

Grotius Lecture 2019

Women's Rights Worldwide

Bank of England, London

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The air is full of women's rights. Last year the UK celebrated 100 years since some women got the right to vote in Parliamentary elections and all women got the right to stand for Parliament. This year we celebrate 100 years since women got the right to join the professions, to serve on juries and to hold public office, including as magistrates and judges. Today I want to look at how well the UK is doing when judged against international standards of women's rights. The answer is – not very well. But there are some reasons to be cheerful.

How far have we really come in those 100 years? Currently 32% of Members of the House of Commons are women, but it was only in the 1990s that the percentage crept into double figures. Until the 1997 election, it was under 10% and had for many years after the Second World War hovered around 4%. There was a leap to 18% in 1997, to 22% in 2010, and now to over 30% (210 out of 650). In 2016, for the first time, there were as many women MPs *ever* as there were men MPs *then* in the House of Commons.

Much the same pattern can be seen in the judiciary and magistracy. Currently, women make up roughly one quarter of the High Court, the Court of Appeal and the Supreme Court. The percentages are higher the lower down the judicial hierarchy one goes, from the circuit, to the district, to the tribunal benches. But there has been remarkable progress over the past two decades. It took the powers that be a long time to appoint the first women professional judges – a metropolitan stipendiary magistrate in 1945, a Recorder in 1956, a county court judge in 1962 and a high court judge in 1965. When I was appointed in 1994 I was only the 10th ever woman High Court Judge. Progress in appointing women as lay magistrates was much quicker. They had

¹ Grateful thanks are due to my Judicial Assistant, Penelope Gorman, for her invaluable help with the research for this lecture.

reached around 20% by 1948 and by 2018, they were 55%. Perhaps it is easier for women to be accepted into unpaid voluntary work than into well paid professional roles.

There is also some correlation between the presence of women in Parliament and in the law and the advancement of women's rights generally. I have chronicled elsewhere² the improvements in the legal status of women which have taken place over the last century – but mainly since the 1960s: the advent of gender neutral rights and remedies in family law, the advent of (in practice and within limits) no-fault divorce, the improvement in the remedies available to redress the disadvantage suffered by home-making spouses, the equalisation of parental rights and authority (which only happened the year before I had my daughter), the advent of better remedies for domestic violence and abuse and the availability of alternative housing for the victims (at least if they have children), the Equal Pay and Sex Discrimination Acts, and a great deal more. But things are yet perfect in this country. The focus of attention has moved on from those early pre-occupations with basic equality rights at home and at work to other causes for concern.

And if things are not yet perfect in this country, as we shall soon see, how much less perfect must they be in many other countries in the world where women are not as fortunate as we are here? Some random facts about the status of women's rights (supplied by Womankind Worldwide)³ can illustrate the point:

- Globally women make up under 24% of parliamentarians, and in 2016, 38 countries had under 10%, 4 of whom had none.
- In most countries, women earn on average 60-75% of male incomes.
- Only 18 out of 173 countries have specific legislation combatting sexual harassment in public places.
- Women spend twice to ten times more time a day on unpaid care work looking after children, the elderly and the unwell than men.

² Birmingham Law Society and Holdsworth Club lecture, 29 November 2018, *Celebrating Women's Rights*.

³ <https://www.womankind.org.uk/policy-and-campaigns/women%27s-rights/facts-about-women%27s-rights>.

- Over 700 million women alive today were married before they were 18, of whom 250 million were married before they were 15.
- At least 200 million girls and women alive today have undergone Female Genital Mutilation.
- 38% of all murdered women are killed by their partner; globally it is estimated that almost half were killed by a partner or relative compared with less than 6% of men.
- In the European Union women with a disability or health problem are twice as likely to experience violence from a partner.
- Hardly any of the aid to conflict-affected states targets gender equality or goes to women's equality organisations.
- Women are extremely underrepresented in peace processes and yet, when they are involved, the probability of a peace agreement lasting at least two years is increased by 20%.

These shocking facts persist despite more than half a century of international instruments at least paying lip service to gender equality.

Article 1 of the United Nations Charter declares its purposes to include 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Following the establishment of the UN Commission on the Status of Women in 1946, the Universal Declaration of Human Rights was adopted by the General Assembly on 10 December 1948. In its preamble, faith is reaffirmed in 'the equal rights of men and women'. Article 1 declares that 'All human beings are born free and equal in dignity and rights' and Article 2 that everyone is entitled to all the rights and freedoms in the Declaration without distinction as to, among other things, sex.

It is said that the Commission played a role in ensuring gender neutral language in the Declaration. If that is so, it is a shame that they did not find a better word than 'brotherhood' in the otherwise very moving second sentence of Article 1: 'They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. In retrospect, it is also unfortunate that in 1951 the Convention relating to the Status of Refugees did not include sex among the grounds upon which there might be a well-founded fear of persecution in the asylum-seeker's home country. It took the House of Lords to decide that gender-based violence

and female genital mutilation could none-the-less amount to persecution on the ground of membership of a particular social group.⁴

The Universal Declaration was not, of course, a binding instrument and it took until 1966 to translate its obligations into the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Hilary Charlesworth has described some of the criticisms of general international human rights instruments from a feminist perspective:⁵

- (i) Rights are defined with reference to men's lives and public spheres of activity. Women's lives, often associated with the private realms of home and family, do not sit easily within the standard accounts of rights. Issues of particular importance for women, such as sexual violence, are not covered.
- (ii) International law focusses on states as the primary violators of human rights. But non-state actors, including family members, are more likely to threaten women's human rights.
- (iii) Notions of equality and non-discrimination are premised on male-defined terms, requiring women to be treated in the same way as a similarly situated man, without recognizing the effects of structural discrimination against women. The fundamental problem for women is not simply being treated less favourably than men. Women are in an inferior position because they lack economic, social and political power in both the public and private worlds.

In 1965, a start had been made in devising instruments to meet the needs of particular groups, by the International Convention on the Elimination of All Forms of Racial Discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979. This is of very broad scope, transcending the traditional divide between civil and political rights and socio-economic rights. It tries to achieve a blend of formal equality with

⁴ *Islam v Secretary of State for the Home Department* [1999] 2 AC 629; *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412.

⁵ 'Two Steps Forward, One Step Back? The Field of Women's Human Rights' [2014] EHRR 560.

men – equality of opportunity – and substantive equality – equality of outcome. It tries to accommodate both the universality of human rights and the recognition that, in some respects, women’s lives are different from men’s lives and require particular treatment.

In the preamble, the Convention acknowledges that ‘extensive discrimination against women continues to exist’. Discrimination is defined in article 1 as ‘any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field’. States Parties are required by article 3 to take ‘all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’.

The fundamental underlying problems lie in deeply entrenched social and cultural views and practices which ascribe an inferior position to women, coupled with a lack of respect for the vital role they play in bearing and rearing the next generations. Article 5 attempts to tackle these problems. It requires States Parties to 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.’

Civil rights and the legal status of women are dealt with in detail. They should have equal rights to vote, to participate in the formulation of government policy, to hold public office and to perform public functions, to participate in non-governmental organisations and what we now call civil society, and to represent their governments at international level (articles 7 and 8). The Convention on the Nationality of Married Women, adopted in 1957, is integrated to ensure that

women's right to nationality is not dependent on their husbands' nationality; they must also have equal rights with respect to the nationality of their children (article 9).

They must have equal rights to education and access to the same curricula as men. Article 10 (c) seeks the elimination of any stereotyped concept of the roles of men and women in all forms of education by encouraging co-education and the revision of textbooks, school programmes and teaching methods. They are also entitled to equal rights in employment, including not to be discriminated against at work on the ground of pregnancy or maternity (article 11), and in economic and social activities (article 13).

Article 16 asserts the equal rights and obligations of women and men in relation to their choice of spouse, parenthood, personal rights and command over property. Article 16 also directs attention to reproductive rights: women must have 'the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'. Throughout the Convention, the theme of maternity as a social function requiring strong protection can be seen, including the assertion that special measures aimed at protecting maternity are encouraged and should not be considered discriminatory (article 4).

Although shot through with requirements that women should enjoy equal status with men in all things, the Convention does not in so many words acknowledge that gender-based violence is a form of discrimination against women. That had to come later: in the CEDAW Committee's General Recommendation No 19 in 1992.

It might be thought that, with all the reforms which took place in the 1970s, long before the Convention arrived on the scene, the UK was doing pretty well. Nevertheless, the CEDAW Committee has found plenty of causes for concern in its most recent reports.

In its Concluding Observations on the 7th Report from the UK in 2013,⁶ the Committee was critical of the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

⁶ CEDAW/C/GBR/CO/7.

(LASPO) and its impact on women's access to justice. This criticism was deployed in many challenges to that Act, particularly in the successful case of *R (Rights of Women) v Lord Chancellor*.⁷ The Court of Appeal held that the requirement that written evidence of domestic abuse be dated not more than 24 months before an application for legal aid was not rationally connected to the purpose of the legislation. This was, as the Court found, 'partly to withdraw civil legal services from certain categories of case in order to save money but also to make such services available perhaps not to the entire membership of the most deserving categories of case (such as victims of domestic violence) but at any rate to the great majority of persons in the most deserving categories'. This led the Ministry of Justice to establish a working party which resulted in a widening of the regulations to allow victims more easily to access legal aid. This process was aided by the requirement for an interim report to the CEDAW Committee and a further determination directing the UK government to make urgent improvements in areas of non-compliance.

In March this year, the Committee issued its Concluding Observations on the Eighth Periodic Report of the UK.⁸ This welcomes various initiatives in the field of domestic violence in particular and the measures adopted to facilitate access to civil legal aid for victims of domestic violence and child abuse. It also notes that the introduction of fees for employment tribunal applications, which it had previously found to be of concern, had been declared unlawful by the Supreme Court in *R (UNISON) v Lord Chancellor*.⁹ However, it remained concerned that cuts to legal aid, as well as strict criteria for gaining access to it under LASPO, 'continue to have a negative effect upon women's access to justice and effective remedies in areas such as family, housing, immigration and welfare benefits law' (para 23).

The Committee has a number of other concerns. One was the disproportionately negative impact of austerity measures on women, who constitute the vast majority of single parents and are more likely to be engaged in informal, temporary or precarious forms of employment. These measures included cuts in funding to organisations which provide services to women, and in social care services, which increase the burden on primary caregivers, who are disproportionately women (para 17).

⁷ [2016] 1 WLR 2543.

⁸ CEDAW/C/GBR/CO/8.

⁹ [2017] 3 WLR 409.

The Committee does not mention the benefit cap, which has so troubled the Supreme Court recently, perhaps for that reason.¹⁰ But it does single out for particular concern the payment of universal credit into a single bank account, which ‘risks depriving women in abusive relationships of the ability to gain access to necessary funds and trapping them in situations of poverty and violence’. It was also ‘deeply concerned about the introduction of a two-child credit limit, except in certain circumstances such as rape, which has a perverse and disproportionate impact upon women’. The increase in the state pension age for women was contributing to poverty, homelessness and financial hardship among the women affected (para 51).

Another concern of the Committee is Brexit, which ‘could, in the absence of comprehensive measures to empower women and national legislation incorporating the provisions of the Convention, lead to a retrogression in the protection of women’s rights’. Women might also be disproportionately affected by the negative economic impact of Brexit and the loss of funding from the European Union for specialized programmes and services for women and girls (para 21).

Further concerns relate to modern slavery and trafficking (para 33); reports that increasing numbers of women were turning to prostitution due to poverty (para 35); the findings of the House of Commons Women and Equalities Committee on the prevalence of sexual harassment of girls in schools (para 41); and on the prevalence of sexual harassment in the workplace; the concentration of women in lower paying positions in all occupational sectors and in lower paying occupational sectors; the over-representation of women in informal, temporary or precarious forms of employment including zero-hours contracts; the under-representation of women on corporate boards and in executive positions (para 43); and the continued under-representation of women in public and political life, particularly of black, Asian and minority ethnic women and women with disabilities (para 37).

Running throughout the document is a concern that the ‘absence of a functioning government in Northern Ireland since January 2017 has led to gaps in legislation and policy to ensure the effective protection of women there’. Specifically, the Equality Act 2010 does not apply in

¹⁰ See *R (DA and DS) v Secretary of State for Work and Pensions* [2019] UKSC 21.

Northern Ireland (para 15); the laws to protect women from all forms of gender-based violence there are inadequate (para 29); they are particularly under-represented in political and public life there, and it recommends the use of gender quotas¹¹ (para 37); mandatory pay gap reporting¹² has not yet been brought into force there (para 44(c)); and child care costs remain excessive (para 45).

The CEDAW Committee had, of course, produced a report in 2018, finding Northern Ireland's abortion law and practice seriously to violate the Convention in a number of respects.¹³ It was unimpressed by the UK government's response that abortion is a devolved matter, pointing out that the devolution of government powers does not negate the direct responsibility of the UK to fulfill its obligations under the Convention, a responsibility which was recognised in the Good Friday Agreement (para 48).

All in all, this year's report is an interesting document. No doubt the government would not accept that all of its criticisms are valid. However, it illustrates how far, despite all the advances in women's rights which have taken place over the last half century, the UK still falls short of what, in the eyes of the international community at least, is required to eliminate all forms of discrimination against women.

But, even if we agreed with the Committee, there is very little that we in the courts can do about this. Despite the Committee's urgings, CEDAW has not been incorporated into UK law. It is the kind of treaty, like the UN Convention on the Rights of the Child, which the UK considers too vague and aspirational to translate directly into binding legal obligations. Sometimes, as with article 3.1 of the Children's Rights Convention, there are statutory provisions which are designed to reflect it, although not in so many words. Sometimes, it is possible to take note of international law obligations as part of the interpretation and application of the rights protected by the European Convention on Human Rights. The Supreme Court now accepts that whether public authorities have complied with article 3.1 and treated the best interests of the children

¹¹ Permitted under the Sex Discrimination (Northern Ireland) Order 1976, art 43A.

¹² Under the Employment Act (Northern Ireland) 2016.

¹³ CEDAW/C/OP.8/GBR/1.

involved in their decisions is relevant to whether discrimination in the enjoyment of convention rights can be justified.¹⁴

CEDAW, however, has fared less well. In *R (A) v Secretary of State for Work and Pensions*,¹⁵ a woman victim of severe domestic violence complained that it was unjustified sex discrimination to impose the so-called ‘bedroom tax’ upon her specially adapted sanctuary home. In holding that it was, I invoked the decision of the European Court of Human Rights in *Opuz v Turkey* (2009) 50 EHRR 28,¹⁶ which cited article 1 of CEDAW in support of its conclusion that gender-based violence had been internationally recognised as a form of discrimination against women. But only Lord Carnwath agreed with me.

Again, in *R (A and another) v Secretary of State for Health* [2017] UKSC 41,¹⁷ the majority of the court was not persuaded that the international law materials (principally CEDAW) were relevant to deciding whether the discrimination against women from Northern Ireland (in not funding abortion services for them in England) was justified. The appellants placed particular emphasis on article 12 and the obligation for States to take appropriate measures to eliminate discrimination against women in the field of healthcare including family planning and services in connection with pregnancy. They also relied on General Comment No 22 (2016) of the Committee on Economic, Social and Cultural Rights, that reproductive health care is ‘intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life, liberty and security of person...denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security’ (para 10). However, the majority held that this material only ‘adds background colour to the inquiry into fair balance’ under the European Convention and material ‘of a far more vivid hue’ would be needed to overcome the minister’s legitimate concerns of maintaining the provision of health care services on a territorial basis and respecting the competence of the Northern Ireland legislature over abortion law in that territory.

¹⁴ See *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 and *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, the benefit cap cases.

¹⁵ [2016] 1 WLR 4550.

¹⁶ (2009) 50 EHRR 28.

¹⁷ [2017] 1 WLR 2492.

Among the CEDAW Committee's recommendations is that the UK should ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), which came into force on 1 April 2014. Its aim is to build on existing international obligations, for example in CEDAW and in the European Convention on Human Rights, to 'design a comprehensive framework, policies and measures for the protection of and assistance to all *victims of violence against women and domestic violence*' (art 1(b)).

Behind this phraseology lies a deep division of opinion about whether domestic violence is a gender-based problem. Lisa Gormley¹⁸ reports that during the negotiations some states still identified domestic violence as an issue that affected as many men as women, albeit without studies to support this belief. But this issue went to the heart of the substance of the treaty: compromise was found in the words of article 2 that

(1) This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.

(2) Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provision of this Convention'.

Later provisions of the Convention (articles 6, 18(3) and 49(2)) incorporate more gender-sensitive approaches but there was still concern that a gender-neutral approach was leading to resources being allocated to the support of men, despite the lack of any evidence of need, and at the expense of services for women (p 611).

Nevertheless, the Convention goes into great detail about the obligations of States Parties to provide practical as well as legal solutions and resources to combat gender-based violence. Lisa Gormley identifies many progressive milestones:

¹⁸ 'The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence: A Consolidation of Existing International Law, or a Significant Progression?' [2014] EHRLR 606.

The inclusion for the first time in binding treaty law of sexual orientation and gender identity as impermissible grounds for discrimination (art 4(3)); the European Court of Human Rights has long recognized sexual orientation as an ‘other status’ but including it in the list of impermissible grounds is new.

Requiring that incidents of domestic violence are taken into account in deciding custody and visitation rights and that the exercise of such rights does not jeopardise the rights and safety of the victim or children: in other words, the parental rights of fathers must not trump the safety of victims or children (art 31);

Contrary to the views of those who regarded these as more minor or likely to lead to an unfair penalising of men, the requirement to criminalise psychological violence – the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats (art 33); stalking – the intentional conduct of repeatedly engaging in threatening conduct direct at another person, causing her or him to fear for her or his safety (art 34); and sexual harassment – any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (art 40) – although this last may be subject to ‘criminal *or other* legal sanction’.

The definition of rape and sexual violence based on the International Criminal Court definition which encompasses a variety of acts of penetration and does not require physical force. The negotiators drew on the European Court of Human Rights case of *MC v Bulgaria*¹⁹ for this: ‘Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances’ (art 36.2). This is also consistent with the CEDAW Committee’s comments on the definition of rape.

The requirement that in any civil or criminal proceedings, evidence relating to the previous sexual history or conduct of victims may only be introduced when it is ‘relevant and necessary’ (art 54).

¹⁹ App No 39272/98.

The insistence that ‘culture, custom, religion, tradition or so-called honour’ are not to be regarded as justification for acts of violence (art 42). This is drawn widely enough to cover traditional ideas about provocation as a partial defence to murder for killing an adulterous spouse.

The practical commonsense provisions in art 52 allowing for emergency barring orders and in art 53 immediate restraining orders without undue financial or administrative burdens.

The requirement that gender-based violence against women be recognised as persecution within the meaning of the Refugee Convention and as a form of serious harm giving rise to complementary or subsidiary protection, together with gender-sensitive reception procedures and support services (art 60).

The insistence that victims whose residence status depends upon a spouse or partner should have the opportunity of establishing their own residence status, and must be offered a renewable residence permit where their stay is necessary owing to their personal circumstances or for the purpose of assisting investigation of prosecution (part 59).

The UK has not yet ratified the Convention, but is taking steps to enable it to do so. Among these was the publication of the Domestic Abuse Bill for consultation earlier this year.

The detailed and intensely practical requirements of the Convention are surely to be welcomed. Lisa Gormley expects that it will have an immediate transformative effect in causing more survivors to make known their experience, thereby improving the knowledge base for implementing the Convention. The requirements on States in article 9 to engage positively with civil society organisations should improve its effectiveness. For all these reasons she concludes that the Convention provides an engine for change and may lead to a universal convention. This optimism echoes that of Judith Reznik,²⁰ who has argued that the CEDAW reporting mechanism ‘undermines not only inequalities among women and men but also traditional hierarchies in international law’. Referring to the CEDAW Committee, she comments that ‘This diverse set of

²⁰ ‘Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production’ (2012) 10 *International Journal of Constitutional Law* 531.

persons, hailing from poor as well as powerful countries, is positioned to interrogate high-level officials from all 187 signatories’.

However, as she also points out, the Committee has the competence to make demands but not to impose sanctions. The protection of women’s rights world-wide is precarious. Evidence of this can be found in the many broad reservations to the requirements of CEDAW, mostly based on assertions of culture or religion. Israel, for example, reserves its position insofar as the laws of personal status binding on the several religious communities in Israel do not conform to the Convention and as to the appointment of women to be judges in religious courts where this is not allowed by the religion in question. This takes virtually the whole of family law out of the requirement for equal treatment.

Hilary Charlesworth also points out that it is striking that the concept of culture is much more frequently invoked in the context of women’s rights than in any other. This would be unacceptable if racial discrimination were in issue. She quotes Arati Rao, who described the notion of culture favoured by international actors as ‘a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top’.²¹ That is one reason why it matters that so few women are engaged in peace processes in conflicts such as those in Iraq and Afghanistan. It is deeply troubling that UN Women decided not to hold another conference on women in 2015, 20 years after the Beijing Declaration and Program for Action, for fear that the gains made since then might be put at risk.

Even so, there must be some more reasons to be cheerful:²²

- The majority of members of the cabinet in Spain is now female.
- Women in Saudi Arabia may now drive legally.
- Voters in Ireland repealed the eighth amendment to Ireland’s constitution and approved a scheme to legalise abortion in the country.

²¹ Arati Rao, “The Politics of Gender and Culture in International Human Rights Discourse” in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995) p174

²² <https://www.vox.com/2018/12/4/18114868/women-rights-advancements-world-2018>.

- Women, especially women of colour, were voted in record numbers to the House of Representatives in the US mid-term elections.
- Jacinda Ardern became the first elected head of state to take maternity leave in office.
- One of the joint winners of the Nobel Peace prize was Nadia Murad, an Iraqi member of the Yazidi community who was captured by ISIS and now works for victims of sex trafficking.

The MeToo movement has started an international conversation about harassment and sexual assault: for example, Care International is campaigning for the International Labour Organisation to adopt a new global treaty to tackle the sexual harassment of women in the workplace in all corners of the world.

The suffragettes' slogan was 'deeds not words' but sometimes words – especially those in international treaties adopted across the world – can help.