doc. A/C.3/SR.733 (Jan. 16, 1957); U.N. GAOR, 11th Sess., 3rd comm., 731st mtg. at ¶ 30, U.N. Doc. A/C.3/SR.731 (Jan. 15, 1957)

¹⁴ Quan, *supra* note 13.

¹⁵ 1952 ILO Maternity Protection Convention, *supra* note 13.

¹⁶ U.N. GAOR, 11th Sess., 730th mtg., Third Committee, *Draft International Covenant on Human Rights*, at ¶ 45, U.N. Doc. A/C.3/SR.730 (Jan. 14, 1957) (hereinafter 730th meeting).

¹⁷ U.N. GAOR, 11th Sess. 733rd mtg., Third Committee, *Draft International Covenant on Human Rights*, at ¶ 27, U.N. Doc. A/C.3/SR.733 (Jan. 16, 1957) (hereinafter 733rd meeting).

¹⁸ U.N. GAOR 11th Sess., 731st mtg., Third Committee, *Draft International Covenant on Human Rights*, at ¶30, U.N. Doc. A/C.3/SR.731 (Jan. 15, 1957) (hereinafter 731st meeting).

¹⁹ *Id.* at ¶ 16.

²⁰ 730th meeting, *supra* note 16, at ¶ 15.

the rights in the Covenant were to be realized progressively – therefore, it would be wrong not to introduce certain minimum provisions.²¹

Denmark admitted that if the idea of paid leave was introduced, it would be appropriate to specify what form of economic assistance women are entitled to.²² The Danish representative also suggested adding the words “leave with adequate social security benefits” as an alternative to paid leave.²³ Norway reiterated its disagreement with the idea of specifying how exactly the protection should be exercised and stated that accepting the wording proposed by the USSR, (“paid leave for the period before and after childbirth” which should be “accorded to employed women at the expense of the State of the employer”), would prevent States with social security systems not entirely financed by the State from acceding to the Covenants.²⁴ Echoing this disagreement, Brazil stressed that the Covenant should not require States to alter their existing social security systems.²⁵ On the other hand, Poland supported significant specificity in the Covenant, including listing the methods of financing the leave suggested by the USSR.²⁶

During negotiations, the distinction was drawn between maternity leave and ordinary or statutory paid leave.²⁷ It was suggested that “paid holidays before and after confinement” should be granted to “gainfully employed” women.²⁸ This issue later resurfaced in discussions about the situation of women who did not have this status. The U.K. noted that protections, such as special medical care and financial assistance, are extended to all women during maternity, and also includes housewives in its jurisdiction.²⁹ Denmark suggested that “paid leave” could be understood to mean not only salary and wages “but also other maternity benefits, all payable under social security schemes and not directly by

²¹ U.N. GAOR, 11th Sess., 3rd comm., 735th mtg., ¶34, U.N. Doc. A/C.3/SR.735 (Jan. 18, 1957) (hereinafter 735th meeting); Romania fully agreed with this point, *see* ¶ 37. Czechoslovakia also made a similar remark. *See* U.N. GAOR, 11th Sess., 3rd comm., 731st mtg. at ¶12, U.N. Doc. A/C.3/SR.736 (Jan. 21, 1957).

²² 737th meeting, *supra* note 11, at ¶ 29.

²³ U.N. GAOR, 11th Sess., Agenda Item 31 at ¶ 108, U.N. Doc. A/3525 (Feb. 9, 1957).

²⁴ 730th meeting, *supra* note 16, at ¶ 28.

²⁵ 733rd meeting, *supra* note 17, at ¶ 1.

²⁶ 731st meeting, *supra* note 18, at ¶ 23.

²⁷ 737th meeting, *supra* note 11, at ¶ 7.

²⁸ U.N. GAOR, 10th Sess., Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General), at Ch. VIII ¶ 26, A/2929 (July 1, 1955).

²⁹ U.N.C.H.R., 7th Sess., 224th mtg., Agenda Item 3, U.N. Doc. E/CN.4/SR.224 (June 14, 1951). *See* 735th meeting, *supra* note 21 at ¶ 20 (Sweden’s similar point); *see also* 737th meeting, *supra* note 11 at ¶ 14 (Bolivia’s similar point).

the individual employer.”³⁰ There was also some recognition that attention should be paid not only to working mothers but also to “widows, divorcees or unmarried women who brought up their children alone.”³¹

Furthermore, the USSR recognized that in many countries, women could not afford to stop working when they were denied paid leave, which led to “untold suffering” and raised the level of maternal and child mortality, causing particular obstacles for mothers who were the principal breadwinners of their families.³² Bulgaria emphasized the fact that “a woman who was paid no wages during maternity leave might be without means of subsistence.”³³ The USSR stated that “unless working mothers were guaranteed special protection, including the right of returning to work after confinement and, in particular, paid maternity leave, their social and economic position was bound to suffer.”³⁴

In sum, States agreed on the importance of maternity leave but differed on the method of its financing. They also did not conclude the concrete duration of leave. They did, however, acknowledge that mothers cannot be left without a means of subsistence for the period when they are unable to work as a result of giving birth.

ii. Other proposed services

Yugoslavia proposed the phrasing “[i]n labor relations, it is the duty of the State to guarantee to mothers special facilities for the protection of their interests and the interests of their children by establishing maternity clinics, nurseries, etc.”³⁵ During a later stage of the negotiations, the USSR explained that working mothers, besides the special maternity leave of 112 days, were accorded other special privileges in addition to various social security benefits under their jurisdiction.³⁶ In the same vein, the U.K. stated that they provide comprehensive state aid under the social security system through maternity benefits, antenatal care, hospitalization, or other medical care

³⁰ 735th meeting, *supra* note 21, at ¶ 27.

³¹ *Id.* at ¶ 3.

³² 730th meeting, *supra* note 16, at ¶ 2; *contra* 735th meeting, *supra* note 21, at ¶ 18 (Sweden at that time made the remark though that it would not be advisable to retain provisions suggesting that mothers were the bread-winners of the family as it was “not generally the case.”).

³³ 731st meeting, *supra* note 18, at ¶ 28.

³⁴ 733rd meeting, *supra* note 17, at ¶ 22.

³⁵ United Nations Commission on Human Rights, *supra* note 12, at 1.

³⁶ 730th meeting, *supra* note 16, at ¶ 4.

during confinement and postnatal care.³⁷ The noteworthy difference was, in the U.K.’s view, that mentioning the leave specifically would limit assistance for mothers to that measure only.³⁸ Iraq shared this concern.³⁹ According to El Salvador, there was no need to prefer paid leave over other rights.⁴⁰ That view was also echoed by Chile when its representative expressed regret that singling out paid leave as a required state protective measure—instead of putting an emphasis on a broader range of services—could create the impression that women wage-earners were the only women who had to be considered.⁴¹

Uruguay proposed that the word “working” would be broader than “employed” but did not elaborate on the consequences of this distinction.⁴² Israel found that “mothers, in general, and working mothers, in particular” need protection.⁴³ Canada suggested that providing special protection to mothers without specifying if they are working mothers, and without mentioning paid leave, may lead to consensus among the delegations as it would constitute a call for the appropriate measures for all women.⁴⁴ In some cases, this could include paid leave for employed mothers, but would not result in the exclusion of other measures.⁴⁵

France suggested that the confusion regarding the relation between paid leave and other services could have its source, among others, in the lack of distinction between concepts of protection and assistance.⁴⁶ According to its representative, “[p]rotection should be understood as the sum of the laws and regulations defining the rights and obligations of an entity or group,” while assistance meant the provision of material benefits or allowances would be generally distributed through the social security system or by welfare organizations.⁴⁷ The Philippines proposed to add the word “assistance” to the paragraph concerning the rights of mothers because otherwise, its absence, in conjunction with the presence in paragraphs 1 and 3 concerning the families and children, could create the impression that the paragraph 2 was less important.⁴⁸

³⁷ *Id.* at ¶ 15.

³⁸ 730th meeting, *supra* note 16, at ¶ 15.

³⁹ 737th meeting, *supra* note 11, at ¶ 35.

⁴⁰ 735th meeting, *supra* note 21, at ¶ 7.

⁴¹ United Nations General Assembly, *supra* note 18, at ¶ 38.

⁴² 733rd meeting, *supra* note 17, at ¶ 11.

⁴³ 735th meeting, *supra* note 21, at ¶ 3.

⁴⁴ 733rd meeting, *supra* note 17, ¶¶ 6, 28, 37.

⁴⁵ *Id.*

⁴⁶ 737th meeting, *supra* note 11, at ¶ 3.

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶ 12.

iii. "Motherhood," "mothers," "maternity," or "while they are responsible for nursing/dependent children" under Article 10.2 of ICESCR.

The question of the precise subject of protection provoked a deluge of comments. According to the proposal of the Commission on Human Rights, special protection should be "accorded to *motherhood and particularly to maternity* during reasonable periods before and after childbirth."⁴⁹ Uruguay proposed to grant special protection simply to "mothers" particularly for a reasonable period before and after childbirth,⁵⁰ and Saudi Arabia used only a slightly different expression referring also to "mothers" particularly during reasonable "periods" (instead of "period") before and after childbirth.⁵¹ Alternatively, Saudi Arabia advocated for special protection to "*mothers, particularly during maternity*, for reasonable periods before and after childbirth."⁵²

The words "maternity" and "motherhood" were not defined during negotiations, but their distinction was acknowledged.⁵³ According to some delegations, "maternity" referred to the shorter period immediately preceding and following childbirth.⁵⁴ The U.K. and Syria insisted that it would be sufficient to mention only the specific case of childbirth, as other rights of mothers may be realized through the provisions on the protection of families included in the preceding paragraph.⁵⁵ It was suggested that extending protection to mothers during the period of maternity would ensure that the Covenant's article was in line with the 1952 ILO Maternity Protection Convention (No. 103).⁵⁶

The term "motherhood" could cover the period of the mother's responsibility for the development of the child during the early years⁵⁷ or, according to other definitions, refer to the general state of being a mother.⁵⁸ Chile, for example, stated that such protection should be

⁴⁹ Quan, *supra* note 13, at ¶ 86.

⁵⁰ *Id.* at ¶ 95 (amendment A/C.3/L.565).

⁵¹ 730th meeting, *supra* note 16, at ¶ 18.

⁵² Quan, *supra* note 13, at ¶ 91. (amendment A/C.3/L.561).

⁵³ U.N., Commission on Human Rights, Seventh Session, Agenda Item 3(b), Draft International Covenant on Human Rights and Measures of Implementation, ILO: Suggestion Relating to Special Provisions Concerning Women and Children, E/CN.4/587 (May 2, 1951).

⁵⁴ 731st Meeting, *supra* note 18, at ¶ 5.

⁵⁵ 736th Meeting, *supra* note 31, at ¶¶ 28, 37.

⁵⁶ 735th Meeting, *supra* note 21, at ¶ 18.

⁵⁷ 731st Meeting, *supra* note 18, at ¶ 5. *See also* ¶ 48, "the word 'motherhood' related to the early years of a child's development"; "particularly during the child's first years of life."

⁵⁸ Quan, *supra* note 13, at ¶ 111.

broader in scope and “the mother should be protected because she was a mother.”⁵⁹ Indonesia, on the other hand, argued that motherhood should be understood as covering only the period of pregnancy and nursing, not the general state of being a mother.⁶⁰ The Philippines noted that “maternity” referred to the periods before and after childbirth, while motherhood was the state of having borne a child or children.⁶¹

The Secretary General, in his annotations on the text of the Draft International Covenants on Human Rights, suggested using the word “motherhood” instead of “maternity” because “the according of special protection to ‘motherhood,’ not exclusively to ‘maternity,’” was meant to signify that protection should extend over the whole period of the mother’s responsibility for the development of the child during the early years.⁶² However, the Secretary General also acknowledged the feeling among delegations that the expression “motherhood” was too vague because the general rights of mothers were covered by Article 9 on social security.⁶³

The Working Party, composed of representatives of Afghanistan, Bulgaria, Canada, Chile, Ecuador, Guatemala, Italy, Sweden, the USSR, and Uruguay, proposed to grant special protection for “mothers while they are responsible for the care and education of dependent children” and particularly during a reasonable period before and after childbirth.⁶⁴ The propositions to protect mothers “while they are responsible for the care and education of dependent children” were met with some skepticism, as it was difficult to decide when such responsibility ended.⁶⁵ According to Saudi Arabia, “if the years during which a woman can bear children and the years during which her youngest child might remain dependent were added together, it would be seen that a mother might continue to receive social security benefits until she was eligible for an old-age pension,” but it was doubtful that many States would be ready for this kind of interpretation.⁶⁶ Such a suggestion, however, did not

⁵⁹ 736th Meeting, *supra* note 31, at ¶ 2. Rather surprisingly though Chile supported its claims saying that it’s in conformity with the position adopted by the Commission on Human Rights according to which special protection accorded to motherhood “should extend over the whole period of the mother’s responsibility for the development of the child during its early years.” The status of mother does not terminate after the child’s early years although, of course, her responsibility changes.

⁶⁰ 733rd meeting, *supra* note 17, at ¶ 14.

⁶¹ *Id.* at ¶ 30.

⁶² Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General), *supra* note 28, at ¶ 23.

⁶³ *Id.*

⁶⁴ Quan, *supra* note 13, at ¶ 101 (amendment A/C.3/L.570).

⁶⁵ 735th Meeting, *supra* notes 21, at ¶ 13; 21, at ¶ 31; 14, at ¶ 103.

⁶⁶ 735th Meeting, *supra* note 21, at ¶ 30.

seem to concern Czechoslovakia, which explained that in their country, the mother's care of a child was socially as important as the father's professional activity, which could be demonstrated by the fact that "when a mother who had not been working took a job, the time she had spent raising her children was taken into account in computing her retirement benefits."⁶⁷

Guatemala suggested the words "maternity and motherhood" could be substituted for "during pregnancy and while nursing their offspring," which "certain persons might consider rather too indelicate for the inclusion in the Covenant."⁶⁸ The problem of the alleged "indelicateness" was not mirrored in other States' comments, and the U.K., Sweden and Chile argued that the phrase "during pregnancy and while nursing their offspring" was more precise since no term could be set to the period of motherhood.⁶⁹ They considered vagueness to be problematic, as in their view, protection should be granted for a limited period only.⁷⁰ The U.K. rhetorically asked, "[w]as a woman to receive special protection all her life just because she had children?" which would suggest the entitlement to independent protection for a mother.⁷¹ Similar remarks were made by the representatives of the Dominican Republic and Ceylon.⁷² Australia did not agree with such a broad understanding of motherhood, stating that "a relatively restrictive construction was normally placed on the word "motherhood" which did not cover the general status of mother in the family."⁷³

Nonetheless, France took the opposite position, explaining the UDHR was clear that it was a mother who required special protection, and hence the protection should not be limited to pregnancy and the nursing period.⁷⁴ As an example of the acknowledgment that the protection should extend far beyond those states, the French representative explained that in France, female civil servants with a certain number of children were entitled to special leave.⁷⁵ Chile understood the English text of the Draft Covenant as defining motherhood as a "permanent state, in which childbirth was an incident."⁷⁶ Canada suggested that the difficulties the words

⁶⁷ 736th Meeting, *supra* note 31, at ¶ 10.

⁶⁸ 735th Meeting *supra* note 29, 422.

⁶⁹ *Id.* at 424–25.

⁷⁰ 733rd Meeting, *supra* note 21, at ¶ 3.

⁷¹ U.N.C.H.R., 7th Sess., 224th mtg, *supra* note 29, at 423.

⁷² 731st Meeting, *supra* note 12, at ¶ ¶ 31, 37.

⁷³ *Id.* at 429.

⁷⁴ U.N.C.H.R., 7th Sess., 224th mtg, *supra* note 29, at 425–26.

⁷⁵ *Id.* at 426.

⁷⁶ 730th meeting, *supra* note 16, at ¶ 29.

“motherhood” and “maternity” presented could be avoided if they were replaced with the word “mothers.”⁷⁷

The discussions about the precise subject of protection show various conceptions that States had in regard to whether that protection should be afforded based on short-term physical challenges (maternity) or the general status of being a mother (motherhood). The difference between justifying this protection by the good of the children or by mothers’ independent needs further exemplifies these disagreements.

iv. The reasons for and meaning of “special” protection.

Besides the question of paid leave and other services that should be granted to women, as well as the differences between the terms “maternity,” “motherhood,” and “mothers,” representatives also discussed the underlying reasons for and aims of the special protection for mothers and its relation to other social and economic rights.

Considering the primary aim of Article 10.2 protection, some representatives emphasized the interest of children, which would be conditioned upon the well-being of mothers.⁷⁸ Belarus lamented that in many countries, children failed to survive due to the lack of protection for mothers.⁷⁹ Romania stated that mothers should be accorded “special rights to enable them to provide for the proper physical care, upbringing and education of their children.”⁸⁰ Israel and Sweden drew attention to the welfare of children being the primary consideration in the protection of mothers, but Israel also emphasized that “[t]he purpose of the proposed Covenants was to help to remove some of the evils and injustices of society; it was natural, therefore, that they should provide for the protection of women, who, in their special role as mothers, were often victimized and discriminated against.”⁸¹ Instead of focusing on children, Colombia pointed to the fact that women are subjected to great physical and emotional strain during pregnancy and after childbirth as the primary reason for special protection at those times.⁸²

There seemed to be some degree of acknowledgment of the distinctiveness of the role and status of a mother, with Indonesia stating that “despite the many United Nations directives regarding the treatment of men and women, certain distinctions must be made, on grounds of

⁷⁷ 733rd meeting, *supra* note 17, at ¶ 6.

⁷⁸ ICESCR, *supra* note 2, art. 10.2.

⁷⁹ 731st meeting, *supra* note 18, at ¶ 44.

⁸⁰ 735th meeting, *supra* note 21, at ¶ 39.

⁸¹ 735th meeting, *supra* note 21, at ¶ 3.

⁸² *Id.* at ¶ 12.

biological differences.”⁸³ Israel’s point could also implicitly reaffirm these statements when its representative drew attention to the fact that a father, even if he were a widower responsible for a dependent child, would only be entitled to the protection from paragraph 1 (protection of the families), not paragraph 2 (focused exclusively on the mothers), even though in his case the interest and welfare of a child would also be at stake.⁸⁴

Yugoslavia even stated that “women, in fact, did not really have equal rights unless they could command special protection,” specifying further that in its country women were guaranteed against dismissal during pregnancy, enjoyed paid maternity leave, and “many other advantages.”⁸⁵ For Belarus “special protection” meant “paid maternity leave, the prohibition of night work, provision for lighter work at the same pay, nursing breaks, free medical attention before and after confinement, and so forth.”⁸⁶ There was also considerable emphasis on the word “reasonable” in the description of the periods of protection, which could be vague enough to accommodate varying socioeconomic models but also sufficiently concrete to preclude any extreme limitations.⁸⁷

Finally, it must be noted that the issue of special protection for mothers in the ICESCR is not limited to Article 10.2 provisions relating to other socioeconomic rights, such as the right to adequate food, clothing, housing, and standard of living; it must be interpreted in light of the particular vulnerabilities and needs of mothers, as the meaning of the word “adequate” might vary depending on them. This interconnectedness was recognized in the United States’ early proposal concerning women and children, according to which the State Parties to the Covenant would “recognize the right of everyone to improved standards of living and adequate housing and the enjoyment of the highest standard of health obtainable, with special protection for mothers and children.”⁸⁸ Another U.S. proposal would “recognize the right of everyone to improved standards of living, including: a) adequate housing; b) the enjoyment of the highest attainable standard of health

⁸³ 733rd meeting, *supra* note 17, at ¶ 13.

⁸⁴ 735th meeting, *supra* note 21 at ¶ 8.

⁸⁵ 731st meeting, *supra* note 18, at ¶ 30.

⁸⁶ *Id.* at ¶ 44.

⁸⁷ 730th meeting, *supra* note 16, at ¶ 43.

⁸⁸ U.N. Comm’n on Hum. Rts., 7th Sess., Agenda Item 3(b), Draft Int’l Covenant on Hum. Rts and Measures of Implementation, USA: Revised Proposal on Provisions Concerning Women and Child., U.N. Doc. E/CN.4/582 (May 1, 1951).

obtainable; and c) special protection for mothers and children.”⁸⁹ Interpretation of qualifiers “adequate” or “improved” in light of multiple and intersecting forms of discrimination mothers experience exemplifies the need of their protection.

B. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW, adopted thirteen years after the ICESCR, became the second major human rights treaty that expressly included guarantees for mothers’ rights.⁹⁰ As a comprehensive instrument dedicated to respecting, protecting, and fulfilling women’s human rights, its way of incorporating mothers and maternity protection differs from that presented in the ICESCR. Thus, particular attention will be paid to Articles 4, 5, 11, and 12 and conclusions related to the included issues that may also partially be drawn on the basis of other articles. For the purposes of clarity, they will be analyzed consecutively, bearing in mind that their scope largely overlaps with the ICESCR’s Article 10.2 protection.

The social significance of 13aternity and the role of women in procreation, which should “not be a basis for Discrimination,” together with the emphasis that the responsibility for the upbringing of children ought to be shared “between men and women and society as a whole” was acknowledged in the Preamble of CEDAW.⁹¹ Interestingly, the phrasing from the preambular paragraph touching upon maternity generated discussions. During debates, Sweden proposed substituting “parenthood” for the word “maternity.”⁹² The United Nations Educational, Scientific and Cultural Organization (UNESCO) suggested replacing the phrase “the social significance of maternity” with “the social significance of childbearing and the role of both parents in the

⁸⁹ U.N. ESCOR, Comm’n on Hum. Rts, 7th Sess., Summary Record of the 222nd Meeting, U.N. Doc. E/CN.4/SR.222 (May 2, 1951).

⁹⁰ See Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers’ Participation in International Commercial Surrogacy Contract*, 48 GOLDEN GATE U. L. R. 162, 166 (May 2018);
see also CEDAW, *supra* note 3.

⁹¹ CEDAW, *supra* note 3, at *Preamble*.

⁹² U.N. Secretary-General, 32nd Sess., Agenda Item 85, ¶ 16, *Draft Convention on the Elimination of Discrimination against Women: Rep. of the Secretary General*, U.N. Doc. A/32/218/Add.1 (Oct. 12, 1977).

family and in the rearing of children.”⁹³ This later became a recurring theme in the course of negotiations.

i. Article 4 – Temporary special measures and protecting maternity.

Article 4 of CEDAW speaks about temporary special measures, including those aimed at protecting maternity:

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

*2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.*⁹⁴

The U.K. proposed the following wording of Article 4:

1. The adoption of special temporary measures aimed at establishing de facto equality between men and women shall not be considered discriminatory, where circumstances justify their introduction.
2. Measures in the social security field relating to different social needs of men and women shall not be considered discriminatory.
3. Measures undertaken for the protection of women at certain branches of work due to their physical nature and for the promotion of the welfare of

⁹³ U.N. Secretary-General, 32nd Sess., Agenda Item 85, at 5, *Draft Convention on the Elimination of Discrimination against Women Annex I* U.N. Doc. A/32/218/Add.1 (Sept. 21, 1977) (this position was supported by Denmark, Finland, the Netherlands, Norway and Sweden); U.N. GAOR, 32nd Sess., Agenda Item 85, at 5, *Draft Convention on the Elimination of Discrimination against Women Amendments*, U.N. Doc. A/C.3/32/WG.1/CRP.2 (Oct. 24, 1977).

⁹⁴ CEDAW, *supra* note 3, at art. 4.

mothers shall not be interpreted as violating the principle of equality of rights of men and women.⁹⁵

The United States wanted wording that emphasized that special measures should be discontinued when the objectives of equality of opportunity and treatment have been achieved,⁹⁶ which was later supported by Canada, Kenya, the USSR, and Denmark.⁹⁷ India was dissatisfied that the text dealt only with temporary measures and failed to mention permanent measures.⁹⁸ Sweden argued that measures designed to protect the social functions of reproduction should cover both men and women.⁹⁹ Hungary favored special measures aimed at de facto equality and the protection of maternity.¹⁰⁰ Canada alternatively suggested the phrasing “adoption of special measures aimed at protecting maternity shall not be considered discriminatory,” which was very close to the Hungarian version of Article 4, which was the phrase eventually included in the text of the Convention.¹⁰¹

Referring specifically to paragraph 2, Finland observed that the protection of women in certain branches of work, due to their physical nature and for the promotion of the welfare of mothers, is based on ILO conventions and therefore should not be not considered discriminatory.¹⁰² Sweden drew attention to the ILO Declaration on

⁹⁵ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., Agenda Item 9, *Draft Convention on the Elimination of Discrimination Against Women, Adoption of the Rep. of the Comm’n on its Twenty-Sixth Session*, ¶ 15, U.N. Doc. E/CN.6/L.681/Add.1 (Sept. 27, 1976).

⁹⁶ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., Agenda Item 3(a), at ¶12; *United States of America: Amendment to the Draft Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. E/CN.6/L.688 (Sept. 28, 1976).

⁹⁷ U.N. GAOR, Comm’n on the Status of Women, 32nd sess., Agenda Item 85, *Draft Convention on the Elimination of Discrimination Against Women Amendments*, U.N. Doc. A/C.3/32/WG.1/CRP.6/Add.6 (Nov. 18, 1977).

⁹⁸ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., 661th mtg, *Summary Rec. of the 661st Meeting*, ¶ 12, U.N. Doc. E/CN.6/SR.661 (Dec. 8, 1976).

⁹⁹ *Id.* at ¶ 19.

¹⁰⁰ U.N. GAOR, 32nd Sess., Agenda Item 85, *Draft Convention on the Elimination of Discrimination against Women: Rep. of the Secretary-General*, ¶ 10, U.N. Doc. A/32/218/Add.2 (Oct. 28, 1977).

¹⁰¹ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., Agenda Item 9, *Draft Rep. on the Comm’n on its Resumed Twenty-Sixth Session*, ¶¶ 23–26, U.N. Doc. E/CN.6/L.716 (Dec. 13, 1976).

¹⁰² U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., Agenda Item 3(a), *Draft Convention on the Elimination of Discrimination Against Women: Working Paper Prepared by the Secretary-General*, ¶ 60, U.N. Doc. E/CN.6/591 (June 21, 1976) (hereinafter *Draft Convention on the Elimination of Discrimination Against Women*).

Equality of Opportunity and Treatment for Women Workers¹⁰³ and the World Plan of Action for the Implementation of the Objectives of the International Women's Year,¹⁰⁴ noting the necessity to review special measures of protection for mothers in light of scientific and technological knowledge.¹⁰⁵ The former German Democratic Republic (East Germany) wished to include "provisions for the adoption of industrial safety measures geared to the psychological particularities of women."¹⁰⁶ In contrast, the Federal Republic of Germany, (present-day Germany), questioned whether the physical constitution of women required special protective measures.¹⁰⁷

Belarus, the USSR, and the U.K. shared the view that the words "promotion of the welfare of mothers" should be retained, while Pakistan and the International Council of Social Democratic Women disagreed.¹⁰⁸ Portugal proposed to add the words "due to their physical nature" after the words "mainly in what concerns their maternal role," while Panama proposed to add the phrase "in accomplishment of the maternal functions which is in the general interests of society."¹⁰⁹

Canada and Denmark insisted on the deletion of Article 4, expressing the view that "many forms of protectionist legislation in respect to women can be used to their disadvantage."¹¹⁰ The USSR, on the other hand, wanted to extend Article 4 by adding a separate provision requiring States to provide for protection "with a view to guaranteeing

¹⁰³ Article 9.4 of the Declaration provides that "Measures shall be taken to extend special protection to women for types of work proved to be harmful for them from the standpoint of their social function of reproduction and such measures shall be reviewed and brought up to date periodically in the light of advances in scientific and technological knowledge." See Int'l Lab. Off., Declaration on Equality of Opportunity and Treatment for Women Workers, adopted by the Conference on June 25, 1975, in INT'L LAB. OFF. OFFICIAL BULLETIN VOL. LVII SERIES A 1975, https://ilo.primo.exlibrisgroup.com/discovery/fulldisplay/alma993963823402676/41ILO_INST:41ILO_V2. [hereinafter ILO].

¹⁰⁴ U.N. ESCOR, Rep. of the World Conference of the Int'l Women's Year, ¶ 102, U.N. Doc. E.76.IV.1. "Protective legislation applying to women only should be reviewed in the light of scientific and technological knowledge, and should be revised, repealed or extended to all workers as necessary."

¹⁰⁵ Draft Convention on the Elimination of Discrimination Against Women, *supra* note 102, at ¶ 63.

¹⁰⁶ U.N. Secretary General, 32nd Sess., Agenda Item 85, *Draft Convention on the Elimination of Discrimination Against Women: Rep. of the Secretary-General*, ¶ 38, U.N. Doc. A/32/218 (Sept. 21, 1977).

¹⁰⁷ Draft Convention on the Elimination of Discrimination Against Women, *supra* note 102, at ¶ 51.

¹⁰⁸ Draft Convention on the Elimination of Discrimination Against Women, *supra* note 102, at ¶ 61.

¹⁰⁹ *Id.* at ¶ 62.

¹¹⁰ *Id.* at ¶ 66.

women real opportunities to combine successfully their obligations as mothers with their participation in all aspects of the life of the country,”¹¹¹ because it was necessary to recognize motherhood as a “social function.”¹¹²

ii. Article 5 – Maternity as a social function

Article 5 of the CEDAW provides that:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.¹¹³

The Philippines and the USSR wished to emphasize that the “protection of motherhood is a common interest of the entire society which should bear responsibility for it.”¹¹⁴ Cuba stressed that motherhood should not serve as a pretext for discrimination and must be looked upon as a social function.¹¹⁵ Several States differed on whether motherhood should be protected as a social function, or if this concept rather ought to be

¹¹¹ U.N. ESCOR, Comm’n on the Status of Women, 25th Sess., Agenda Item 4(b), *International Instruments and National Standards Relating to the Status of Women*: Working Paper by the Secretary-General, ¶ 52, U.N. Doc. E/CN.6/573 (Nov. 6, 1973).

¹¹² U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., 638th mtg., *Summary Rec. of the 638th Meeting*, ¶ 54, U.N. Doc. E/CN.6/SR.638 (Sept. 20, 1976).

¹¹³ CEDAW, *supra* note 3, art. 5.

¹¹⁴ U.N. ESCOR, Ad Hoc Comm., *Draft Convention on the Elimination of All Forms of Discrimination Against Women: Working paper submitted by the Philippines and the Union of Soviet Socialist Republics*, art. 6, U.N. Doc. E/CN.6/AC.1/L.4/Corr.1 (Jan. 10, 1974).

¹¹⁵ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., 636th mtg., *Summary Record of the 636th Meeting*, at 2, ¶ 9, U.N. Doc. E/CN.6/SR.636 (Sept. 16, 1976).

considered in the context of economic and social rights.¹¹⁶ The Federal Republic of Germany and Portugal believed that it was important to keep a specific reference to the protection of motherhood for the common interest of the entire society.¹¹⁷ Indonesia considered that the social function of motherhood must be recognized not only in education but also in legislation, particularly in legislation on employment and social security.¹¹⁸ Egypt noted that the discussion boiled down to the question of whether the parental function should be viewed in its strictly private aspect or as a social function.¹¹⁹

Two alternative versions of Article 5 referred to "all appropriate measures" instead of initially proposed "all necessary measures."¹²⁰ Norway complained that the idea of "protection of motherhood" was unclear and might seem to bind women too closely to that role.¹²¹ The U.K. noted that "the protection of motherhood" was vague and may raise a number of questions about social policy not strictly within the scope of the Convention,¹²² and Canada suggested that the word "maternity" should be substituted for "motherhood."¹²³

The relationship between motherhood and fatherhood also generated some controversies. The United States claimed that the word "motherhood" in Article 5 was discriminatory since it perpetuated discrimination against men and would be unacceptable under its domestic law.¹²⁴ Kenya wanted the word "motherhood" replaced with "parenthood,"¹²⁵ and Sweden suggested replacing "motherhood" with

¹¹⁶ U.N. ESCOR, Comm'n on the Status of Women, 26th Sess., *Draft Rep.: Adoption of the Report of the Commission on its Twenty-Sixth Session*, ¶ 17, U.N. Doc. E/CN.6/L.681/Add.1 (Sept. 27, 1976).

¹¹⁷ Draft Convention on the Elimination of Discrimination Against Women, *supra* note 102, at ¶ 70.

¹¹⁸ Comm'n on the Status of Women, *Summary Record of the 636th Meeting*, *supra* note 115, at ¶ 25.

¹¹⁹ *Id.* at ¶ 22.

¹²⁰ U.N. ESCOR, Ad Hoc Comm., *Draft Rep. of the Working Group to the Commission on the Status of Women*, at 9, U.N. Doc. E/CN.6/AC.1/L.12 (Jan. 14, 1974).

¹²¹ Draft Convention on the Elimination of Discrimination Against Women, *supra* note 102, at ¶ 71.

¹²² *Id.*

¹²³ *Id.* at ¶ 72.

¹²⁴ Draft Convention on the Elimination of Discrimination Against Women: Rep. of the Secretary-General, *supra* note 106 at ¶ 46.

¹²⁵ U.N. ESCOR, Comm'n on the Status of Women, 32nd Sess., *Agenda Item 85, Proposed Amendments to the Draft Convention on the Elimination of Discrimination Against Women (1732/218, annex IV)*, U.N. Doc. A/C.3/32/WG.1/CRP.6/Add.2 (Nov. 3, 1977).

“parenthood” or “maternity.”¹²⁶ India, the U.K., and Sweden proposed to describe “parenthood” as a social function.¹²⁷ In the end, after the vote on the amendment, the word “maternity” was used even though some States, like Morocco, did not consider maternity to be a social function.¹²⁸

iii. Article 11 – Employment protection for mothers

Pursuant to Article 11 of CEDAW:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(...)

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

¹²⁶ Comm’n on the Status of Women, *Summary Record of the 636th Meeting*, *supra* note 115, at ¶ 48.

¹²⁷ *Id.* at ¶ 49.

¹²⁸ U.N. ESCOR, Comm’n on the Status of Women, 32nd Sess., Agenda Item 85, *Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination Against Women*, ¶¶ 105–106, U.N. Doc. A/C.3/32/L.59 (Dec. 6, 1977).

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.¹²⁹

Referring to Article 5 generally, Czechoslovakia considered that the Convention should address measures needed to assist women with children to achieve actual equality.¹³⁰ Belgium proposed to limit protective measures to periods of pregnancy and “the enhancement not only of motherhood but of responsible parenthood and the assumption by society of the resulting costs.”¹³¹ It also explained that women are more often dismissed because of their age or “fear of absenteeism resulting from pregnancy or family responsibilities.”¹³² Pakistan pointed out that, to ensure the right to work, measures should be taken to prevent women’s dismissal “in the event of marriage or maternity,” and be provided with paid maternity leave, guarantees of returning to former employment after maternity, and provisions of social services.¹³³ The German Democratic Republic argued that one of the most important guarantees of the equality of women was the protection of the interests of mothers and children by measures such as maternity leave, services for the protection of mothers and children, or free hospitalization and

¹²⁹ CEDAW, *supra* note 3, at art. 11.

¹³⁰ U.N. ESCOR, Comm’n on the Status of Women, 25th Sess., Agenda Item 4(b), *Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General*, at ¶ 89, U.N. Doc. E/CN.6/573 (Nov. 6, 1973).

¹³¹ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., Agenda Item 3(a), *Draft Convention on the Elimination of All Forms of Discrimination Against Women: Working Paper Prepared by the Secretary-General*, ¶ 3, U.N. Doc. E/CN.6/591/Add.1/Corr.1 (Sept. 14, 1976).

¹³² *Id.* at ¶ 4.

¹³³ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., at 3, *Communication Addressed to the Secretary of the Commission by the Permanent Representative of Pakistan to the United Nations Office at Geneva*, at ¶ 12, U.N. Doc. E/CN.6/606 (Dec. 13, 1976).

medical care.¹³⁴ According to Egypt, the issues of part-time work, lower age for retirement, or shortening of the working period giving entitlement to a pension should be also considered.¹³⁵ The idea of a “lower pensionable age,” however, was disputed, as France argued that it would shorten women’s already short professional life, and the U.K. considered it inappropriate.¹³⁶

The United States suggested that Article 2(a) should be amended to read “to make unlawful dismissal merely based on marriage or maternity of a woman,” which India supported.¹³⁷ Hungary, Indonesia, Venezuela, and Belarus stated that it was necessary to make it unlawful for a woman to be dismissed from her job while she was on pregnancy or maternity leave.¹³⁸ France, with the support of Iran, proposed “to prohibit – subject to the imposition of penalties – dismissal on grounds of marriage, pregnancy or maternity leave” in order to protect women from being dismissed from their employment in the early stages of pregnancy or while they were on maternity leave.¹³⁹ Japan wished to use the phrase “eliminating, through the imposition of penalties where appropriate” instead of “prohibiting, subject to the imposition of penalties.”¹⁴⁰

Considering paid leave, Sweden wanted to replace “maternity leave” with “paid leave for parents”¹⁴¹ or “parental leave.”¹⁴² The ILO representative proposed paragraph 2(b) to be cross-referenced to the 1952 ILO Maternity Protection Convention (No. 103) and stated that it should be made clear that the cost of maternity leave should not be borne by the individual employer but by social security or public funds.¹⁴³

¹³⁴ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., 644th mtg., *Summary Record of the 644th Meeting*, at ¶ 10, U.N. Doc. E/CN.6/SR.644 (Sept. 22, 1976).

¹³⁵ *Id.* at ¶ 3.

¹³⁶ Comm’n on the Status of Women, *Draft Convention on the Elimination of Discrimination Against Women: Working Paper Prepared by the Secretary-General*, *supra* note 102, at ¶ 123.

¹³⁷ U.N. ESCOR, Comm’n on the Status of Women, 26th Sess., *Summary Record of the 647th Meeting*, ¶¶ 40, 42, U.N. Doc. E/CN.6/SR.647 (Sept. 23, 1976).

¹³⁸ *Id.* at ¶¶ 43–45.

¹³⁹ *Id.* at ¶¶ 47–48.

¹⁴⁰ U.N. ESCOR, Comm’n on the Status of Women, 33rd Sess., Agenda Item 75, *Draft Convention on the Elimination of Discrimination Against Women*, Japan: Amendment to the Draft Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/C.3/33/WG.1/CRP.5/Add.7 (Oct. 19, 1978).

¹⁴¹ *Draft Convention on the Elimination of Discrimination Against Women*, *supra* note 102, at ¶ 69.

¹⁴² Comm’n on the Status of Women, *Summary Record of the 647th Meeting*, *supra* note 137, at ¶ 54.

¹⁴³ *Draft Convention on the Elimination of Discrimination Against Women*, *supra* note 102, at ¶ 69.

Denmark opined that the right to return to employment after maternity leave ought to be qualified, as otherwise, it could become a “stumbling block to younger women employees.”¹⁴⁴ France wanted paragraph 2(b) to read “to grant paid leave for pregnancy and maternity, without loss of the job held and without loss of social allowances and benefits, the periods of leave being treated as equivalent to periods of work actually performed.”¹⁴⁵ Hungary expressed support for the French proposal but noted that the words “maternity leave” already covered the period of pregnancy.¹⁴⁶

India was in favor of using the expression “encourage” instead of “grant” to take into account situations in countries where private employers did not grant paid maternity leave and “where public funds were insufficient to cover the cost of such leave.”¹⁴⁷ The United States agreed with Indonesia’s statement that “any sophisticated system under which the cost of maternity leave was covered out of public funds was irrelevant to countries such as her own.”¹⁴⁸ The United States further emphasized the importance of using the word “encourage” because not all the countries were in a position to require employers, whether private or public, to grant paid maternity leave, so each country should be able to adopt the kind of measures it deemed appropriate.¹⁴⁹ In response, France said it was essential to protect women using collective arrangements because it was unlikely that employers would be philanthropically inclined to pay allowances.¹⁵⁰

The USSR said it would be a step backward to include weaker provisions than those in the 1952 ILO Maternity Protection Convention (No. 103),¹⁵¹ but the U.K. disagreed, stressing that the Commission on Human Rights should avoid using wording taken from other conventions that a number of countries were unable to ratify.¹⁵² ILO argued that if a Convention was to be fully acceptable to all States, its text would have to be practically meaningless, and the texts of conventions should serve as a model and example for all countries.¹⁵³ The representative added

¹⁴⁴ *Id.* at ¶ 28.

¹⁴⁵ Comm’n on the Status of Women, *Summary Record of the 647th Meeting*, *supra* note 137, at ¶ 53.

¹⁴⁶ *Id.* at ¶ 55.

¹⁴⁷ *Id.* at ¶ 56.

¹⁴⁸ *Id.* at ¶ 58.

¹⁴⁹ *Id.* at ¶ 57.

¹⁵⁰ *Id.* at ¶ 62.

¹⁵¹ Comm’n on the Status of Women, *Summary Record of the 647th Meeting*, *supra* note 137, at ¶ 67.

¹⁵² *Id.* at ¶ 69.

¹⁵³ *Id.* at ¶ 72.

that "if, in the United States, maternity benefits were not at present payable from public funds, the adoption of a convention providing for the payment of such benefits by the community might provide women in that country with an argument in favor of the introduction of that practice."¹⁵⁴ Hungary suggested that the Commission on Human Rights might wish to replace the word "granting" with "the progressive granting of" to account for the views of third world countries.¹⁵⁵ India complained that "progressive granting" had no clear meaning, while the original word "encourage" was perfectly clear.¹⁵⁶ France opposed that statement, considering that the word "encourage" was meaningless because there were no practical means of such encouragement.¹⁵⁷

Additionally, Guinea proposed incorporating "medical care for the mother and child during pregnancy, confinement and the post-natal period" in the sub-paragraph.¹⁵⁸ In the same vein, Sweden suggested including the phrase "to grant women free medical services in connection with pregnancy, confinement and the post-natal period."¹⁵⁹ India wanted to replace the words "medical services" with "easily available health care services."¹⁶⁰ The Netherlands wished to use the words "to ensure women access to medical services" instead of "to grant women free medical services"¹⁶¹ and the United States proposed to limit these services to "needy" women.¹⁶² These amendments ultimately were not reflected in the official text of Article 11.

Finally, turning to the special safeguards for pregnant women in the workforce, Cuba proposed "to protect pregnant women, giving them appropriate working conditions, including transfer to work not harmful

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at ¶ 75.

¹⁵⁶ *Id.* at ¶ 76.

¹⁵⁷ Comm'n on the Status of Women, *Summary Record of the 647th Meeting*, *supra* note 137, at ¶ 77.

¹⁵⁸ *Id.* at ¶ 89.

¹⁵⁹ U.N. ESCOR, Comm'n on the Status of Women, 32nd Sess., Agenda Item 75, *Sweden: Amendment to the Draft Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. A/C.3/33/WG.1/CRP.5/Add.1 (Oct. 13, 1978).

¹⁶⁰ U.N. ESCOR, Comm'n on the Status of Women, 33rd Sess., Agenda Item 75, *India: Amendment to the Draft Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. A/C.3/33/WG.1/CRP.5/Add.6 (Oct. 19, 1978).

¹⁶¹ U.N. GAOR, 33rd Sess., Agenda Item 75, *Rep. of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination Against Women*, ¶ 103, U.N. Doc. A/C.3/33/L.47 (Nov. 28, 1978).

¹⁶² *Id.*

to their condition, while keeping the same remuneration.”¹⁶³ Some representatives stressed the need to strengthen the protection of women from employer abuse, and reference was made to the need to make women aware of the protection that this provision confers upon them.¹⁶⁴ Denmark and the Netherlands proposed “to extend special protection to women during pregnancy for types of work proved to be harmful to them.”¹⁶⁵

In sum, States acknowledged discrimination that women experience based on pregnancy and childbearing even though they differed on the precise means of combatting it. They also recognized the importance of safeguarding equality of women, specifically in the job market and in health care. This protection included paid maternity leave, but its financing and duration were the points that generated the most controversies.

iv. Article 12 – Health care and nutrition

According to Article 12:

1. 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.

*2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*¹⁶⁶

The discussions on the section of Article 12 related to mothers were relatively short. The U.K. suggested the article read: “[i]n order to safeguard the health and promote the welfare of mothers, State Parties shall undertake progressively to provide free medical care which shall include treatment in the ante and post-natal periods and during

¹⁶³ U.N. ESCOR, Comm’n on the Status of Women, 33d Sess., *Amend. Submitted by Cuba to the Draft Convention on the Elimination of Discrimination Against Women*, U.N. Doc. A/C.3/33/WG.1/CRP.5/Add.8 (Oct. 19, 1978).

¹⁶⁴ U.N. GAOR, *Rep. of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination Against Women*, *supra* note 161, ¶ 111.

¹⁶⁵ *Id.* at ¶ 112.

¹⁶⁶ CEDAW, *supra* note 3, at art. 12.

confinement.”¹⁶⁷ Bangladesh wished to add the words “receive adequate nutrition during pregnancy and lactation.”¹⁶⁸ The issue later surfaced in Article 14, focused primarily on the situation of rural women when some delegates complained that singling out pregnancy and lactation would equate them with sickness.¹⁶⁹

Additional special protection for mothers exposed to multiple and intersecting forms of discrimination was also discussed. For example, in negotiations on Article 16, Bulgaria advocated for the inclusion of special protection of unwed mothers and their right to establish the paternal filiation of their children.¹⁷⁰ Similarly, Austria wanted to turn existing moral rights into legal rights by considering that “unmarried mothers . . . may have special rights such as a right to official assistance, and that this special treatment should not be eliminated.”¹⁷¹ Protection of mothers was also one of the central themes of the Working Paper submitted by the Philippines and the USSR.¹⁷² Besides what was already discussed, it proposed certain new provisions such as granting nursing mothers additional paid work breaks to nurse their infants, granting others paid leave to care for sick children, and special assistance to mothers with large families in addition to unwed mothers.¹⁷³

III. ANALYSIS OF NEW DEVELOPMENTS

In the years that passed since the adoption of the ICESCR and CEDAW, new developments in legislation relevant to motherhood protection occurred, as well as the advancement of scientific knowledge that could inform decisions on appropriate measures to be taken. Significant gaps remain in creating international binding standards for

¹⁶⁷ U.N. ESCOR, Ad Hoc Comm., *Draft Convention to the Elimination of Discrimination Against Women: United Kingdom Amends. to the Working Paper Submitted by the Philippines and USSR*, U.N. Doc. E/CN.6/AC.1/L.7 (Jan. 10, 1974).

¹⁶⁸ U.N. GAOR, 32d Sess., *Draft Convention on the Elimination of All Forms of Discrimination Against Women: Amend. Submitted by Bangladesh*, ¶ 152, U.N. Doc. A/C.3/32/WG.1/CRP.6/Add.4 (Dec. 1, 1978).

¹⁶⁹ U.N. GAOR, 33s Sess., *Draft Convention on the Elimination of Discrimination Against Women: Addendum to the Rep. of the Working Group*, ¶ 152, U.N. Doc. A/C.3/33/L.47/Add.1, (Dec. 1, 1978).

¹⁷⁰ *Draft Convention on the Elimination of Discrimination Against Women*, *supra* note 102, ¶ 164.

¹⁷¹ U.N. Secretary General, *Draft Convention on the Elimination of Discrimination Against Women: Rep. of the Secretary-General*, *supra* note 106, at ¶ 126.

¹⁷² “Working paper” in this context is typically a tentative statement prepared as a basis for discussion or negotiation.

¹⁷³ AD HOC COMM., *Draft Convention to the Elimination of Discrimination Against Women: United Kingdom Amends. to the Working Paper Submitted by the Philippines and USSR*, *supra* note 167, at 3.

this protection. The analysis of the available sources, particularly legal scholarship, suggests that, in comparison with other groups at risk of discrimination based on their vulnerabilities, mothers do not receive sufficient legal attention. The following section briefly addresses some of the issues that were partially discussed in the *travaux préparatoires* but are not fully clarified.

A. *Paid Leave and the Duration of “Reasonable” Protection*

During the discussions on paid leave and the method of its financing, States repeatedly invoked the 1952 ILO Maternity Protection Convention (No. 103), emphasizing that if the employers were forced to pay a larger share, they would be unwilling to hire women of reproductive age, which would result in discrimination.¹⁷⁴ That risk was clearly acknowledged only later, in the 2000 ILO Maternity Protection Convention (No. 183), which states that with two exceptions, “an employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her.”¹⁷⁵ Exceptions apply when “(a) it is provided for in national law or practice in a Member State prior to the date of adoption of this Convention by the International Labor Conference; or (b) it is subsequently agreed at the national level by the government and the representative organizations of employers and workers.”¹⁷⁶ Precluding the employer’s liability intended to protect the situation of women in the labor market. Instead, the ILO Convention suggests that the benefits should be provided “through compulsory social insurance or public funds, or in a manner determined by national law and practice.”¹⁷⁷

Likely to avoid further disagreements, States generally omitted the question of the duration of the leave and its potential relation to the “reasonable” periods of protection. The first international minimum standard for maternity leave was set by the 1919 ILO Maternity Protection Convention at six weeks after giving birth,¹⁷⁸ and was later

¹⁷⁴ See 730th meeting, *supra* note 16; 735th meeting, *supra* note 21 at ¶¶ 3, 5, 22 37, 45.

¹⁷⁵ Int’l Lab. Org. [ILO], *Maternity Protection Convention*, C183 2000 (No. 183), art. 6.8, (June 1, 2002), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ ILO, *Maternity Protection Convention*, C3 1919 (No. 3), (Nov. 28, 1919), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C003. See also, *id.* at art. 3(b): “shall have the right to leave her work if she

extended to fourteen weeks by the 2000 Convention.¹⁷⁹ The non-binding 2000 ILO Maternity Protection Convention Recommendation indicates eighteen weeks as a desirable standard.¹⁸⁰ The requirement that the leave be paid or to include adequate social security benefits is essential to ensure the special protection of mothers guaranteed in ICESCR and CEDAW. The 2000 ILO Maternity Convention (No. 183) sets minimum benefits at a level, “which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.”¹⁸¹ ILO Maternity Protection Recommendation (No. 191) encourages States to raise benefits to the full amount of the woman's previous earnings or those earnings as are taken into account for the purpose of computing benefits.¹⁸² It must be noted, however, that the majority of States did not ratify the ILO Conventions.¹⁸³

Although any uniformity is highly questionable when it comes to the desirable duration of the paid leave, the meaning of the word “reasonable” when applied to “other means of protection” remains even more vague. While the time before giving birth is naturally confined by the duration of pregnancy, the period after birth appears far more open ended and could be potentially defined by the duration of maternity leave, by the child's age, or by other markers of child's maturity.¹⁸⁴ The specific mention of childbirth as the event conditioning special protection might, on the one hand, create the impression that the protection would be relatively limited in time or, at least, should diminish in time.

On the other hand, perhaps the “scientific knowledge,” mentioned several times in CEDAW, could play a role in the interpretation of the special protection - if it was proven that the consequences of motherhood for a woman herself extend far beyond the short periods before and after

produces a medical certificate stating that her confinement will probably take place within six weeks.”

¹⁷⁹ *Maternity Protection Convention*, *supra* note 175, at art. 4.1.

¹⁸⁰ ILO, *Maternity Protection Recommendation*, R191 2000 (No. 191), ¶ 1 (June 15, 2000),

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312529:NO.

¹⁸¹ *Maternity Protection Convention*, *supra* note 175, at art. 6.2.

¹⁸² *Maternity Protection Recommendation*, *supra* note 180, at ¶ 2.

¹⁸³ ILO, *Ratifications of Maternity Protection Convention*, C183 2000 (No. 183), (Feb. 7, 2002),

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312328.

¹⁸⁴ BEN SAUL *et al.*, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INT'L COVENANT ON ECON., SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 798 (2014).

childbirth.¹⁸⁵ This would circle back to the discussion about underlying reasons for the protection, and the question of whether it should be the interconnectedness between the well-being of a mother and child or the independent interest of a woman whose needs change when she becomes a mother.

B. Social Function and Biological Consequences

Article 10.2 of ICESCR, by pointing to childbirth, emphasizes the biological aspect of motherhood, while Article 5 of CEDAW speaks about maternity as a “social function.”¹⁸⁶ These notions are not mutually exclusive, but rather describe two aspects of the same phenomenon. The biological aspect is strongly related to the right to the highest attainable standard of health protected by Article 12 of ICESCR, and the social aspect can serve to safeguard the rights of adoptive mothers, for example. Importantly, the protection of mothers may be regarded as beneficial on two levels – the personal level when protection improves the situation of the individual mother and her child, and the social level when it helps to maintain society’s demographic renewal, for example.

In that context, it is relevant to consider temporary special measures aimed at protecting maternity, as suggested by Article 4 of CEDAW. In its physiological dimension, which includes carrying a child during pregnancy, childbirth, breastfeeding, and maternity represents biological differences that require special measures.¹⁸⁷ According to the Committee on the Elimination of All Forms of Discrimination Against Women, “special” here means that “the measures are designed to serve a specific goal.”¹⁸⁸ The concept of temporary special measures was first introduced in the 1958 ILO Discrimination Convention (No. 111), which stated that special measures shall not be deemed to be discrimination when they are designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities, or social or cultural status, are generally recognized to require special protection or assistance.¹⁸⁹

¹⁸⁵ See ICESCR, *supra* note 2, at art. 10.2.

¹⁸⁶ See *id.*; see also CEDAW, *supra* note 3, at art. 5.

¹⁸⁷ See Frances Raday, Article 4, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN. A COMMENTARY* (Marsha A. Freeman, Christine Chinkin, Beate Rudold eds., 2012), at 123, 125.

¹⁸⁸ U.N. Comm. on the Elimination of Discrimination Against Women, *General recommendation No. 25, Temporary Special Measures*, at ¶ 21, U.N. Doc. CEDAW/C/GC/25 (2015).

¹⁸⁹ Discrimination (Employment and Occupation) Convention, No. 111, June 25, 1958, 362 U.N.T.S. 31, art. 5.2.

The ICERD also provides for special measures “taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.”¹⁹⁰ The Convention on the Rights of Persons with Disabilities (CRPD) establishes in Article 5.4 that “[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”¹⁹¹ The CRPD Committee stated that “[w]hile temporary special measures such as quotas might be necessary to overcome structural, or systemic, multiple discrimination, long-lasting measures such as reforming laws and policies to ensure the equal participation of women with disabilities in all areas of life are essential prerequisites for achieving substantive equality for women with disabilities.”¹⁹²

Nonetheless, the dilemma remains regarding the qualifier word “temporary” when describing special measures for mothers. Even presuming the achievement of complete social equality between men and women, the physical experience of maternity will always result in mothers having special needs that require special treatment. Although pregnancy and childbirth are not the same as sickness or disability, it appears that some analogies can be drawn between the needs of persons in these situations. This represents the difference with special measures proposed by ICERD, which, ideally, one day or in specific territories, could be discontinued if equality became a reality. Thus, to address mothers’ needs, it is desirable to understand “temporary” in relation to the period in an individual woman’s life rather than society generally. It must be noted here, however, that that period may be difficult to limit and may require determination on a case-by-case basis, considering the impact of motherhood on a woman’s life. This may vary depending, for example, on her state of health, the state of her children’s health, the number of children, or the extent to which time spent on unpaid care work affected her professional opportunities.

¹⁹⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 212, art. 1.4.

¹⁹¹ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3., art. 5.4.

¹⁹² Comm. on the Rts. of Pers. with Disabilities, *General Comment No. 3: Women and Girls with Disabilities*, ¶ 20, U.N. Doc. CRPD/C/GC/3, (Nov. 25, 2016); see also *Declaration on Equality of Opportunity and Treatment for Women Workers*, art. 1.2, (June 25, 1975).

C. Protection of Working Mothers and Those Who are Not Gainfully Employed

As presented earlier, a significant amount of attention in the negotiations on CEDAW and Article 10.2 of ICESCR has been devoted to the rights of working mothers. In addition to the safeguards designed specifically for working mothers, they may also be protected through Article 2.2 (prohibition of discrimination), Article 3 (equal rights of men and women), and Article 7 (conditions of work) of the ICESCR.¹⁹³ Yet, there seems to be a considerable gap in defining protection for those who are not gainfully employed. Since some mothers are unable to be employed because of their status as such, and thus are deprived of income, they should automatically be covered by the social security provisions. However, a similar argument could be made with regard to working mothers who benefit from the articles on workers' rights. This fact, however, does not make their specific special protection superfluous. In certain circumstances, mothers who are not gainfully employed may struggle with additional vulnerabilities – for instance, if they are single or teenage mothers lacking sufficient means of support for themselves and their children,¹⁹⁴ refugee mothers, or mothers of children with disabilities who need to dedicate additional time to the child's needs.¹⁹⁵

Protection of the right to the highest attainable standard of health and living for mothers requires considering their different experiences to ensure that this right can be fulfilled for all women. Article 12 of CEDAW speaks about appropriate services in connection with pregnancy, confinement, and the postnatal period, including free services where necessary, as well as access to adequate nutrition.¹⁹⁶ Mothers who, for different reasons, are deprived of sufficient income, may benefit from the clause on “free services, where necessary,” as access to the services should be granted primarily on the basis of the demonstrated needs, not financial capabilities.¹⁹⁷ These needs also include adequate nutrition,

¹⁹³ ICESCR, *supra* note 2, at arts. 2.2, 3, 7.

¹⁹⁴ See generally, Comm. on the Elimination of Discrimination Against Women, *Views adopted by the Committee under Article 7(3) of the Optional Protocol, concerning communication No. 107/2016*, UN Doc. CEDAW/C/75/D/107/2016, (Feb. 24, 2020) (On pregnant women and girls facing multiple and intersecting forms of discrimination); see also Comm. on the Elimination of Discrimination Against Women, *Views adopted by the Committee under Article 7(3) of the Optional Protocol, concerning communication No. 110/2016*, U.N. Doc. CEDAW/C/75/D/110/2016, (Feb. 24, 2020).

¹⁹⁵ See e.g. Chang Heng-hao, *From Housewives to Activists: Lived Experiences of Mothers for Disability Rights in Taiwan*, 15 ASIAN J. OF WOMEN'S STUD. 34 (2009).

¹⁹⁶ See CEDAW, *supra* note 3, at art. 12.

¹⁹⁷ *Id.* at art. 12.2.

where “adequate” must be assessed in light of medical and scientific guidelines for pregnant and breastfeeding women.¹⁹⁸ Similarly, psychological vulnerabilities, including the risk of postpartum depression,¹⁹⁹ which may affect any mother, have to be considered in deciding the measures of protection.²⁰⁰

In order to find examples of these measures realized in extreme circumstances, the Geneva Conventions may be worth examining. For instance, Article 38.5 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), referring to the treatment of refugees, provides that pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.²⁰¹ According to Article 89.5, expectant and nursing mothers shall be given additional food, and Article 91.2 provides for adequate treatment in maternity cases.²⁰² Similarly, the Additional Protocol to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflict stipulates in Article 70.1 that in distributing humanitarian aid to the civilian population, priority must be given to expectant mothers and nursing mothers, among others.²⁰³ In times of peace, benefits discussed by States as “other services” in the CEDAW and ICESCR negotiations appear to be a good starting point to realize these rights for mothers. The protective measures for working mothers, as well as those who are not gainfully employed, are aimed at balancing difficulties of pregnancy, birth, breastfeeding, and usually unproportionate care work, rather than at creating any privileged status for them.²⁰⁴

¹⁹⁸ See e.g., Nicole E. Marshall, et. al., *The Importance of Nutrition in Pregnancy and Lactation: Lifelong Consequences*, 226 AM. J. OF OBSTETRICS AND GYNECOLOGY 607 (2022); N M Nnam, *Improving Maternal Nutrition for Better Pregnancy Outcomes*, 74 PROCEEDINGS OF THE NUTRITION SOCIETY 454 (2015).

¹⁹⁹ See also Theodore D. Wachs et. al., *Maternal Depression: A Global Threat to Children’s Health, Development, and Behavior and to Human Rights*, 3 CHILD DEV. PERSPECTIVES 51 (2009).

²⁰⁰ See Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶ 12, U.N. Doc. A/54/38/Rev.1 (1999).

²⁰¹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 38.5.

²⁰² *Id.* at arts. 89.9, 91.2.

²⁰³ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3., art. 70.1.

²⁰⁴ See Diana Zacharias, *The Protection of Mothers in British and German Constitutional Law: A Comparative Analysis and a Contribution to the Implementation of*

IV. CONCLUSION

In accordance with ICESCR and CEDAW, protection for mothers should be “special” and “adequate,” and its determination in a specific case must take into account the indivisibility, interdependency, and interrelatedness of human rights. Although recognizing the interconnectedness between the well-being of a mother and child is crucial, independent reasons for the protection of a mother, (such as the unique impact that pregnancy and childbirth have on a woman's health, professional opportunities, and familial situation), should suffice for the protection to be granted. Indeed, mothers often make enormous sacrifices for their children, but this can never justify ignoring their interests and their entitlements under international human rights law. Motherhood encompasses both biological and social functions—both of which profoundly impact a woman's life and necessitate measures tailored to her specific circumstances. This requirement also extends to determining the meaning of 'reasonable' periods of protection, which should be interpreted in light of social, scientific, and medical research on the impact of motherhood on women developed since the adoption of CEDAW and ICESCR. This knowledge should inform policy decisions aimed at the progressive realization of rights in accordance with States' binding obligations.

the European Convention on Human Rights in the Domestic Legal Area, 9 GERMAN L.J. 27 (2008).

