Strengthening the Effectiveness of the UN Human Rights Treaty Bodies: A Gender Perspective on the Proposal for a Common [Expanded] Core Report

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Background to the Common [Expanded] Core Document Proposal

There are now seven international human rights treaties that require states parties to report periodically on their compliance with their obligations under the treaty.[1] Each of these treaties also has a treaty body (committee of experts) that is responsible for monitoring states' implementation of their treaty obligations.[2] States' periodic reports are the main monitoring tool available to the treaty bodies,[3] which may also receive related written (and sometimes verbal) information from other UN agencies, and from international and national nongovernmental organisations (NGOs) in the form of 'shadow reports'. On the basis of all the information available to them, the treaty bodies then engage the reporting state in a 'constructive dialogue', which takes place during a session of the treaty body in either Geneva or New York. The treaty committee then produces its 'concluding observations'[4] in writing, which usually praise the state party for the progress that has been made, as well as make recommendations about further measures that are required to address any problems with implementation.[5]

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[1] International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture and Other Cruel, In human or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); and Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).

[2] Committee on Economic, Social and Cultural Rights (ICESCR); Human Rights Committee (ICCPR); Committee on the Elimination of Racial Discrimination (ICERD); Committee on the Elimination of Discrimination Against Women (CEDAW); Committee Against Torture (CAT); Committee on the Rights of the Child (CRC); and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).

[3] The treaty bodies may also have other monitoring mechanisms available to them, including procedures for individual complaints and complaints by other states parties. But these mechanisms are mostly optional, and a state party must have consented to subjecting itself to them. Periodic reporting is the only compulsory monitoring procedure.

[4] Some treaty bodies use slightly different terminologies of 'concluding recommendations' or 'concluding comments'.

[5] States' reports and the concluding observations of the committees are available at http://www.unhchr.ch/tbs/doc.nsf

With over 80% of United Nations (UN) member states having ratified at least four human rights treaties,[6] the system of periodic reporting has been placed under considerable strain. There are a huge number of overdue reports, despite the fact that reporting is a legal obligation. Some states have not even provided an ‘initial report’, which is required within a year or two of ratification or accession. Those states parties that have submitted reports usually face waiting periods of up to two years before their report is considered, which often means that it requires substantial updating in order for the dialogue between the committee and the state party to be meaningful.

There are many factors that have contributed to the problems with reporting, but three stand out. One is the limited capacity of the treaty committees, who meet for only a few weeks each year and whose members are overloaded and under-resourced.[7] A second factor is that many states, particularly developing states, find the reporting obligations difficult to comply with because they do not have the resources or the technical capabilities required. Thirdly, many states lack the political will to comply with their reporting obligations and are largely able to avoid them with impunity because the system is under such stress.

Dating back to the late 1980s, there have been many proposals for reform of the entire human rights treaty monitoring system, which have suggested changes to the reporting procedures in the context of broader reform. [8] In response to these proposals, the human rights treaty bodies have adopted a number of measures to assist states and to stream-line their own monitoring responsibilities, including the development of reporting guidelines for each treaty,[9] the wider provision of technical assistance, and the introduction of annual meetings of the chairpersons of the treaty bodies to enhance coordination and cooperation. Since 1991, states parties have also been encouraged to produce a ‘core document’ containing general background material on land and people, political structure, the framework within which human rights are protected, and other methods of promoting and protecting human rights,[10] which can be used by all treaty bodies, thus obviating the

[6] Amnesty International, ‘United Nations Proposals to Strengthen the Human Rights Treaty Bodies’, September 2003 http://www.web.amnesty.org/library/print/ENGLIQR400182003

[7] Office of Internal Oversight Services (OIOS), *Management Review of the Office of the UN High Commissioner for Human Rights*, A/57/488, 21 October 2002, observed that the demands on the treaty body team were virtually impossible to fulfill because of lack of capacity.

[8] Final, interim and initial reports on enhancing the long-term effectiveness of the UN human rights treaty system, by the independent expert Mr. Philip Alston, E/CN.4/1997/74, A/CONF.157/PC/62/Add.11/Rev.1, and A/44/668. See further http://www.ohchr.org/english/bodies/icm-mc/documents-system.htm. See also, Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000.

[9] ‘Compilation of Guidelines on the Form and Content of Reports to be submitted to the International Human Rights Treaties’, HRI/GEN/2/Rev.2, 7 May 2004.

[10] ibid, ‘Initial parts of State party reports (‘core documents’) under the various international human rights instruments,’ 3.

need for repetition of general information in every report.[11] Many treaty bodies have also gradually formalised procedures for NGOs to contribute to the reporting process.[12]

While these and other measures have eased some of the problems, the number of overdue reports has continued to grow. This led eventually to the proposal by the UN Secretary-General, in 2002, that:

> First, the committees should craft a more coordinated approach to their activities and standardise their varied reporting requirements. Second, each state should be allowed to produce a single report summarising its adherence to the full range of international human rights treaties to which it is a party.[13]

While there has been little disagreement with the first suggestion that committees seek to harmonise their reporting requirements, the second proposal of a single report has been controversial. Following an initial round of consultations,[14] the treaty bodies agreed in 2003 that they would not support the idea of a single report because it 'would be a complex, perhaps unmanageable exercise … [that] would result in either very lengthy reports or superficial and summary reporting'.[15] Instead, they proposed expanding the existing core document to include more information that was relevant for all or several treaty committees (now referred to as the 'common core document') and the retention of treaty specific periodic reports, but with more focused content.[16]

Draft Guidelines on the Common [Expanded] Core Document and Treaty-Specific Targeted Reports

Following the approach agreed to by the treaty bodies, the Secretariat of the Office of the High Commissioner for Human Rights (OHCHR) produced draft guidelines, with an accompanying introduction.[17] The guidelines propose that state parties' reports consist of two parts: the first being a 'common core document' and the second a 'treaty-specific document'. It was anticipated that the two complementary documents would reduce repetition and the length of reports, promote a more 'consistent and holistic' approach to reporting across the system, assist coordination between the treaty bodies, and help to avoid conflicting interpretations of human rights provisions.[18]

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[11] In the 12 years since the option of preparing a core document was made available in 1991, only about half of the states involved had done so. Amnesty International, above n.6.

[12] See, for example, 'NGO participation in activities of the Committee on Economic, Social and Cultural Rights', E/C.12/1993/WP.14, 12 May 1993.

[13] Report of the Secretary-General, *Strengthening of the United Nations: an agenda for further change*, A/57/387, para 52, 9 September 2002, and Corr.1

[14] See in particular, Report of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System, Malbun, Liechtenstein, 4-7 May 2003, HRI/ICM/2003/4, 10 June 2003.

[15] Report of the Second Inter-Committee Meeting of the Human Rights Treaty Bodies, HRI/ICM/2003/5, para 17, 27 June 2003.

[16] ibid, para 18.

[17] [Draft] Guidelines on an Expanded Core Document and Treaty-Specific Targeted Reports and Harmonized Guidelines for Reporting under the International Human Rights Treaties: Report of the Secretariat, HRI/MC/2004/3, 9 June 2004, http://www.unhchr/ch/html/menu2/6/a.htm.

[18] ibid, introduction, para 8.

The guidelines suggest that information in the common core document be provided under three main headings. Firstly, general factual and statistical information should be supplied and, secondly, the state's general framework for the protection and promotion of human rights should be outlined. This information is much the same as that provided through the existing system of core documents, although considerably more detail is required than previously. It is the third section of the common core document, which requires information on the implementation of substantive provisions that are common or 'congruent' to all or several human rights treaties, which is the major innovation. The guidelines do not define congruence, but the introduction refers to provisions that are closely-related in content.[19] The guidelines identify the congruent provisions that should be reported on in the common core document in the following way (I have highlighted the CEDAW references in bold):

Non-discrimination and equality[20]	Non-discrimination and equality: arts 2(1) and 3 ICCPR; arts 2(2) and 3 ICESCR; arts 2-7 ICERD; **arts 2 and 9-16 CEDAW**; art 2 CRC; arts 7,18,25,27 CMW; preamble CAT Equality before the law and equal protection of the law: arts 14(1) and 26 ICCPR; art 5(a) ICERD; **art 15 CEDAW**; art 18(1) MWC; art 9(2) CRC; arts 12 and 13 CAT Special measures to accelerate progress: art 27 ICCPR; art 2(3) ICESCR; arts 1(4) and 2(2) ICERD; **arts 4 and 14 CEDAW**; arts 22 and 23 CRC
Effective remedies[21]	Art 2(3) ICCPR; art 6 ICERD; **art 2(c) CEDAW**; art 14 CAT; arts 37(d) and 39 CRC; art 16(9) CMW
Procedural guarantees[22]	Arts 14(2),(3) and (5) and 15 ICCPR; art 5(a) ICERD; art 15 CAT; arts 37 and 40 CRC; arts 18(2) and (3) and 19 CMW
Participation in public life[23]	Right to a nationality: art 24(3) ICCPR; art 5(d)(iii) ICERD; **art 9 CEDAW**; arts 7 and 8 CRC; art 29 CMW Right to political participation and access public service: art 25 ICCPR; art 5(c) ICERD; **arts 7 and 8 CEDAW**; arts 18(2) and (3) and 23(3) and (4) and 26 CRC; arts 41 and 42(3) CMW

As you can see from the diagram, almost all of the substantive provisions in CEDAW are included.

The guidelines do not provide a detailed outline of what should be included in the treaty-specific documents, suggesting instead that guidelines should be developed once agreement on the guidelines for the common core document has been reached. It is envisaged that each treaty body would develop its own treaty-specific guidelines. However, the draft does propose that the following information should be included:

1. Information requested by the relevant treaty body in its guidelines;
2. More specific information requested by the relevant treaty body to supplement what is provided in the common core document; and
3. Information on steps taken to address issues that were raised in the concluding observations on the state's previous report, where applicable.

[19] ibid, introduction, para 17.
[20] ibid, guidelines, paras 58, 67 and 69.
[21] ibid, para 71.
[22] ibid, para 73.
[23] ibid, para 78.

The introduction to the guidelines explains that the information provided will enable each treaty body 'to pursue in greater depth any issues of particular concern to its mandate, although these may already have been covered in the common core document'.[24]

In addition, states would be encouraged to update the common core document 'regularly' so as to maintain its complementarity with each treaty-specific document.[25] It is also proposed that the different periodicities of a state's reports, which can range from 2-5 years,[26] be synchronised so that a state's combined 'reporting cycle' is confined to a limited period of 18 months.[27] If this is done, it is suggested that the core document would need to be updated every reporting cycle.[28] The draft guidelines, and the OHCHR's introduction to them, go to some lengths to emphasise that states parties should be alert to the possibility that some of the information they require may already have been compiled as a result of complying with other reporting procedures, such as those required by the Millennium Development Goals or the International Labour Organisation system. The emphasis is on identifying and capitalising on overlap, wherever it may exist, in order to reduce the burdens of reporting.[29] Finally, it is proposed that the guidelines be piloted by interested states in order to test them in concrete situations and evaluate their effectiveness.[30]

The guidelines were approved in principle by the Third Inter-Committee Meeting of Human Rights Treaty Bodies and the Sixteenth Meeting of the Chairpersons of the Human Rights Treaty Committees in 2004, although it was also agreed that further development of them was required.[31] To this end, the OHCHR was requested to continue work on the guidelines with a view to producing revised guidelines in 2005. The meeting also agreed that piloting the guidelines was important, provided it was done with the approval of the treaty committees.

A Women's Rights Perspective on the Draft Guidelines

The proposal to reorganise reporting arrangements, to accord with the draft guidelines I have just outlined, has the potential to result in positive advances for women's enjoyment of human rights. But there are also many dangers in the proposal, which could set back

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[24] ibid, introduction, para 21.
[25] ibid, para 10.
[26] For example, following a state party's initial report, which is usually due within 12 months of ratification, ICERD requires reporting 'every two years and whenever the Committee so requests' (art. 9(1)(b)); CEDAW requires reporting 'at least every four years' (art. 18(1)(b)); and CRC requires reporting 'every five years' (art. 44(1)(b)).
[27] Above n.17, introduction, para 27.
[28] ibid, para 26.
[29] ibid, paras 13-15.
[30] ibid, para 34.
[31] Report of the Chairpersons of the Human Rights Treaty Bodies on their Sixteenth Meeting, Geneva, 23-25 June 2004, A/59/254, 11 August 2004; Report of the Third Inter-Committee Meeting of the Human Rights Treaty Bodies, 21-22 June 2004, A/59/254, Annex I, para 22.

struggles for women's full enjoyment of all human rights and result in the loss of many of the hard-won gains of recent years. The proposal therefore raises many challenges for women's human rights advocates which include: resisting the recurring problem of women's invisibility in generalist settings like the proposed common core document; ensuring that the 'congruence' of provisions means their interpretation continues to develop, using the most progressive jurisprudence rather than the lowest common denominator; ensuring that the principles of equality and non-discrimination are monitored and interpreted substantively and progressively across the system; carving out a central institutional and jurisprudential role for the CEDAW committee; and building the capacity of women's rights NGOs to play a role in the reporting processes of all treaty bodies. I will discuss these five challenges in turn.

Challenge 1: Resisting the reinstitution of women's invisibility and marginalisation

Until the mid 1990s, women's human rights were treated as if they were the sole concern of the CEDAW committee. All the other treaty committees had neglected the specific human rights concerns of women (and girls).[32] While in 1993, the treaty bodies were officially urged to mainstream women's human rights into all of their work by the World Conference on Human Rights,[33] which was reiterated by the World Conference on Women two years later,[34] they have been slow to respond. Some positive signs of change have emerged more recently, with the adoption of a General Comment on women's equal enjoyment of ICCPR rights by the Human Rights Committee,[35] and General Recommendation XXV on the gender-related dimensions of race discrimination by the Committee on the Elimination of Racial Discrimination.[36] But the Committee on Economic, Social and Cultural Rights has not so far been able to finalise its discussions on a general comment on women's equal enjoyment of ICESCR rights, and the Committees Against Torture and on the Rights of the Child have yet to formally respond. But formal statements are only a beginning, and a cursory examination of the concluding observations to states' reports under ICERD, since the adoption of General Recommendation XXV, reveals that it has had little impact on the practice of states parties and the ICERD Committee. Further, persistent calls to rectify the under-representation of women on all the treaty committees except CEDAW[37] have had little effect.[38]

[32] Dianne Otto, '"Gender Comment": Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) 14 *Canadian Journal of Women and the Law* 1.
[33] The Vienna Declaration and Program of Action, 1993, para 37.
[34] The Beijing Declaration and Platform for Action, 1995, para 213.
[35] ICCPR, General Comment 28, 'Equality of rights between men and women (article 3)', CCPR/C/21/Rev.1/Add.10, 29 March 2000.
[36] ICERD, General Recommendation XXV, 'Gender related dimensions of racial discrimination' (2000).
[37] See for example, 'Improvement of the status of women in the United Nations system', UN Doc A/Res/57/180. See further, Amnesty International, above n.6, point 4.
[38] Brainstorming Meeting, above n.14, point 85.

The slow progress of gender mainstreaming needs to be understood against the backdrop of history, which has consistently shown that general or generic approaches to human rights ignore or marginalise women's specific human rights concerns. The same result occurs with the human rights of racial and ethnic minorities, children, migrant workers, people with disabilities, sexual minorities and other groups that have little economic, social or political power. This explains why it was necessary to develop specific human rights instruments, like CEDAW, ICERD, CRC and MWC.[39] These instruments have proved to be a critical counterpoint to the exclusionary effects of general instruments, although they can also be used to further marginalise, as has been the experience of CEDAW.[40]

Gender mainstreaming remains an important goal, but its success depends on the parallel maintenance of forums for the identification and promotion of gender-specific concerns, and a robust dialogue between the general and specific treaty bodies. The proposed common core document could provide an important means of advancing such a dialogue, thereby promoting the indivisibility of women's human rights and ensuring that feminist insights inform the work of all the treaty bodies. However, it could also provide a means of reasserting the generic, which has a masculine form, over the specific, and thus serve the ends of those states (and religious groups) that do not support women's equal enjoyment of human rights.

The guidelines pertaining to the common core document do pay some attention to these issues. The general factual and statistical information to be provided in the first part of the report should include relevant statistical data that is 'disaggregated by sex and other population groups'.[41] In an annex to the core document full statistical information should be provided 'disaggregated by sex … [and] should be further disaggregated where possible in relation to other demographic groups including, *inter alia*, children and young people under the age of 18, racial, ethnic, indigenous, linguistic or religious groups, persons with disabilities, minorities, refugees, internally displaced persons or migrants'.[42] While the fore-fronting of gender disaggregation is a good start, it would be preferable if the language used was mandatory. A long list of indicators is provided in appendix 4 to the draft guidelines, which 'may be relevant to reporting'.[43] These also make reference to sex disaggregation in a number of contexts including demographic characteristics, household heads, work-force participation and representation in parliament. But this is far from being comprehensive and there are many areas of entrenched women's inequality that are omitted from this list, for example in income, in education, before the law, and in cultural and family life. References are also made to indicators concerning births, fertility, and infant and maternal mortality, which all concern women, but have historically served

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[39] A convention on the rights of people with disabilities is currently being drafted, and efforts to ensure the inclusion of sexual minorities are snow-balling.

[40] Andrew Byrnes, 'Women, Feminism and International Human Rights Law – methodological myopia, fundamental flaws or meaningful marginalisation? Some current issues', (1992) 12 *Australian Year Book of International Law* 205.

[41] Above n.17, Annex I, para 37.

[42] ibid, para 38.

[43] ibid, para 39.

to advance population agendas rather than progress women's human rights. With this in mind, an indicator relating to the availability of family planning information and contraception should also be included.

The guidelines for the second part of the common core document, which is to describe the general framework for the protection and promotion of human rights, also provide some important openings for more fully integrating women's human rights into the system as a whole.[44] For example, states parties are required to identify and explain any reservations and declarations, and are urged to review them and establish time-lines for their withdrawal.[45] If this leads to more intense scrutiny of reservations and increased pressure to withdraw them, it may have particularly important consequences for women, as CEDAW is the most highly reserved of all the human rights treaties. A second example is that states parties are encouraged to include information about mechanisms devoted to the advancement of women and to addressing the particular situation of various disadvantaged groups when describing national machineries for implementation of their international human rights obligations.[46] This is a welcome recognition that the full enjoyment of human rights will not result from a 'one-size-fits-all' approach, but that different measures may be necessary to address different forms of inequality and disadvantage in order to achieve substantive equality. A third example is that states parties must report on the steps taken by the government to encourage the engagement of civil society, including NGOs, in the promotion and protection of human rights.[47] Information on the participation of those groups, including women, who are most affected by specific treaty provisions in the preparation of a state's core common document is also required,[48] as is information on how earlier concluding observations of all the treaty bodies have been followed up.[49] These components of the core document will help to support the advocacy work of women's human rights NGOs.

However, the problem is whether the guidelines provide a framework that will be effective in resisting the propensity to marginalise or erase women's human rights issues in the generality of a core document. One glaring inadequacy is that the guidelines have avoided any specific reference to human rights in the private sphere, including the domestic sphere of family relationships. For example, in addition to the silences about family planning, there are no indicators relating to violence against women, or to the distribution of household income. Further, there is no reference to indicators that measure changes in the structural impediments to women's full enjoyment of human rights, such as cultural attitudes and practices based on stereotyped gender roles or on notions of women's inferiority. The danger is that private and structural causes of women's human rights violations will not be treated as a concern of all treaty bodies, but will be regarded as belonging exclusively in the targeted CEDAW report. This would contravene the

[44] ibid, paras 46-55.
[45] ibid, para 46(b).
[46] ibid, para 48(f).
[47] ibid, para 49(g).
[48] ibid, para 50(d).
[49] ibid, para 51.

principle of gender mainstreaming and undo the hard-won progress that has been made towards this goal. Women's human rights advocates need to find ways to ensure that the gendered dimensions of human rights violations are fully comprehended by and integrated into the common core document, or women's marginalisation in the human rights treaty system will have been unwittingly reinvigorated.

Challenge 2: Ensuring that 'congruence' leads to adoption of the most progressive jurisprudence and to further progressive development of the law

The third part of the common core document is concerned with reporting on the implementation of substantive human rights provisions that are 'congruent' to all or several human rights treaties. The draft guidelines group common articles together into four clusters as set out in the chart above: non-discrimination and equality; effective remedies; procedural guarantees, and participation in public life. In the OHCHR's introduction to the guidelines, there is another chart that maps the congruence of the majority of the substantive provisions of the seven human rights treaties into 26 clusters.[50] There are a number of issues that arise from the treatment of congruence in the guidelines, which need to be addressed. Firstly, no definition of congruence is provided and there are no processes outlined for resolving disagreements about the content of a congruent cluster. Secondly, there is no rationale provided for the selection of the four clusters in the guidelines from the 26 clusters identified in the introduction, without which there is great potential for gender issues to be ignored and for economic and social rights to be side-lined. Finally, the effect of the different implementation obligations applying to different rights in the cluster is not discussed. I will discuss these points in turn using the right to life as an example.

First, how is congruency to be defined and what is the process for resolving disagreement about which rights are congruent? The concept of congruence is new to the human rights regime. It is not a term that is used in any of the human rights treaties, and nor has it been used by any of the treaty committees in their work, therefore it has no pre-existing content and no history of application. The guidelines do not define congruence, but the introduction refers to provisions that have 'closely-related content',[51] and suggests that congruence may range from absolute, 'where provisions of the treaties have the same scope or objective (and often identical wording),' to congruence in a broader sense 'where provisions are not identical but are related'.[52] The guidelines do not suggest a process for deciding on what belongs in a particular congruent cluster of provisions, or for enabling other provisions to be included as jurisprudence develops. The right to life is one of the clusters in the more comprehensive chart in the OHCHR's introduction to the guidelines. The provisions included in the cluster are as follows:

	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	CMW

[50] ibid, introduction, 'Chart of congruence in the substantive provisions of the seven core international human rights treaties', between paras 19 and 20.
[51] ibid, introduction, para 17.
[52] ibid, para 18.

	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.
Right to life; right to physical and moral integrity; slavery, forced labour and traffic in persons		6;7; 8		6	1;16	6;11; 19; 32; 33; 34; 36; 37(a)	9: 10; 11

But this mapping is inconsistent with the jurisprudence of some of the treaty committees on gender issues. The Human Rights Committee interprets article 6 (the right to life) to require states parties to provide information, *inter alia*, on 'the particular impact on women of poverty and deprivation that may pose a threat to their lives'.[53] This interpretation means that the right to an adequate standard of living is closely related or congruent to the right to life, and therefore that ICESCR article 11 should be included in the cluster. Another example is the CEDAW Committee's interpretation of its mandate to include violence against women as a form of discrimination against women.[54] Domestic violence, rape and other forms of violence against women violate women's right to physical integrity, so there is a strong argument for inclusion of CEDAW General Recommendation 19 in the cluster, as an interpretive guide. This would also be consistent with the inclusion of CRC articles 19 and 34, which protect children from physical and mental violence and sexual exploitation and abuse. Also, inexplicably, article 5(b) of ICERD, which grants the right to security of the person and protection from violence, is not included. A revised congruence would include the provisions in the row added below (and there may be others that I have overlooked):

	ICESCR	**ICCPR**	**ICERD**	**CEDAW**	**CAT**	**CRC**	**CMW**
	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.
Right to life; right to physical and moral integrity; slavery, forced labour and traffic in persons		6;7; 8		6	1;16	6;11; 19; 32; 33; 34; 36; 37(a)	9: 10; 11
Additional congruent provisions/jurisprudence	11		5(b)	1(1) and GR 19			

This example illustrates how important it is that the concept of congruence be defined, and in such a way as to

(a) avoid an unduly narrow approach which would have the effect of immunising the content of a cluster from progressive development of the law, and not be so open-ended that all human rights are possible contenders for inclusion;
(b) ensure that the identification of congruence is gender-inclusive;
(c) ensure that economic and social rights are given equal weighting with civil and political rights; and
(d) enable the identification of congruent rights to be kept in step with the evolution of the law.

[53] ICCPR, General Comment 28, above n.35, para 10.
[54] CEDAW General Recommendation 19, 'Violence Against Women' (1992).

Supporting processes will need to be established to resolve disagreements about congruence and to regularly update the content of the cluster and identify the related jurisprudence.

The second issue is the lack of a rationale for selecting the clusters of congruent rights that will be addressed in the common core document. It would be relatively easy to justify the inclusion of the provisions relating to non-discrimination and equality, as they are undeniably central to the entire regime. Further, the inclusion of provisions relating to remedies and procedural guarantees can be defended on the basis that the provision of effective remedies for rights violations and the establishment of procedures whereby those remedies can be claimed are indispensable to the enjoyment of rights in practice. In their absence, implementation would clearly be inadequate. However, it is the fourth cluster that seriously lacks a rationale. While rights associated with participation in public life are important, why would they be chosen over a cluster of rights congruent with the right to life? It can be argued that the enjoyment of the right to life cluster is an essential prerequisite to the exercise of rights to participation in public life? This would be true for the many women who live in extreme poverty. Indeed, the choice of any limited number of congruent rights from the remaining clusters identified in the introduction to the guidelines risks either recreating old hierarchies or instituting new ones, which is inconsistent with the recognition that human rights are indivisible and interdependent. Therefore, any selection beyond non-discrimination and equality, effective remedies, and procedural guarantees would seem to be ill-advised. In any event, a rationale for the selection of congruent clusters needs to be carefully developed in order to ensure that

(a) the former hierarchy that gave priority to civil and political rights is not reinstated;
(b) new hierarchies are not created; and
(c) selection does not result in gender-disproportionate advantages.

Thirdly, what does identifying congruence mean for a state's implementation obligations when different obligations apply to different rights in the cluster? States obligations differ to some extent from one treaty to another in a number of ways. Some treaty obligations are immediate and others allow progressive implementation; some treaties are stricter about allowable derogations and limitations than others; and a state's obligations will be differently affected by any reservations that it may have entered. In the right to life example above, no derogations are allowed under any circumstances to most of the ICCPR and CAT provisions included,[55] while the obligations under CEDAW and ICERD require states parties to immediately pursue a policy directed at full and effective implementation[56] and some components of the ICESCR obligation are immediate while others are progressive.[57] Further, while the notion of a 'core minimum' obligation developed by the ICESCR Committee makes sense in the context of progressive realisation of the right to an adequate standard of living, if it is applied to other provisions in the cluster it would have the undesirable effect of diminishing a state's implementation

[55] ICCPR art 4(2); CAT art 2(2).
[56] CEDAW art 2; ICERD art 4.
[57] ICESCR General Comment 3, 'The nature of States parties' obligations', (1990), para 5.

obligations. The problem of reservations also arises where they limit a state's obligations with respect to one of the provisions in the cluster, but not the others. For example, the effect of a reservation that limits a state's obligation to measures that are compatible with Islamic Shariah[58] or consistent with the teachings of Catholicism,[59] would, in the context of congruence, need to be strictly limited to the provision(s) that they are directed at and not be allowed to affect the obligations under the other treaties. While there is no easy resolution to the problem of differing implementation obligations, congruency should not, under any circumstances, result in a watering down of a state's legal obligations under any of the treaties.

There are also a number of other, more legalistic, issues associated with the notion of congruence that need to be resolved. They include whether the provision of a core document would be a binding legal obligation and what the implications would be if it was not; whether the core document would have a legal status; whether a treaty body's concluding observations responding to information in the core document would have the same legal status as its concluding observations to the treaty specific document; whether the treaty bodies can be bound by each other's jurisprudence; how inconsistencies would be resolved; and what impact the ratification of only some of the human rights treaties would have on reporting in the common core document.

Challenge 3: Ensuring that the principles of equality and non-discrimination are interpreted substantively and progressively

The principles of equality and non-discrimination are central to the human rights regime in that all human rights are to be enjoyed without discrimination, on grounds that are non-exhaustively identified in the treaties.[60] This open-endedness allows for further forms of discrimination to be recognised and explicitly included in the regime as the law develops. Special emphasis has been placed on equality between women and men[61] and on the elimination of all forms of racial discrimination.[62] There is also a growing awareness of the need to recognise and address 'intersectional' discrimination, where a person's experience of discrimination arises from the interaction between a number of grounds of discrimination, such as, for example, sex and race.[63] The following chart sets out the articles identified as congruent in the guidelines, summarising from the earlier chart:

	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	CMW
	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.
Non-discrimination and equality	2(2); 3; 2(3)	2(1); 3; 14(1); 26; 27	2-7; 5(a); 1(4); 2(2)	2; 9-16; 15; 4; 14	Preamble; 12; 13	2; 9(2); 22; 23	7; 18; 25; 27; 18(1);

[58] See, for example, CEDAW reservations of Bahrain and Egypt.
[59] See, for example, CRC reservations of the Holy See.
[60] ICESCR art 2(1); ICCPR art 2(2); CRC art 2.
[61] ICCPR and ICESCR common article 3; CEDAW.
[62] ICERD.
[63] ICERD, General Recommendation XXV, above n.36 , is ground-breaking in this respect.

Although there is considerable commonality in the text of the treaty provisions relating to equality and non-discrimination, there are also some differences in wording and in interpretation. I will begin by outlining some of these differences before returning to the critical issue, which is whether the concept of congruence means that a lowest common denominator approach is to be adopted in the common core document, or whether states will be expected to report in a way that is consistent with the most progressive treaty body jurisprudence.

One difference in the treaty texts relating to non-discrimination is that only ICERD and CEDAW define the concept. The definitions are very similar, both recognising that acts of discrimination can take a number of forms, that discrimination can be direct (purposeful) or indirect (an effect), and that the goal is to ensure the equal 'enjoyment or exercise' of human rights and fundamental freedoms; that is, substantive or *de facto* equality. To date, the only other treaty body to formally address the question of definition is the Human Rights Committee, which has adapted the ICERD and CEDAW definitions to the ICCPR.[64] It is a serious oversight that the provisions that define non-discrimination in ICERD and CEDAW are not recognised as congruent in the guidelines. Does this mean that that states parties will only be required to report in terms of minimal non-discrimination standards in the common core document, and if so, how would that minimum be determined? For example, if a state is not a party to CEDAW, does the concept of congruence mean that it is legally obliged to adopt measures to eliminate sex discrimination in the enjoyment of ICESCR rights that prohibit both direct and indirect discrimination? Further, if a state party to CEDAW has entered a reservation that makes its implementation of anti-discrimination measures under CEDAW subject to religious mores, will the notion of congruence mean that this reservation can impact on its obligations to eliminate sex discrimination under the ICESCR and ICCPR? In order to address these issues, the concept of congruence should ensure the following:

(a) that articles 1(1) of ICERD and CEDAW are included in the cluster of congruence;
(b) that the ICERD/CEDAW definition of non-discrimination (appropriately adjusted) is adopted across the treaty regime, and that states are expected to report against that standard of substantive equality in the common core document; and
(c) that any reservations affecting a state's obligations to implement non-discrimination under one treaty are not allowed to affect the implementation of congruent obligations under another treaty.

A second difference in the treaty texts relating to non-discrimination is in the prohibited grounds of discrimination that are explicitly recognised. While the ICESCR and ICCPR texts are identical in this regard, ICERD expands the concept of racial discrimination to include discrimination based on descent and ethnic origin, and CEDAW expands sex discrimination to include discrimination on the basis of marital status. The CRC also recognises ethnic origin and the additional ground of disability. Many of the treaty bodies have expanded on the grounds explicitly identified in the text of their treaty in General

[64] ICCPR, General Comment 18, "Non-discrimination', 10 November 1989, paras 6-7.

Comments and in their responses to individual complaints.[65] The grounds on which discrimination is prohibited is an area of human rights law that is constantly developing and expanding, and the treaty bodies do not always keep pace with each other. How will the reporting requirements in the core document deal with the issue of different and expanding grounds of prohibited discrimination being recognised by the various treaty bodies? Will states be expected to report only on the grounds that are common to the treaties to which it is a party, or will congruence mean that all of the identified grounds must be addressed in the core document? For example, as the Human Rights Committee has recognised discrimination on the grounds of sexual orientation as a form of sex discrimination,[66] does congruence mean that states parties must report on measures to eliminate this form of discrimination in the enjoyment of ICESCR, CEDAW and CRC rights as well? In order to address these issues, the concept of congruence should ensure the following:

(d) that the prohibited grounds of discrimination to be reported on in the core document are updated as soon as new grounds are identified by any of the treaty bodies; and

(e) that all states are required to report on measures to eliminate discrimination on all recognised grounds, in addition to any other forms of discrimination that may be particular to that state.

A third difference in the treaty texts is the way in which the language of equality is used. Both the ICESCR and ICCPR protect the 'equal right' of men and women to 'enjoy' the rights in those instruments,[67] and the Human Rights Committee has elaborated on what this means for the implementation of the ICCPR in great detail in General Comment 28. Both Covenants also use the language of equality in several substantive provisions.[68] These should be included as congruent provisions as they underline the general non-discrimination and equality provisions in articles 2 and 3, drawing attention to areas of particular concern, such as equal pay and equality between spouses. Their inclusion would also be consistent with the inclusion of the substantive provisions from ICERD and CEDAW. As I have already mentioned, ICERD and CEDAW describe the goal of eliminating discrimination as the equal 'enjoyment' of human rights and fundamental freedoms, requiring substantive equality.[69] Further, almost every substantive provision in CEDAW refers to granting women 'equal rights with men' or to women enjoying rights 'on equal terms with men'. Many of the CEDAW Committee's General Recommendations emphasise that CEDAW requires the realisation of women's substantive or de facto equality. The specific references to equality in ICERD are fewer, which may account for the lack of ICERD Committee jurisprudence that develops the normative content of equality required by ICERD. The CRC uses the language of equality

[65] See, for example, ICERD General Recommendation XXIII, 'Indigenous peoples'(1997); ICERD General Recommendation XXVII, 'Discrimination against Roma' (2000); ICESCR General Comment 5, 'Persons with disabilities' (1994); ICESCR General Comment 6, 'The economic, social and cultural rights of older persons' (1995).

[66] Toonen v Australia (488/92) 31/3/94; Young v Australia (941/00).

[67] ICESCR and ICCPR, common article 3.

[68] See ICESCR arts 7(a)(i), 7(c) and 13(2)(c); ICCPR arts 14(3), 23(4), 25(b) and (c).

[69] ICERD and CEDAW, art 1(1).

in only a few places,[70] the CAT refers to equality only in its preamble, and the CMW uses equality in the special sense of requiring equality of treatment with the nationals in the state of employment for various purposes. This may explain why the work of other treaty bodies on equality has been minimal to date. The common core document would provide an opportunity for the other treaty bodies to benefit from the work already undertaken. In order to address these issues, the concept of congruence should ensure the following:

(f) that equality is understood as a substantive norm requiring states parties to ensure that rights are equally enjoyed and exercised in fact, and not just formally, across all the treaties;
(g) that jurisprudence relating to the norm of equality in any of the treaties is understood to be applicable to them all;
(h) that ICESCR arts arts 7(a)(i), 7(c) and 13(2)(c) and ICCPR arts 14(3), 23(4) and 25(b) and (c) are included in the congruent cluster; and
(i) that the treaty bodies whose primary mandate is to eliminate discrimination and guarantee equality are encouraged to take the lead in the further development of the law in this regard.

A fourth difference between the treaties is the specificity with which they describe the measures that should be adopted by states parties to eliminate discrimination and guarantee equality. Not surprisingly, it is ICERD and CEDAW that are the most detailed in this regard. For example, CEDAW requires that states parties address the historical and structural underpinnings of women's inequality by modifying social and cultural practices and beliefs that normalise women's inequality,[71] and by ensuring that family education about roles and responsibilities is consistent with the goals of CEDAW.[72] The ICERD requires states parties to take 'special and concrete measures' to ensure that different racial groups are able to fully and equally enjoy human rights and fundamental freedoms.[73] These and other specific requirements in CEDAW and ICERD are essential to achieving the goal of substantive equality and should therefore be applicable across the treaty regime. Yet only some of these provisions are included as congruent in the guidelines. Both ICERD and CEDAW also explicitly promote the adoption of temporary 'special measures' for the purpose of accelerating the achievement of equality. While the other treaties are silent on this matter, such measures are important components of realising substantive equality. The guidelines rightly include these provisions in the cluster of congruent rights, which supports the view that other provisions proposing specific measures should also be considered congruent. In order to address these issues, the concept of congruence should ensure the following:

(j) that CEDAW arts 3 and 5 are included in the cluster because they provide specific guidance about measures necessary to eliminate discrimination and ensure equal enjoyment of human rights and fundamental freedoms.

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[70] CRC arts 28(1), 29(1)(d), 30(2) and 40(2)(b)(iv).
[71] CEDAW art 5(1).
[72] CEDAW art 5(2).
[73] ICERD art 2(2).

A revised chart of provisions congruent with the principles of equality and non-discrimination would include the provisions in the row added below (and there may be others that I have overlooked):

	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	CMW
	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.	Art. No.
Non-discrimination and equality	2(2); 3; 2(3)	2(1); 3; 14(1); 26; 27	2-7; 5(a); 1(4); 2(2)	2; 9-16; 15; 4; 14	Preamble ; 12; 13	2; 9(2); 22; 23	7; 18; 25; 27; 18(1);
Additional congruent provisions/jurisprudence	7(a)(i); 7(c); 13(2)(c); GC 4, 5,	14(3); 23(4); 25(b) and (c); GC 18; GC 28; related OP juris	1(1); GR XXV	1(1); 3; 5; GR		28(1); 29(1)(d); 30(2); 40(2)(b)(iv)	

Challenge 4: Securing a central role for the CEDAW Committee in the progressive development of the common understanding of gender equality

The CEDAW was adopted in 1979 because of the neglect of women's human rights by the mainstream human rights bodies. Since its establishment in 1982, the CEDAW Committee has made important contributions to the development of the norms of women's substantive equality and sex non-discrimination through its General Recommendations and Concluding Comments. It now has the opportunity to substantially expand these contributions through its individual complaints mechanism that entered into force in 2000.[74] The proposed guidelines for the common core document include most of the provisions of CEDAW as congruent to the principles of non-discrimination and equality. In fact, I have argued above that all of the general provisions of CEDAW should be included in the congruent cluster in order to ensure that states' reporting in the core document is informed by the most progressive jurisprudence in the system.

However, if this occurs, what would be the role of the CEDAW Committee in relation to the common core document and what would a state's CEDAW-specific report contain? Can the obligations of women's equal enjoyment of all human rights be divided into core and specific obligations? The guidelines attempt to avoid this by drawing a distinction based on degree of focus rather than breaking down the right into core and specific components, with the core document providing general information and the treaty-specific documents providing information that is more focused or targeted to the treaty. However, the danger is that the core document will allow, even encourage, an inadequate standard of equality/non-discrimination, which may then become acceptable as a minimum. Legally, substantive equality is the common standard across the system, as I have argued. The principles of equality and non-discrimination are not obligations that can be progressively fulfilled, therefore the notion that minimum core obligations might

[74] Optional Protocol to the CEDAW (1999), entry into force 22 December 2000.

be identified is inconsistent with the law. Further, the practical effect of such a division would promote – even condone – regressions in women's equal enjoyment of all human rights. But there is a fine line between core 'focus' and core 'minimum' that will need to be closely scrutinised to avoid their conflation.

Clearly, this needs further thinking through. As I have outlined above, it is proposed that the treaty-specific reports include information requested by the guidelines of the treaty body, requested by the treaty committee to supplement information in the common core document, and reporting on follow-up from the committee's previous concluding observations as applicable. The idea is that the specific report will enable the treaty body to pursue issues of concern to its mandate in greater depth than the common core document would allow. But would this mean the CEDAW Committee's ability to monitor the obligations of sex non-discrimination and equality as a whole might be reduced? Or, even worse, would the other treaty bodies leave all the references to women in the core document to CEDAW to monitor? If this occurred, it is not hard to see that the entire gender-mainstreaming agenda would rapidly unravel.

The danger that the CEDAW Committee, and women's human rights, might be further marginalised by the proposal needs to be addressed urgently. The treaty bodies have yet to develop new guidelines that would operate in conjunction with the common core document proposal. But most of the information required by the CEDAW Committee's current reporting guidelines relating to the implementation of CEDAW would/should be included in the common core document. This suggests, on the one hand, that the proposal to report on congruent rights in the core document is untenable because of its negative impact on the work of the more targeted treaty bodies. On the other hand, the role of the CEDAW Committee (and likewise the ICERD Committee) could be enhanced if the proposal was to recognise its particular expertise and give it a central role in informing, perhaps even coordinating, monitoring of the common core document by the other treaty bodies, in respect of women's equal enjoyment of all human rights. This would boost gender mainstreaming across the system and ensure a central role for the CEDAW Committee.

Challenge 5: Empowering women's human rights NGOs to contribute to the monitoring processes of all the treaty bodies

There are also many uncertainties related to how women's human rights NGOs would engage with the proposed new system of reporting. The introduction to the guidelines identifies participation by civil society as 'an important aspect' of the new process,[75] but nothing concrete is proposed to facilitate this. Yet the adoption of the guidelines will demand a lot more from human rights NGOs, who will need to produce a shadow report to the common core document in addition to the present practice of providing information to treaty bodies in reports that shadow the treaty-specific periodic reports. They may also need to participate in the processes of many more of the treaty bodies than they currently do. This will require capacity-building and resources that are beyond the reach of many

[75] Above n.17, introduction para 29.

women's NGOs, which may make grass roots engagement with the system impossible. Further, the demands of shadow reporting may become so bureaucratised that the elements of activism and advocacy, which are so essential for promoting progressive change, may be lost.

Currently, NGOs have largely organised themselves around the different treaties. Indeed, many NGO constituencies preceded the adoption of the human rights treaties, as in the case of women's movements. The proposed system may encourage and strengthen coalitions between NGOs, which may broaden the visions and contributions made by NGOs. But it may also lessen the impact of the treaty-specific constituencies and give more power to the general human rights NGOs, who have historically neglected women's rights as well as economic and social rights, and are a very long way from the grass roots. Guidelines that facilitate the participation of NGOs need to be adopted by all the treaty bodies, and the processes whereby the common core report will be monitored should be clarified. If the new system has the effect of disempowering women's human rights NGOs, then I suggest that the cost is too high and it should be rejected.

Conclusions

As the foregoing analysis illustrates, the proposed guidelines are a double-edged sword for women's human rights advocates. On the one hand, they may help to advance women's human rights by opening many new opportunities to promote gender mainstreaming through congruency, and ensuring that women's substantive equality is recognised and developed progressively across the entire system. But, on the other hand, the proposed guidelines may lead to regressions in the jurisprudence and practical realisation of women's human rights if they condone lowest common denominator approaches to addressing women's inequality, and lead to the marginalisation of the CEDAW Committee and the disempowerment of women's human rights NGOs.

I have outlined five main areas of challenge that need to be addressed in the further development and piloting of the guidelines. While it is to be hoped that these challenges will be taken up by all those involved in the reform process, women's human rights advocates have important contributions to make and it is imperative that they are encouraged to participate at all levels.

Ultimately, though, the question is whether the guidelines that are eventually adopted will enhance reporting and implementation of state's obligations under the human rights treaties, or provide a new cover for malingerers. The Secretary-General's suggestions for reform have served to focus attention on the reporting obligations of the system. This focus risks representing the cause of the stresses in the system as a problem of the burdensome reporting requirements, and ignoring the compounding problems of lack of resources and capacity, and lack of political will. These contributing factors also need to be addressed before reform efforts can really hope to strengthen the effectiveness of the human rights treaty monitoring system.