

The Optional Protocol to CEDAW
Mitigating Violations of Women's Human Rights

International Training Seminar for NGOs and women's rights activists
13-15 March, 2003
Berlin, Germany

SEMINAR DOCUMENTATION

"The international human rights system, while built on legal principles and using legal language, is basically a political system. Treaties are international law, but implementation and monitoring are political processes. Understanding and using treaties, finding a voice and a space in which to speak, are political acts – a basic exercise in democracy.

Arguments about the problems of justiciability and enforcement in human rights treaties must not be allowed to detract from the deeply significant fact that in some countries, human rights treaties are the only instruments people have to render their government accountable in any way. The very act of invoking a human rights treaty can be dangerous, a challenge to authority or to sacrosanct cultural norms. Even challenge on the basis of the CEDAW Convention – invoking the fundamental international norm of nondiscrimination – can be risky in some circumstances.

Human rights treaties are instrumental to democratic development. Knowing your rights, and knowing that your government is accountable, are powerful tools for building democracy."¹

¹ Quote by Marsha Freeman during the International Training Seminar on the Optional Protocol to CEDAW.

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A. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women

I. Introduction to CEDAW

Hanna Beate Schöpp-Schilling, CEDAW Committee

This introduction highlights some of the essential general elements of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in order to create the framework for the following contributions regarding the substantive articles and the Optional Protocol. It also points to existing and potential actions for representatives of non-governmental organisations.

The Convention is the most important international convention on women's human rights. By May 2003, 171 States were party to CEDAW; approximately 10% of the member States of the United Nations were still missing. There are ongoing efforts to encourage universal ratification. The fact that Afghanistan, after having signed the Convention in 1980, very recently ratified it, even before adopting a new Constitution, is promising.

There are several monitoring procedures to the Convention, including the reporting process and the processes of the communication and inquiry procedures under the recently adopted Optional Protocol. The CEDAW Committee, the treaty body monitoring the implementation of the Convention, is composed of 23 experts. A future expert is nominated by her/his respective State party. Every two years there is an election during the States parties' meeting. Re-election of experts is possible. Consequently, the composition of the Committee may change frequently with regard to the regions of the world being represented. So far, only three men were nominated and elected.

CEDAW has the second highest number of ratifications among the six most important human rights instruments of the UN, the Convention on the Rights of the Child being the one with almost universal ratification. At the same time, CEDAW is the Convention with the largest number of reservations. Often, reservations to CEDAW do not appear vis-à-vis the other conventions, even though the rights and provisions may be the same. Many commentators hold the view that a number of these reservations to CEDAW are contrary to the object and purpose of the CEDAW Convention and should therefore be not be considered as 'legal.' The issue of reservations will play a role under the communication and inquiry procedures.

With a view to human rights monitoring it is important to recognise that although CEDAW is the most important international instrument on women's human rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR) also explicitly prohibit discrimination on the basis of sex. They obligate States parties to guarantee and fulfil equality between men and women with regard to the enjoyment of their human rights. Although the main focus of women-oriented monitoring and lobbying activities by non-governmental organisations should be on CEDAW, I strongly recommend to include the other existing UN human rights instruments in this effort, including those instruments which lack explicit references to sex and gender equality. Gender mainstreaming now informs all six human rights treaty bodies established to oversee the implementation of the six UN human rights instruments. Thus, the Committee on Civil and Political Rights (CCPR) and the Committee on the Elimination of Racial Discrimination (CERD) adopted very important General Comments on gender equality, and the Committee on Economic, Social and Cultural Rights (CESCR) is currently in the process of doing so.

Several unique aspects of the CEDAW Convention are worth highlighting. First, it is crucial to underline its definition of discrimination as contained in Article 1. This definition distinguishes between intentional and unintentional discrimination (discrimination of effect). Although the Committee has not yet formulated a General Recommendation on the interpretation of this definition, this understanding of discrimination bears great potential for the complaint and inquiry procedures under the Optional Protocol. Indirect discrimination may result from sex-

and gender-neutral laws which do not take into account the differing life experiences of women and men or which do not pay attention to the potential discrimination through institutional structures which were set up in the past without women's participation and without reflection on their life circumstances. The whole issue of discrimination of effect is an area which deserves scrutiny by legislators, policy makers and representatives of non-governmental organisations alike.

A second significant feature of the Convention is the fact that the prohibition of discrimination does not only affect State actors but includes private actors as well. States parties are fully responsible for preventing discrimination by non-state actors, i.e. individuals, organisations and enterprises in the private sector (Article 2 (e)). This can be achieved by passing laws through which discrimination by private actors is prohibited and adequate legal remedies and compensations are offered to its victims.

A third important feature of the CEDAW Convention is the obligation of immediate implementation. States parties ratifying CEDAW are under the obligation to respect, promote and fulfil the right to non-discrimination without delay. As opposed to the ICECSR in which implementation is contingent upon financial resources and may therefore be progressive, although action, especially for vulnerable groups, should also not be delayed, CEDAW requires under Article 2 an immediate set of actions from any new State party. Consequently, there are no grounds on which to base the continuing discrimination of women. States parties may choose from a wide range of available instruments to achieve this goal, including legal instruments. However, when reviewing States parties' reports, the CEDAW Committee retains the right to evaluate the instruments chosen, including the effects achieved.

A fourth important aspect of the CEDAW Convention are temporary special measures permitted under Article 4 (1). Unequal treatment of women and men in order to accelerate the achievement of *de facto* equality of women and men shall thereby not be considered discriminatory. While the equality clause and the right to non-discrimination generally prohibit unequal treatment, Article 4(1) and 4(2) expressly permit it, thus highlighting an understanding of these two concepts in their formal as well as substantive sense.

Fifth, as a general rule, the Convention should be considered as a living document, open to interpretation. Among the issues currently under discussion are the concepts of discrimination on the basis of sex as opposed to discrimination on the basis of gender. The word "gender" is not mentioned in the Convention. However, a combined reading of Article 5 and Article 1 allows for gender discrimination to be read into it. It is exactly "marital status," "social and cultural patterns of conduct of men and women," "prejudices and customary ... practices ... based on the idea of the inferiority or the superiority of either of the sexes," "stereotyped roles for men and women," and the understanding of maternity as not merely a biological, but also a "social function" putting obligations on both women and men, which point to the socially and culturally conditioned expectations attached to women and men which may constitute gender discrimination and which have done so throughout history. Thus, both kinds of discrimination are prohibited in the "political, economic, social, cultural, civil" AND "or any other field," thereby, again, leaving room for interpretation and new developments. A look at the Convention reveals that neither violence against women, discrimination against women with disabilities nor discrimination against the girl-child or elderly women, among others, are mentioned.

Consequently, any reflection on the Convention requires a close reading of the General Recommendations developed by the CEDAW Committee and of the General Comments by the other human rights treaty bodies². Thus, General Recommendation no. 19 clarifies that violence against women constitutes a form of discrimination. A reference to Article 12 is another example for the importance of these General Recommendations. The article itself guarantees non-discrimination of women in the field of health care in only two paragraphs.

² General Recommendations are available at www.un.org/womenwatch/daw/cedaw.

General Recommendation no. 24 on Article 12 offers an interpretation of this right in its details and covers several pages. It is therefore important to take these General Recommendations into account when working with the CEDAW Convention. Unfortunately, they are not always translated into national languages, although all States parties are responsible for making their content available to the public. General Recommendations have the status of "soft law" as they explain the Convention without being part of its legal text. It is an encouraging fact that there have been cases in which national courts have drawn inspiration from these General Recommendations in the determination of court cases.

The Concluding Comments issued by the CEDAW Committee at the end of each constructive dialogue with a State party on the basis of the State party's report(s) also deserve attention. It is in these formulations that the CEDAW Committee lays out explicitly its concerns and recommendations as to what it expects States parties to do under the Convention. With a view to lobbying efforts nationally and internationally, it is therefore important to follow developments in the formulations of the Concluding Comments. Essentially, Concluding Comments are useful indicators for the implementation of the Convention in the territory of a given State party.

In this context it is also important to reflect on the relationship between the CEDAW Convention and the Beijing Platform for Action, since the two documents are sometimes mixed up in their importance for national implementation. Ratification of CEDAW makes it legally binding for a State party to implement the right of non-discrimination under the various articles whereas the Platform for Action is only a policy and not a legally binding instrument. It is crucial, therefore, not to focus entirely on the Beijing Platform of Action at the expense of neglecting the legal obligation of implementing CEDAW. However, a close look at the Beijing Platform for Action reveals that it meticulously spells out steps that States parties ought to be pursuing in the twelve areas of concern, which are linked to articles of CEDAW, in order to guarantee full implementation of the Convention.

The role of non-governmental organisations (NGOs) in the process of implementing CEDAW has evolved over the years. While this role originally was not envisaged and is not mentioned in the text of the Convention itself, non-governmental organisations have assumed an active function in the reporting process. Originally, it was International Women's Rights Action Watch (IWRAP) which supplied the Committee with a shadow report to a respective country under discussion. Now, these efforts have been taken up by the respective national organisations, which receive training by other international non-governmental organisations (IWRAP Asia-Pacific), the UN Secretariat, the office of the High Commissioner of Human Rights, UN Specialised Agencies or by training arrangements based on bilateral efforts between States parties. This emerging role of non-governmental organisations vis-à-vis the reporting process has added a dynamic force to the work of the CEDAW Committee and to the implementation of women's human rights. Government delegations are no longer able to present information in isolation. Representatives of non-governmental organisations are present during the constructive dialogue with the respective State party and can thus, later, lobby on the fulfilment of the State party's promises. At the same time, non-governmental organisations can serve as transmitters of information on the implementation of the Convention to the public at the national level. Additionally, the Concluding Comments are now available on the internet sites of the UN system³.

In light of the additional implementation mechanisms provided for by the Optional Protocol, the role of non-governmental organisations is extending beyond alternative reporting and lobbying activities. Non-governmental organisations can now assist victims of discrimination in submitting a communication to the CEDAW Committee. They can also provide reliable information concerning grave and systematic violations as a first step towards an inquiry procedure. The Committee has adopted Rules of Procedure regarding these mechanisms as

³ See www.un.org/womenwatch/daw/cedaw; following the link 'sessions'.

well as relevant administrative forms⁴. A close reading of these rules governing the handling of individual communications and inquiry procedures as well as an in-depth understanding of these processes is the necessary point of departure for any non-governmental organisation activity in this area.

II. States parties' Obligations under CEDAW Convention Articles 2, 3, 4, 5 and 24

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INTRODUCTION

Articles 2 through 5 of the CEDAW Convention, together with Article 1, provide the framework for implementation of the other substantive articles. Each article refers to an action or set of actions that must be undertaken to comply with the specific obligations of Articles 6-16, and without which attempts to implement those articles are likely to fail.

Article 24, the general obligation to undertake to implement the Convention, is a capstone statement that would seem to be implicit in the act of ratification. However, given the history of many States parties' difficulties and untimeliness in addressing discrimination, the explicit statement of the obligation is well taken.

States parties' obligations run to elimination of discrimination by private actors in addition to the State itself. This obligation is both implicit and explicit. The Convention explicitly indicates that States are obligated to eliminate discrimination by "a person, organisation or enterprise," (Article 2(e)), which are distinguishable from the State. The definition of discrimination in Article 1 refers to action that has "the effect or purpose" of preventing women from enjoying human rights on an equal basis with men. Taken together, Articles 1 and 2 indicate a State obligation to address actions by State and non-state actors that result in discrimination even if the action appears neutral on its face. The implicit obligation lies in the necessity of taking "all appropriate measures" to eliminate discrimination, the language of Article 2 and many of the substantive articles. By their very nature, States are constituted to regulate activities of those who are within their borders: criminal activity; constituent elements of civil society such as voting, local government structure, and rules by which civil society organises itself; protection and distribution of property; commerce and employment. A State cannot presume to have the power to establish rules to protect individuals or enterprises from exploiting each other in these areas but decide that it has no power to establish rules to protect individuals from exploitation resulting from discrimination.

This seminar focuses on the use of the Optional Protocol. Because the Optional Protocol is framed with a view towards making specific claims, the question of justiciability will arise under each article. The issue of justiciability may not be relevant to every element of Articles 2-5, but it cannot be dismissed. It is rather complex with respect to these framing articles and is specific to each legal system. American lawyers, with our long history of law development through litigation, think readily of ways to make claims that other systems perhaps might not tolerate. I will not belabour this point, but it is worth considering, and some examples can be given of claims in various systems under these articles. The most comprehensive and helpful analysis of the justiciability issue remains an article by Jane Connors and Andrew Byrnes, published in 1996 in the *Brooklyn Journal of International Law*⁵. The article was published in support of the Optional Protocol drafting and adoption effort. At this point in history the only "dated" element of the article is its title, as most of us in the field have moved away from referring to the Convention as "the Women's Convention." We now refer to it as the CEDAW Convention because calling it the "Women's Convention" was not helpful in establishing global

⁴ www.un.org/womenwatch/vdaw/cedaw

⁵ Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?" 21 *Brooklyn Journal of International Law* 679 (1995-96).

understanding of it as one of the six international human rights treaties and the CEDAW Committee as a human rights body.

ARTICLE 2

The breadth of accountability under Article 2 is somewhat breathtaking. It is a general obligation to examine the entire legal and policy system, to determine what must be changed to promote equality and eliminate discrimination, and to make those changes. This article refers in 2(a) to “practical” as well as legal realisation of non-discrimination: constitutions, laws, regulations and other written policies will not be enough. States parties must ensure that their administrative and judicial systems are designed to deliver on the obligation. This means training and monitoring even the lowest level administrative staff, those who deal with the public as well as those who make the policies, to understand the requirement to not discriminate. It means making sure that programmes to deliver services are equally accessible to women in terms of location, hours, and cost. It probably means some reallocations of resources to meet this obligation.

The Article 2 obligation is immediate (“without delay”) and comprehensive. The requirement to “take all appropriate measures” should not be read as permission for States parties to exercise complete discretion as to what is appropriate, but as an indication that they must determine what needs to be done, in what order, based on their legal and political systems. While lack of resources may impede complete fulfilment of the obligation in all areas, it goes to the question of priorities and pace but does not excuse lack of action. The obligation is to “undertake” changes, not to pick and choose changes.

An illustration of a State party acting in less than good faith with respect to this article is the position taken by the government of Japan in the employment discrimination case of *Eiko Furukji vs. Sumitomo Electric Co.* The government was brought into the case as a party because the Osaka Prefectural Women’s and Young Workers’ Office refused to accept plaintiffs’ complaint. Plaintiffs claimed that the Equal Employment Opportunity Law of 1987 did not provide sufficient prohibition of discrimination or a sufficient remedy. The government insisted that Article 2 did not require immediate enactment of legislation clearly prohibiting discrimination, that such enactment could and should be held back until the “culture” was ready, and that a mediation remedy that could be refused unilaterally by employers was an adequate remedy⁶.

A complaint brought under the Optional Protocol could conceivably refer to any of the obligations stated in Article 2. The framing of such a complaint for purposes of exhaustion of remedies would depend considerably on the procedural rules of the domestic legal system. A domestic legal system may not provide a mechanism (litigation, ombud) to compel action; in such case the term “unable to provide effective relief” could apply.

ARTICLE 3

This article states the overarching obligation to ensure women’s “development and advancement” and enjoyment of rights on an equal basis with men. It complements Article 2, which indicates the mechanisms that should be employed to eliminate discrimination against women. It reaffirms the contextual nature of equality, indicating that legislation is not the only measure required to be undertaken to eliminate discrimination.

Article 3 parallels Article 3 of the ICCPR and the ICESCR, which states (in exactly the same language in each) the right to equal enjoyment of the rights in the respective treaties. However, it is somewhat more descriptive and comprehensive, alluding specifically to “development and advancement” of women. Each of the respective treaty monitoring bodies has developed its own approach to this obligation, and harmonizing them is beyond this

⁶ The law was changed in 1999, adding clear prohibitions of discrimination by employers and dropping the requirement of employers’ consent to mediation. The plaintiffs have lost at the trial level and are appealing. They State that if they lose on appeal they will bring a complaint under the Optional Protocol—if Japan ever ratifies it.

discussion. However, for purposes of developing cases and examples of appropriate measures, it would be useful to keep these parallel obligations in mind.

ARTICLE 4

Article 4(1) is the subject of a General Recommendation, currently in drafting process. Its application is critical to implementation of the substantive rights in the Convention, but States parties have misconstrued and misapplied it consistently. It is hoped that the guidance provided in the General Recommendation will establish Article 4 as the centrally important tool that it can and should be⁷.

Article 4(1) provides that States parties may adopt temporary special measures to accelerate *de facto* equality, and that such measures shall not be considered to be discriminatory. This means that policies to promote equal access, significant expenditures to establish infrastructure that allows women to exercise rights, and special programmes to promote equal outcomes may not be objected to on grounds that they discriminate against men.

While the language of Article 4(1) is not mandatory, it is clear that accelerating *de facto* equality is one of the goals of the Convention. Since States parties must adopt “all appropriate measures” to eliminate discrimination, temporary special measures should be considered as a primary means to eliminate discrimination and promote equality. The measures may be temporary, but they are necessary to accomplish the Convention’s goals in the long term. Measures such as participation or recruitment and promotion quotas and goals are usually accepted as appropriate and temporary. However, special training programmes for women to “catch up” and for men to understand gender dynamics, policy reviews with an eye to revision of procedures and content of materials, or building facilities such as schools, child care centers, or adequate restrooms or locker rooms, require considerable allocation of resources on a one-time (or short-term) basis. Such expenditures may well be required for women to access opportunities and to succeed. Under Article 4(1) this is not to be considered discriminatory against men. When such programmes and facilities are established, continuing investment is required to maintain equality. This would be a matter of permanent policies that promote equality, required under the various articles of the Convention.

It is important to consider that temporary special measures to accelerate *de facto* equality are necessary because women have been excluded from many of the benefits of society, since time immemorial. Such measures should not be thought of as “remedial” as though women are in some way incapacitated as human beings. They should be considered as addressing long-standing inequalities that result from the privileged position of men.

In terms of the Optional Protocol, Article 4(1) could not give rise on its own to a complaint, as it is permissive and does not state a specific obligation. However, a complaint of failure to undertake temporary special measures could be included with a claim under any of the substantive articles in which such measures are conceivable. For example, a complaint of failure to address educational inequality could indicate that the State party has not undertaken any measures to remedy underrepresentation of girls and women in particular programmes or venues, or has failed to review textbooks and curricula.

Article 4(2) is specifically addressed to the measures that must be in place to account for the biological reality that women bear children. Protecting their employment position during maternity leave and upon return, and providing appropriate maternity and post-natal nutrition and medical care, require expenditures that specifically benefit women. Such measures are not considered to be discriminatory; presumably because they support a biological function that redounds to the benefit of society as a whole and which can only be performed by women.

⁷ This discussion benefits enormously from my participation in the Expert Meeting in Maastricht, 10-12 October 2002, on “Building Blocks for a General Recommendation on Article 4(1) of the CEDAW Convention,” and the Report of the Meeting prepared by Rikki Holtmaat.

ARTICLE 5

This article is unique among human rights instruments and is rarely addressed by States parties in their reports. Many discriminatory practices are specifically grounded in custom, and all are grounded in stereotyping. In many quarters custom, ideas of inferiority of women, and sex role stereotypes are defended as the underpinnings of society. Women as well as men cite custom as unchanging and unchangeable, the source of identity and in some cases of nationhood. It is important to consider the position of the defenders of custom and tradition, what they feel they would lose if things changed. Not only do the privileged fear loss of resources and power, the oppressed fear loss of the only protection they know.

States parties rarely acknowledge that ratification of the Convention requires them to abandon the defence of custom and to promote new attitudes.⁸ They may allude to custom and stereotyping as obstacles to equality under particular substantive articles, but rarely with specific reference to Article 5, and usually with little indication of attempts to change attitudes. Nonetheless, they do have an obligation to undertake such efforts.

Government efforts to change public and private attitudes must be undertaken with full respect for rights of freedom of expression and religion. Such efforts therefore tend to be exhortation, advertisement, programmes to examine and discourage discriminatory expression in the media, textbook reviews, etc. Such “soft” approaches might seem to be less than satisfactory. I offer, as an example of the possibilities, the case of Uganda’s approach to AIDS. Uganda was the first African country to acknowledge the problem and determined that the infection rate could only be curtailed if attitudes towards sexuality changed radically. The message was delivered in a nationwide information campaign promoted by the government. As a result, the rate of new infections has dropped dramatically, while other African countries are struggling with massive increases.

States parties also have a specific obligation to address issues of personal status law—marriage and divorce, child custody, inheritance—that frequently are grounded in discriminatory customary attitudes and practices. Many States parties have reserved on Article 16 or some portion of it, on religious grounds, or indicate cultural constraints on dealing with *de facto* inequalities in family law. Bearing in mind that reservations are to be entered as a matter of current inability to perform the obligation, with a view toward eventually withdrawing them, States parties have an obligation to consider how they might apply principles of interpretation, narrowly construe exceptions, or find ways to harmonise traditional belief systems and international human rights obligations. Certain African countries have done so with respect to “customary law,”⁹ and some Islamic countries have ratified with minimal reservations or have re-examined their laws since entering reservations.

While a complaint under this article alone is conceivable (as under Article 2), it is broadly useful in support of claims under the substantive articles. Article 5 should be cited as a fundamental obligation that precludes the “custom and culture” defence.

ARTICLE 24

This general undertaking reinforces in particular the requirements of Article 2. However, in its generic nature it may be taken as underscoring the comprehensive and continuous nature of States parties’ obligations under the Convention.

⁸ In the *Sumitomo* case, the government went so far as to claim that the country was not culturally ready to provide adequate remedies for discrimination in employment. The plaintiffs noted that since they were part of the national culture, the government was somewhat behind the times in reading the culture, and had a duty to provide leadership in dealing with retrograde cultural attitudes.

⁹ The term “customary law” is generally used to refer to African customary practice, although it is not codified as law. Determination of the particular requirements of custom is frequently the subject of debate and power struggle.

III State obligations under articles 7, 8, 9 and 15 and 16: women's civil and political rights including equality before the law and equality in marriage

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INTRODUCTION

While Articles 7 and 8 lay out the political rights of women to participate fully in public life at the national and international level, Articles 9 and 15 provide the basic framework for granting women full legal capacity. Article 16 complements these provisions by guaranteeing equal rights with men in, during and at the dissolution of marriage, as well as in the family, thereby firmly establishing a State party's responsibility in ensuring women's equal rights also in the private sphere of life.

Those rights must be ensured by the State, keeping in mind the general implementation provisions in Articles 1 to 5 of the Convention. The interrelationship with economic, social and cultural rights enshrined in the CEDAW Convention should also be kept in mind when taking measures to enhance women's political and civil rights in practice. Thus, the right of women to participate fully in the public/political life of their country, as a constitutionally enshrined right, may only be fully achieved if, for example, stereotypical attitudes of men are changed through awareness raising campaigns, if child care facilities are available, and women are made aware of their rights and have access to equal education with men. It is therefore important to adopt a holistic approach to the CEDAW Convention if it is to become an effective tool for the advancement of women's rights and for the prevention of future violations.

ARTICLE 7

This article requires States parties to eliminate discrimination against women in political and public life. Specifically, States parties are under an obligation to ensure that women can vote in all elections, are able to hold elected office, participate in the shaping and implementation of government policy, are represented at all levels of public office, and are active members of civil society the same way as men are entitled to. Such participation, particularly when it reaches a "critical mass" (35 percent in legislative elections, for example) will offer a real chance for women to actively influence the shaping of laws, of educational measures, in advancing the equal rights of women and, in the long run, in changing people's minds that are often filled with stereotyped images.

Most States guarantee the rights enshrined in Article 7 *de jure*, which in practice leads to the "occasional" woman politician, judge, parliamentarian or local government member. In fact, State obligations under this article extend to including concerted efforts to encourage women to become involved in politics while making it possible for them to fulfil their family responsibilities. As indicated in the previous paragraph, this means that guaranteeing these rights in practice, requires further initiatives such as civic education programmes, temporary quotas, child care facilities and information campaigns about the role of women or the creation of role models for girls. The CEDAW Committee's General Recommendation No. 23 provides detailed guidance for States parties as to the meaning of the various provisions of Article 7 and are a useful tool for civil society institutions and NGOs in lobbying for the full implementation of Article 7 and in organising information campaigns.

ARTICLE 8

As a special dimension to the notion of women's adequate representation in the public sphere, Article 8 places an obligation on States parties to ensure to women on equal terms with men the opportunity to represent their government at the international level. This means that women should be given the same opportunities as men to enter the foreign service, be proposed for positions in international organisations and form part of government delegations to international gatherings and, in particular, when the country's observance of its human rights treaty obligations is being reviewed by international expert bodies such as, but not exclusively, CEDAW. In practice, even States which actively promote women's participation in international fora, do so mainly in areas traditionally regarded to be of interest to women such

as children's or women's issues. It is, unfortunately, still rare to see an equal proportion of women in government delegations to, for example, UN Security Council meetings.

ARTICLES 9 and 15

Article 9 ensures women the right - equal to that of men - to acquire, retain or change their nationality and to have the same rights as men in respect of the nationality of their children. This becomes a particularly important legal issue in today's world where marriages to aliens are frequent and where women often lose their nationality upon marriage to a foreigner, while this does not happen in the case of men. Laws are equally discriminatory in many countries with regard to children who automatically acquire the nationality of their father and cannot opt for the nationality of their mother. In case of divorce many practical problems may arise in respect of travel or of educational support if the latter is limited to nationals and the child resides with his or her mother whose nationality the child does not possess. By decoupling the nationality of women from that of their husbands women should have the option of retaining their own or acquiring the nationality of their husband.

Article 15 places an obligation on States parties to ensure the identical legal capacity to women and men. Women must be able to buy and sell property, run businesses in a way that is identical to men, and be able to take up residence in another city or country independently of their husbands' wishes or legal capacity.

The provisions of international human rights treaties are generally applicable to all those residing within the territory of a State party irrespective of a person's status. Certain rights, however, may be limited to citizens such as the right to vote or the entitlement to certain economic or social benefits such as educational grants. In no circumstance, however, is discriminatory treatment of women permitted. This also applies to the right to equality before the law. Complaints under the Optional Protocol in respect of violations of these principles combined with other provisions of the Convention could be brought before the CEDAW Committee. Complaints are filed against the country in which an alleged violation has occurred if that country is party to the Optional Protocol. The author of the complaint does not necessarily have to be a citizen of the country concerned. Due to the general applicability of international human rights treaties to all persons within a given territory, the obligation of States parties to ensure the protection of human rights extends to non-citizens. For example, the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families¹⁰ explicitly places an obligation on States parties to offer adequate protection to migrant workers and provides for additional avenues of redress.

ARTICLE 16

The extensive provisions of this article deal with many aspects of family life and aim at the elimination of discrimination against women in all matters relating to marriage and family. By requiring States parties to grant women the same rights and responsibilities as men in choosing a spouse, during marriage, and in matters of divorce¹¹, Article 16 crosses the line between the public and private spheres of life. In order to guarantee the full enjoyment of human rights of women, government intervention, even in the most fundamental aspects of family life, may become necessary. Many States parties have fallen short of complying with their obligations in this field. Apart from changes in the relevant laws that may not have occurred, policies and programmes to provoke changes in attitudes, traditional thinking and beliefs that are difficult to achieve often lag behind. Therefore, many aspects in the provisions of that article may provide a basis for individual complaints under the Optional Protocol.

General Recommendation No. 21 of the CEDAW Committee offers a detailed interpretation of the specific obligations of States parties under this article and relates them to other provisions of the Convention and other General Recommendations of the Committee, particularly its

¹⁰ This Convention entered into force on 1 July 2003.

¹¹ For example rights as parents, including on issues of family planning, custody and adoption; the same personal rights such as choice of name and the ability to administer property etc.

Recommendation in respect of violence against women. In order to fully understand the meaning of Article 16, a close reading of these General Recommendations is a must.

Violence against women in the family clearly violates provisions of Article 16. However, due to its very nature, it basically also violates most of the other rights enshrined in the CEDAW Convention: namely the right to health, to employment, to education, to access to the courts etc. This is an issue that could lend itself to be pursued not only under the Optional Protocol's individual complaints procedure but also its inquiry procedure.

Women's participation on equal terms with men in public life impacts greatly on shaping, re-shaping and organising society. It is therefore crucial to strive towards full implementation of women's civil and political rights. At the same time, however, the globalised world of today makes a two-fold approach to attaining the full realisation of the human rights of women necessary, which includes measures to gain equality for women also in the private sector. Women worldwide are still underrepresented in decision-making positions in small and large companies. The CEDAW Committee regularly reviews States' actions in this field. Due to its close links between civil and political rights on the one hand, and economic, social and cultural rights, on the other, the Convention on the Elimination of All Forms of Discrimination against Women thus serves as a powerful vehicle at the national level in spurring legal and practical changes toward the full realisation of women's human rights in all domains.

IV. State obligations under articles 10 -14: women's economic, social and cultural rights

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INTRODUCTION

The economic, social and cultural rights that are included in the CEDAW Convention strive to guarantee non-discrimination in the enjoyment of the following rights which lay the foundation for a life in dignity: the right to education (Article 10), the right to work (Article 11), the right to health care (Article 12) and the right to economic resources (Article 13). The unique provisions governing non-discrimination of rural women (Article 14) will also be explained.

Four important concepts need to be understood in order to successfully work with economic, social and cultural rights enshrined in the CEDAW Convention. First and foremost, these are the nature of States parties' obligations under Articles 2 to 5 with respect to economic, social and cultural rights, followed by the exact actions States parties are required to undertake in order to implement the CEDAW Convention. These can be distilled from the work of the CEDAW Committee under the reporting procedure as well as the General Recommendations. Thirdly, it is important to be familiar with the general nature of States' obligations with respect to economic, social and cultural rights under other international conventions and treaties¹². Finally, the issue of justiciability of rights is of fundamental importance to anyone wishing to claim economic, social and cultural rights. Knowledge of these aspects will enable those addressing violations of economic, social and cultural rights through the Optional Protocol to effectively formulate individual complaints.

A study commissioned by the Dutch government to elucidate the exact obligations arising from the CEDAW Convention in general has revealed that the general object of the CEDAW Convention - the elimination of discrimination against women - can be divided into three sub-objects:

1. the realization of full equality before the law and in public administration
2. the *de facto* improvement of the position of women
3. addressing the underlying causes of discrimination of women (see Article 5)¹³.

¹² Particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹³ L.S. Groenman *et al.*, *Het Vrouwenverdrag in Nederland anno 1997*. [The CEDAW Convention in The Netherlands in 1997]. The Hague, 1997, p. 23.

OBLIGATIONS OF STATES PARTIES UNDER ARTICLES 2 - 5

As explained earlier, Articles 2 to 5 impose obligations of a general nature on States parties. As such, they apply to all provisions of the CEDAW Convention, including economic, social and cultural rights. Under Article 2, States parties are obliged to condemn discrimination in all its forms and to pursue without delay a policy of eliminating discrimination. Consequently, the obligation to condemn discrimination is an immediate obligation, which means it must be implemented immediately and without delay. In detail, the following obligations can be drawn from Article 2 and are applicable to all provisions of the CEDAW Convention:

- Introduction of constitutional and other legislative guarantees
- Introduction of legislative measures, if necessary sanctions
- Legal protection by tribunals and other institutions
- No discrimination by State organs
- Appropriate measures to eliminate discrimination by any person, organ or enterprise
- Modification of existing laws, regulations, customs and practices

Obligations of States in respect of economic, social and cultural rights are generally divided into three categories, which also apply to Articles 10-13¹⁴.

1. Obligation to respect: States parties must not interfere in the enjoyment of rights;
2. Obligation to protect: States parties are responsible to counteract or prevent activities which negatively affect the enjoyment of rights;
3. Obligation to fulfil: obligation to provide for those who do not have the resources to provide for themselves.

The CEDAW Convention places an immediate obligation on States parties to take deliberate, concrete and targeted measures (Article 2). Further scrutiny of the Convention's terminology reveals that according to Articles 10-13, all States parties **must take all appropriate measures to ensure** equal rights of men and women with respect to the enjoyment of various rights. By contrast, Article 7 states that States parties **shall ensure** to women, on equal terms with men, the right to vote. This significant difference shows that States parties have a certain margin of appreciation in implementing the CEDAW Convention with a view to eliminating discrimination in the field of economic, social and cultural rights. This margin of appreciation leads to the question of justiciability of the terms "all appropriate measures", as States parties are thereby granted the choice among several available options to eliminate discrimination against women.

THE JUSTICIABILITY OF THE TERM "ALL APPROPRIATE MEASURES"

The central goal of the CEDAW Convention is the elimination of discrimination against women. The Convention does not contain a list of human rights for women, but it obliges States parties to take measures to eliminate discrimination in the enjoyment of all human rights. There is no doubt that guarantees of equality and non-discrimination are justiciable, no matter whether discrimination occurs in the sphere of civil and political rights, or in the sphere of economic, social and cultural rights.

The phrase "all appropriate measures" means that States are required to identify the existing situation and on that basis determine "appropriate" measures to deal with the situation. This

¹⁴ The CESCR's General Comment on education gives insight into the nature of States' obligations. In relation to Article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must **respect** the availability of education by not closing private schools; **protect** the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; **fulfil** (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; **fulfil** (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and **fulfil** (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries. With the exception of its General Recommendation on Article 12 (health), the CEDAW Committee, however, has not made much use of this typology.

means that although States parties have a certain margin of appreciation in determining an appropriate policy, they are nevertheless obligated to assess areas in which discrimination persists and draw up measures for elimination. This obligation includes regular review of the policies chosen. However, the question is to what extent the obligation to work towards the elimination of discrimination is justiciable. Monitoring this type of obligation may not always be easy. Nevertheless, an international body such as the CEDAW Committee is able to express itself on States parties' performance in implementing its obligations under the Convention. Although it may, on occasion, be unable to determine what is "appropriate", the CEDAW Committee will generally be able to determine whether a State has taken the minimum steps necessary to demonstrate a *bona fide* fulfilment of its obligations. On occasions, it will have to conclude that the chosen method to achieve a desired result is within the scope of the State party's margin of appreciation.

The obligation to take all appropriate measures is an obligation of result, rather than an obligation of means or conduct. This, however, does not mean that steps taken by a State party to achieve the desired results are wholly within its discretion. On the contrary, a good faith interpretation of the CEDAW Convention requires immediate action.

EXACT SCOPE OF OBLIGATION

In order to identify the exact scope of obligations States parties are required to undertake under the CEDAW Convention, three sources can be drawn from:

1. Relevant provisions of the CEDAW Convention
2. General Recommendations adopted by the CEDAW Committee
3. Concluding Comments adopted by the CEDAW Committee under the reporting procedure

In addition, widely ratified and detailed international conventions such as those adopted by the International Labour Organisation as well as all relevant material developed in the framework of the ICESCR can prove helpful in interpreting the CEDAW Convention .

The CEDAW Committee phrases obligations in terms of recommendations, which makes it difficult to precisely determine whether a recommended measure is a core obligation under the CEDAW Convention, or whether the CEDAW Committee merely encourages the use of a particular measure. Very rarely has it actually concluded that a State party is in breach of the Convention.

ARTICLE 10

The term 'education' refers to education at all levels, from education for young children, to university and vocational training. The CEDAW Committee has continuously stressed the importance of education. It has maintained that education is a key to the empowerment of women, and low levels of education of women remain one of the most serious impediments to national development. Education is also a prerequisite to the enjoyment of all other human rights. In dealing with State reports, the CEDAW Committee does not only focus on discrimination with regard to the right to education in isolation, but takes into account the relevance of education for other areas as diverse as access to employment and the reduction in the number of children per woman.

As the CEDAW Committee has not adopted a General Recommendation on this issue, the exact obligations of States parties in this respect need to be extracted from the text of Article 10, and the comments made by the CEDAW Committee in the examination of State reports. The work of the CESCR and the Committee on the Rights of the Child which have each adopted a General Comment on education might serve as an additional source of information.

A number of the subparagraphs contained in Article 10 spell out straightforward obligations. For example, Article 10(a) States that the same conditions must be created for career and vocational guidance as well as for access to studies at all levels; 10 (d) requires States parties to ensure the same opportunities to benefit from grants and scholarships. Article 10(c) stands

out, in that it obliges States parties to eliminate stereotyped concepts of roles of men and women and to revise textbooks. This obligation requires tremendous efforts from States parties because it involves addressing the underlying causes of discrimination. To a certain extent, this provision is comparable to Article 5, which also deals with the obligation to eliminate stereotypes. Evidently, the drafters of the Convention found it necessary to draw attention to the importance of revising textbooks. Article 10(f), which obligates States parties to reduce the number of female student drop-outs, shows that States parties are not only required to guarantee access to schools for girls and women on a basis of equality with men, but must also take measures to ensure that girls and women stay in school.

In its Concluding Comments, the CEDAW Committee has expressed its concern about various issues such as the high rate of illiteracy among women in several countries and the fact that women are over-represented in traditional fields of study. On a very limited number of occasions, the CEDAW Committee has explicitly found a violation of Article 10. Examples of such findings are:

- Restricted admission of women to certain courses in higher education (Myanmar) constitutes a violation of Articles 10(b) and (c) as women themselves should be entitled to decide which subjects they wish to study and which professions they wish to pursue.
- As a consequence of the Church-State system of education in Belize, schools are free to expel girls from school because of pregnancy, and only a few secondary schools allow girls to continue their education after pregnancy.
- Upon examination of Colombia's report, the CEDAW Committee said that child labour frequently results in the exploitation of girls and the violation of their rights to health, education and future opportunities.

A further reading of Concluding Comments shows there are certain measures which States parties are required to undertake to implement article 10. These include:

- increasing access to education as well as levels of education by ensuring and promoting universal enrolment of girls, preventing drop-outs at all levels of education, creating an infrastructure by protecting the right to education through effective legislation¹⁵, by providing free compulsory primary education and incentives for parents, public awareness campaigns to encourage girls' education as well as by ensuring that privatising education may not have a negative impact on girls' and women's access to adequate education¹⁶;
- eliminating stereotypes and overcoming traditions by ensuring that school textbooks no longer carry negative images of women, or by increasing - with the help of temporary special measures - the number of women in non-traditional areas of education, especially in science and technology;
- reducing the literacy gap between urban and rural women as well as ensuring education of women from vulnerable groups¹⁷ with the help of affirmative action programmes, including through positive action in recruitment, awareness campaigns and education strategies;
- increasing the number of female teachers and women in decision making positions through the implementation of temporary special measures to accelerate women's representation in educational decision-making and academic posts at all levels;
- using education to eliminate discrimination in other fields, particularly employment, by strengthening vocational and technical training and career counselling for young women and by launching information campaigns regarding non-traditional jobs for women in order to reduce job segregation patterns and the wage gap.

ARTICLE 11

This article begins by stating in paragraph 1 that States parties must eliminate discrimination against women in order to ensure, on a basis of equality of men and women, the right to work

¹⁵ The CEDAW Committee urged the Government of Chile to make all efforts to ensure the passage of a law explicitly prohibiting that adolescent girls be expelled from private and public schools because of pregnancy.

¹⁶ The CESCR mentioned, among others, physical accessibility - education has to be within safe physical reach, either because of reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programmes).

¹⁷ For example Dalits in India and women from ethnic minorities in Western countries.

as an inalienable right of all human beings. Measures must be taken to eliminate discrimination at all stages, including:

- the recruitment stage;
- during employment: promotion schemes, job security and benefits, access to vocational training, equal remuneration, working conditions and protection of health and safety;
- upon termination of employment: right to social security in the event of retirement, unemployment or occupational disability.

Paragraph 2 contains specific obligations to grant women their effective right to work irrespective of marriage and maternity. States parties are not only required to prevent dismissal of women on the grounds of pregnancy, maternity leave and marital status. Also, they are obliged to introduce paid maternity leave without loss of former employment, protect women during pregnancy in types of work harmful to them and are encouraged to provide adequate social services to enable parents to combine family responsibilities with work and participation in public life.

Although the CEDAW Committee has not adopted a General Recommendation solely dedicated to Article 11, a number of General Recommendations deal with elements of this article¹⁸. The issue of over-representation of women in low-paid employment (job segregation), taking temporary special measures to eliminate discrimination, paid maternity leave, equal remuneration, women's work in the informal sector and the double burden for women in combining family and work responsibilities are recurring issues of concern to the Committee. On a number of occasions, it found violations of Article 11. Examples are:

- requiring male spouses to authorize their wife's paid employment and reducing women's pay during maternity leave;
- subjecting women of child-bearing age to mandatory pregnancy tests as a condition of employment;
- gender-restrictive recruitment and job advertisement.

Again, a further reading of the Concluding Comments exposes exact obligations of States parties with regard to the elimination of discrimination in the field of employment. Strikingly, the Committee has strongly emphasised the need to provide legal remedies for women who have been discriminated against. In general, implementation of Article 11 requires:

- the creation of infrastructure to prevent discrimination with respect to the right to work by passing labour laws which contain an equality clause and anti-discrimination provisions and by providing effective enforcement procedures and remedies;
- the elimination of stereotypes with the help of affirmative action and in cooperation with the private sector, to help women cope with both family and work responsibilities as well as integrate women in full-time employment;
- balancing protective labour legislation with granting women the right to freely choose an occupation;
- countries in transition to examine consequences of economic changes for women and take measures to prevent discrimination against women;
- temporary special measures aimed at reaching concrete numerical goals (30 % has been mentioned) and timetables in order to overcome employment segregation;
- guaranteeing equal remuneration for work of equal and comparable value by analysing whether income levels correspond to the level of education (high level of education should correspond to a relatively high level of income); furthermore, it requires the development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate;
- the provision of paid maternity and/or paternity leave while at the same time offering incentives to men to take paternity leave;

¹⁸ These are General Recommendations No. 13, 17 and 19.

- to pay attention to the special needs of women from vulnerable groups such as migrant women, domestic workers, women in the informal sector, older women, women with disabilities and women with sole responsibility for families;
- prevent violence against women in the workplace such as gender-specific violence (i.e. sexual harassment¹⁹) which seriously impairs equality in employment by providing effective legal measures, including criminal sanctions, civil remedies and compensatory provisions.

ARTICLE 12

Although Article 12 is much shorter than Articles 10 and 11, the ensuing obligations have recently been elaborately defined by the CEDAW Committee in General Recommendation No. 24 (1999). The CEDAW Committee has, in this interpretation of Article 12, adopted the broad language used in the ICESCR by stating that measures to eliminate discrimination against women shall be taken in order to realize the right of women to the highest attainable standard of health. Notably, in its work under the reporting procedure, the Committee has also referred to “the right to health” rather than to the more restrictive phrase “access to health care services” used in Article 12 of the CEDAW Convention.

While it is important to thoroughly read the text of the recommendation in its entirety in order to be able to work with Article 12, a few selected obligations spelt out in the recommendation shall be highlighted here. Among these are the obligation to:

- pay specific attention in providing health care services to the needs of vulnerable groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with disabilities;
- provide a gender-sensitive health care system, i.e. a health care system which includes services to prevent, detect and treat illnesses specific to women, and address health rights from the perspective of women and how they differ from men;²⁰
- **respect women’s right to health care** by supporting their health goals and allowing women to make their own choices irrespective of authorization by husbands, partners, parents or health authorities;
- **protect women’s right to health care** by taking action to prevent violations of health rights by private persons and organizations; this includes the enactment and effective enforcement of laws prohibiting female genital mutilation and marriage of girl children as well as the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services;
- **fulfil women’s right to health care** by taking appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care; it should be noted that States parties cannot absolve themselves of responsibility in these areas by transferring powers to private sector agencies;
- ensure women’s right to sexual health by addressing unequal distribution of power in sexual relations²¹ and providing sexual health information, education and services.

Sifting through the Concluding Comments it becomes clear that a series of practices have been considered to constitute a violation of Article 12. These include:

- continued existence of such practices as polygamy, inhumane rites undergone by widows, female circumcision and similar customs, which present serious dangers to the physical and emotional health of women and violate their fundamental human rights;

¹⁹ Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

²⁰ Examples of factors to be taken into account can be found in paragraph 12 of General Recommendation No. 24 and include biological factors, socio-economic factors, psycho-social factors and strict confidentiality between patient and doctor.

²¹ Women and girls are often unable to refuse sex or insist on safe sex.

- laws prohibiting and punishing any form of abortion as well as providing sterilisations only to women who have had four children and provide proof of husband's consent, the refusal to provide abortions on the basis of conscientious objection of doctors ;
- child labour which frequently results in the exploitation of girls and the violation of their right to health.

Numerous other issues have been raised in various Concluding Comments, making the obligations arising from Article 12 more concrete. Examples are:

- education and awareness-raising on family planning, make contraceptives accessible and affordable;
- ensure that privatisation does not prevent access to quality health care services;
- decriminalisation of prostitution and attention for health services for women in prostitution;
- attention for food taboos harming women's health.

ARTICLE 13

This article ensures equal rights in all aspects of economic and social life. The CEDAW Convention thus deals with discrimination in ownership and inheritance, issues which are of major concern to women in many countries. However, this article does not receive much attention, which explains the lack of available information. The CEDAW Committee has welcomed economic initiatives taken by some States parties, such as providing micro credits for women. Significantly, it has started recommending such measures to other States parties during the reporting procedure. In this vein, the Committee recommended the government of Slovenia to set up assistance programmes for women who wished to start their own businesses and educate banks and other relevant institutions about women's capacities in these areas. Vice versa, it has considered the situation where women had limited access to credit owing to their lack of collateral to amount to indirect discrimination to be in violation of Article 13.

ARTICLE 14

This provision is a unique feature in international human rights treaties. No other human rights treaty contains a special provision for rural women which make up two-thirds of the world's female population. As such, it requires States parties to ensure the application of the CEDAW Convention to women living in rural areas and thereby take into consideration the particular difficulties rural women may face in leading a life without discrimination. Furthermore, States parties are obligated to eliminate discrimination against rural women in development by guaranteeing participatory rights, access to housing, health facilities and training as well as to credit, loans and to benefit equally from agricultural reforms and land resettlement schemes. A close reading of available documents from the CEDAW Committee shows that the Committee mainly inquires into the situation of rural women when dealing with the substantive provisions of the CEDAW Convention. The CEDAW Committee generally recommends States parties pay special attention to the needs of rural women while discussing initiatives taken to implement the right to education, the right to work and economic rights.

CONCLUDING REMARKS

Time and again, it has been stated that economic, social and cultural rights are phrased in a vague manner and are therefore not justiciable. Contrary to this belief, the work of the CEDAW Committee in spelling out exact obligations deriving from economic, social and cultural rights of the Convention demonstrates that it is possible to speak of these rights in terms of violations and real guarantees, particularly when dealing with the obligation to eliminate discrimination in the enjoyment of these rights. In giving instructions of a general nature as well as in providing individual States parties with detailed guidance in implementing these articles, the CEDAW Committee has filled Articles 10-14 with life. Although it has been somewhat restrictive in singling out particular practices and national laws which violate the CEDAW Convention, these instances are indicative of the Committee's view on the implementation of the Convention and may prove of help in filing complaints under the Optional Protocol. It is therefore of utmost importance to use both the Concluding Comments and the General Recommendations as they provide guidance in extracting concrete State obligations from the CEDAW Convention.

B. The Optional Protocol to CEDAW

I. Introduction to the Optional Protocol and its mechanisms

Jane Connors, United Nations Office of the High Commissioner for Human Rights²²

The Optional Protocol to the Convention came into force on 22 December 2000, and as at 22 September 2003 had been ratified or acceded to by 55 States parties, while a further 75 states were signatories to the treaty. The Protocol contains two distinct procedures: a communications or petition procedure and an inquiry procedure. The communications procedure entitles individuals or groups of individuals, who fulfil certain preconditions, to submit communications or petitions in which they claim to be victims of violations of any of the rights set forth in the Convention by a State party (see Articles 3 and 4). Communications may be submitted on behalf of an individual or a group of individuals, provided that they consent, or the author of the communication can justify acting without their consent (see Article 2). The inquiry procedure entitles the Committee of its own motion to inquire into grave or systematic violations of the Convention in a State party (Articles 8 and 9). The Protocol can be ratified or acceded to by any State party to the Convention (article 15), and any State which chooses to accept the Protocol may opt out of the inquiry procedure (Article 10). To date, only two States parties to the Protocol, Bangladesh and Belize have decided to opt out of the inquiry procedure. Any State party which opts out of the inquiry procedure, may choose to accept it at a later stage (Article 9.2).

As the Optional Protocol is a new instrument, the CEDAW Committee has not had the opportunity to develop procedures and jurisprudence. The procedures to be followed by those who wish to use the mechanisms under the Protocol must therefore be gleaned from the terms of the treaty itself, the statements made by delegations on its adoption and the rules of procedure relating to the Protocol which were crafted by the Committee at a meeting in Berlin in December 2000 and adopted in early 2001. Necessarily, the approaches of existing human rights treaty bodies with similar procedures can also be drawn on particularly as the Optional Protocol is part of a holistic framework of mechanisms to assist in the implementation of human rights, rather than a stand-alone solution to address violations of women's rights.

THE INDIVIDUAL COMPLAINTS PROCEDURE

A complaint under the Optional Protocol can only be brought against a State which is party to the CEDAW Convention, having ratified it or otherwise accepted it; and has recognized the competence of the CEDAW Committee to consider complaints from individuals through acceptance of the Optional Protocol (Articles 1 and 3). If a State is a party to the CEDAW Convention but not to the Optional Protocol, or, if it is not a party to the CEDAW Convention it is impossible for complaints of alleged violations of the Convention to be admissible against this State. However, if these two pre-conditions are satisfied anyone can lodge a complaint with the CEDAW Committee claiming that her rights under the treaty have been violated.

The complaint need not take any particular form, although CEDAW has adopted guidelines for complaints under the Protocol²³. Claims may not be anonymous and must be submitted in writing and be signed. Accordingly, complaints may not be submitted by e-mail, as these do not bear a signature (see Article 3). There is no time limit for the submission of complaints, but delayed submission may pose difficulties in respect of the provision of relevant supporting documentation material and establishing the facts.

When the Committee receives a complaint it is faced with two levels of inquiry. These relate to **the admissibility** of the claim, as certain preconditions must be fulfilled before the validity of the alleged violation can be considered; and **the merits** of the claim, or whether the facts alleged are considered to constitute a violation of the CEDAW Convention.

²² The views expressed are those of the author and do not necessarily reflect the views of the Office of the High Commissioner for Human Rights.

²³ UN Document A/57/38 (Part I), Chapter V, p. 45 - 47.

The claim should be accompanied by all documents which are relevant to both levels of inquiry. Claims should be accompanied by details of any administrative or judicial decisions taken at the national level with respect to the matter, including copies of such decisions, as well as copies of all relevant national laws. If the complaint contains sufficient information relating to the admissibility criteria, as well as the merits of the case, the complaint will be 'registered' by the CEDAW Committee, and the procedure for consideration of communications outlined in the Optional Protocol and amplified by the Committee's rules of procedure will begin. It is crucial to fulfil the formal requirements governing the admissibility of a complaint in order to access the communications procedure. As these affect the information would-be petitioners should provide in their communication, they are set out below.

Admissibility requirements of an individual complaint

The first precondition of admissibility is that the complainant have 'standing' under the Optional Protocol to submit a complaint. Article 2 of the Protocol indicates that standing is limited to those who are victims of violations or those who claim on their behalf. Accordingly, the complainant must be an individual or a group of named individuals (not a group *per se*), who are under the jurisdiction of the State party, who claims to be a victim or victims of a violation of one or more of the rights set out in the CEDAW Convention. The complainant must therefore show in her communication that she is personally and directly affected by the law, policy, practice, act or omission of the State party which she claims has violated or is violating her rights under the CEDAW Convention. It is not sufficient for a claimant to challenge a law or State policy as being discriminatory or a violation of the Convention in the abstract. Such a claim is termed an *actio popularis* which will be inadmissible. The complainant or complainants must show how the law, policy or practice victimizes her or them as an individual.

Complaints under the Protocol may also be submitted on behalf of an individual or group of individuals who are alleged to be a victim or victims of a violation by their designated representatives where they consent (see Article 2 and Rule 68 of the Rules of Procedure), or by others where the individual or group gives her or their consent. A complaint may also be submitted on behalf of such an individual or group of individuals in the absence of consent, where the author can justify such action. Again, actual victimization of the alleged victim must be shown, and where one acts on behalf of another one must obtain and prove sufficient authorization, or justification for acting without consent.

The individual or group of individuals submitting the communication must prove that she is or they are under the jurisdiction of the State party concerned. This is particularly important in the case of alleged violations of the rights of female immigrants, non-nationals and individuals residing in States other than their own.

Those who submit a communication must claim a violation by the State of one or more of any of the rights set out in the Convention. In order to address the fact that many of the provisions of the Convention do not set out 'rights' *per se* but identify appropriate measures to be taken by States parties to eliminate discrimination against women on the basis of sex, drafts of the Optional Protocol provided that the complainant could submit a claim if she were directly affected by the failure by the State party to give effect to its obligations under the CEDAW Convention or if she were directly affected by a violation of one or more of the provisions of the Convention. The Optional Protocol as adopted provides that communications must relate to a violation of any of the rights set forth in the Convention. Several of the interpretative statements made by governments on the adoption of the Optional Protocol by the Commission on the Status of Women²⁴ emphasized the fact that as the Convention requires States parties not only to refrain from conduct that infringes directly on the rights of the Convention, but also to take positive measures to ensure that a right set forth in the Convention can be effectively enjoyed, the Committee would be able to accept communications concerning each and substantive provision of the Convention, and will examine whether the State party has taken all

²⁴ See UN document E/199/27/Annex II.

necessary steps to fulfil the Convention's obligations²⁵. In order to be admissible, however, the communication must relate to areas covered by the Convention. Thus, if a communication concerned arbitrary deprivations of life, the right to form a trade union or freedom of expression, it would not be admissible unless there were some element of discrimination on the basis of sex, as the CEDAW Convention does not protect those rights *per se*. Whether the General Recommendations of the CEDAW Committee, expand the meaning of the articles of the CEDAW Convention so that violations of the terms of a General Recommendation by a State party could found a communication will need to be considered by the context of a concrete case. In particular, the capacity of General Recommendation No. 19, on violence against women, to be considered as an explanation of the definition of discrimination in Article 1 of the CEDAW Convention is likely to be an important consideration for the Committee, as with the exception of obligations to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women contained in Article 6, violence against women is not addressed explicitly in the Convention itself.

In order for a communication to be admissible, all available domestic remedies must be exhausted (Article 4.1). On the basis of the practice of the existing treaty bodies, this means the complainant must have pursued her claim through the local court system, even if she has doubts about the effectiveness of such action. There are, however, exceptions to this rule. Thus if exhaustion of domestic remedies would be unreasonably prolonged, or if they would be clearly ineffective, such as where the law in the State on the issue is clear, or if remedies are otherwise unavailable, for example, if legal aid is available, but denied, the complainant may not be required to exhaust domestic remedies. Rule 69.9 of the Committee's Rules of Procedure provides that where a claimant under the Optional Protocol claims to have exhausted domestic remedies or invokes one of the exceptions to this requirement, and the State party disputes that claim, the State party is required to give details of the remedies available in the particular circumstances of the case.

A communication will also be regarded as inadmissible if the CEDAW Committee has already examined the same matter or if the same matter has already been examined or is being examined by another international procedure of investigation or settlement. Inadmissibility in these circumstances aims to ensure that there is no duplication at the international level. It also highlights the importance of routing communications to the body which can provide the most appropriate relief for the victim, given that in many cases victims would have possibilities of claiming under the First Optional Protocol to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination or the Convention against Torture, or regional procedures, such as those within the Council of Europe, the European Union, the Organization of American States and the African Union. Several issues arise with regard to this criterion of admissibility. These include the meaning of 'the same matter', and what constitutes another 'international procedure of investigation or settlement'.

It is clear that the term 'same matter' refers to communications involving the same set of facts, the same individuals and the same violations. Where the latter is concerned, it is fairly clear that the 1503 Procedure of the Commission on Human Rights, the Committee on the Status of Women (CSW) communications procedure and the communications procedures developed by the special procedures mandate holders do not meet the definition of an international procedure of investigation or settlement. The Human Rights Committee has taken the view that inasmuch as the Covenant provides greater protection than is available under other international instruments, facts that have already been submitted to another international mechanism can be brought before the Human Rights Committee if broader protections are invoked. In that Committee's view, also, if complaints dismissed by other international mechanism on procedural grounds have not been substantively examined, the same facts may therefore be brought before the Human Rights Committee. It is likely that the CEDAW Committee will take the same position on these issues.

²⁵ See Austria; Canada; Costa Rica; Denmark; Germany; Ghana; and Italy.

A communication may also be deemed inadmissible if it is insufficiently substantiated, ill-founded or incompatible with the provisions in the CEDAW Convention. Further, if the complaint is perceived to be an abuse of process, because it is frivolous, vexatious or inappropriate, it may be determined to be inadmissible. This may occur if there have been repeated claims with respect to the same issue, although these have been dismissed.

The most difficult admissibility criterion of the Optional Protocol is the requirement that a communication must refer to facts which occur after the entry into force of the Optional Protocol for the State party concerned. If these facts have occurred prior to its entry into force, a complaint regarding these facts is inadmissible, unless these facts continued after that date. As the Optional Protocol enters into force three months after ratification or accession for the State party concerned, this period should be taken into account in drawing up potential claims.

Reservations to the CEDAW Convention may also be relevant to the question of admissibility. The Optional Protocol prohibits reservations to its terms, although it does allow States parties to opt-out of the inquiry mechanism. However, the CEDAW Convention itself is subject to a large number of reservations, some of which may be contrary to its object and purpose, and therefore precluded by Article 28, paragraph 2. It is likely that communications will concern articles of the Convention to which the State party concerned has submitted reservations, or may be submitted in circumstances where the State has entered reservations which are general and affect the Convention in its entirety. In an appropriate case, as in the practice of the Human Rights Committee²⁶, the Committee may be required to determine whether such a complaint is inadmissible, or whether it may proceed to examine the communication on the basis that the reservations are incompatible and severable.

If a complaint is considered admissible, the Optional Protocol and the Committee's Rules of Procedure provide that the complaint will be forwarded to the State party concerned confidentially. The State is then given six months in which to submit a written explanation to the CEDAW Committee, clarifying the matter and providing details of any remedy that may have been provided. This material will then be considered by the CEDAW Committee in a closed meeting, which will make its decision on the basis of the written submissions. The Committee is then obliged to transmit its 'views', constituting of its decision, and any recommendations it might have, to both parties. The State party is obliged to give consideration to these views and recommendations, and submit a report on any follow-up action within six months. The Committee may ask the State party to present further follow-up information, as well as providing information in the context of the State's next periodic report to the Committee. It is up to the State party to determine how to fulfil these recommendations.

Like other United Nations human rights treaty bodies with complaints procedures, the Committee is able to take urgent action where irreparable harm would otherwise be suffered were the case to wait to be examined in the usual way. Such a request would be appropriate if the State's action could not be undone.

THE INQUIRY PROCEDURE

This procedure, set out in Articles 8 and 9 of the Optional Protocol is modeled on Article 20 of the Convention against Torture, Inhuman and Degrading Treatment or Punishment, and enables the CEDAW Committee, to initiate inquiries into reliable indications of grave or systematic violations by a State party of the rights set forth in the Convention, provided that the State party concerned has not declared at the time of ratification or accession that it does not recognize the Committee's competence in this context. The procedure is confidential, but a summary of the Committee's activities in relation to this procedure must be provided in its annual report to the General Assembly.

²⁶See General Comment 24, adopted by the Committee at its fifty-second session and *Rawle Kennedy v Trinidad and Tobago*, Communication 845/1999.

The Committee's rules of procedure provide that an inquiry may be instigated on the basis of information received from any source, including, for example, women's organizations, or human rights groups. Information that appears to be submitted to initiate an inquiry must be forwarded by the secretariat to the Committee, and maintained in a permanent register. The Committee may instruct the secretariat to investigate the reliability of the information and seek further or corroborating information. After the Committee has examined the information and ascertained that it is reliable, it must then invite the State party concerned to comment within a certain time limit. The Committee considers any comments, any additional information, including from representatives of the State party, non-governmental organizations and individuals, as well as relevant United Nations documentation. On the basis of this information, the Committee may decide to designate one or more of its members to conduct the inquiry, and report within a fixed time limit. The modalities of the inquiry are to be determined by the Committee, but confidentiality is required, and the cooperation of the State party is sought at all stages. An inquiry may include a visit to the State party as long as the State party consents.

After the inquiry comes to an end, the Committee is required to transmit its findings to the State party, together with any comments or recommendations. The State has six months to react, and the CEDAW Committee is entitled to request the State party to provide further details of any measures taken in response to the inquiry, including in its next periodic report under Article 18 of the Convention. The Committee against Torture has now conducted seven inquiries. These have been instigated by non-governmental organizations, who wish to address a broad pattern of violation.

Where the CEDAW Convention is concerned, an important question to be addressed is whether an alleged violation meets the threshold requirement of a 'grave or systematic violation of the rights under the Convention'. Several interpretative statements made by governments on the adoption of the Optional Protocol at the forty-third session of the Commission on the Status of Women raised this issue. For example, China suggested that in view of the substantial amount of human and financial resources required to carry out an inquiry, that procedure should apply only to cases where women's rights are seriously violated and on a massive scale, and accordingly a single event could not constitute grave or systematic violations. Similarly, Egypt expressed the view that the reference to grave violations, using the plural form, means the repeated occurrence of such violations, while Israel expressed its view that the phrase 'grave or systematic' excluded inquiries into singular, isolated incidents, a view supported by Japan which indicated that an inquiry should not be conducted in relation to individual or accidental cases. Several interpretative statements, including those made by Canada and Germany on behalf of the European Union and associated countries stressed that 'grave or systematic violations' could also arise as a result of the State party failing to act. Ghana indicated that the phrase grave or systematic will be construed broadly so as not to impede the effective functions of the Committee. Similarly, the Philippines expressed its understanding that the term grave was distinct from systemic, and imposed no higher standard than the term serious, with the expression 'violation of any of the rights in the Convention' being inclusive of all its provisions and obligations - Articles 2 to 16 and 24. It will be for the Committee, taking into account these statements, and the practice of the Committee against Torture, to make a decision on whether allegations reach the threshold of grave or systematic violations of the Convention.

II. The Optional Protocol in the Framework of International Human Rights Instruments

Jane Connors, United Nations Office of the High Commissioner for Human Rights²⁷

The Optional Protocol to the Convention constitutes but one part of the comprehensive framework of international human rights monitoring mechanisms which seek to ensure implementation of human rights obligations at the national level. Currently, implementation of

²⁷ The views expressed are those of the author and do not necessarily reflect the views of the Office of the High Commissioner for Human Rights.

seven of the human rights treaties adopted by the United Nations is monitored by a human rights treaty body, comprised of 10 to 23 independent experts of recognized competence in the field of human rights who are nominated and elected by States parties to the treaties. States which ratify human rights treaties not only assume the obligation to implement the treaty's provisions at the national level, but also to submit reports periodically on the measures it has taken to ensure the enjoyment of the rights provided in the treaties. Four of the human rights treaty bodies have competence to consider communications from individuals alleging violations of the rights in the respective treaty. Only complaints from persons within the jurisdiction of States that have formally accepted these procedures can be examined by the treaty bodies. Formal acceptance in the case of the International Covenant on Civil and Political Rights requires ratification of a separate treaty, the First Optional Protocol to that Covenant. Similarly, formal acceptance of the communications competence of the Committee on the Elimination of Discrimination against Women results from acceptance of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. In the case of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the competence of the relevant Committee to receive petitions results from specific declarations by States parties to the optional complaints procedures contained in those Conventions. A fifth procedure for individual communications is contained in the International Convention on the Protection of Migrant workers and Members of their Families. This treaty entered into force on 1 July 2003, but no State party has accepted its monitoring committee's competence to receive and consider complaints.

The preconditions for admissibility of complaints with respect to these various treaties are similar to those of the Optional Protocol to the CEDAW Convention. The procedures are also similar, and to a large extent the issues discussed by each treaty body in determining the merits of any claim is congruent.

There has been a significant growth in the numbers of communications submitted for the consideration of the Human Rights Committee under the First Optional Protocol. The Committee has taken a broad view of its competence in cases of discrimination, in light of Article 26 of the International Covenant on Civil and Political Rights which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The Committee has developed strong jurisprudence on discrimination, including sex discrimination. Accordingly, a number of petitions raising discrimination against women in the context of nationality, judicial process and pension entitlements have been considered by the Committee²⁸.

Despite the fact that the International Convention on the Elimination of All Forms of Racial Discrimination provides scope for such claims, and the Committee would be happy to receive such claims, very few cases of sex discrimination have been brought before the Committee on the Elimination of Racial Discrimination. Similarly, again despite the scope of the Convention and the interest of the Committee against Torture, that Committee has received very few petitions raising sex discrimination. In 2000, however, in *AS v. Sweden*²⁹, the Committee concluded that there were substantial grounds for believing that the complainant would be in danger of being subjected to torture or death because of her alleged adultery if the State party expelled, returned (refouler) or extradited the petitioner to her country of origin. Accordingly, it decided that the State party had an obligation in accordance with Article 3 of the Convention against Torture to refrain from forcibly returning her to her country of origin or any other country where she might run a risk of being returned to her country of origin.

In addition to the procedures which exist in the framework of the United Nations, sex discrimination is also a concern of the institutions of the Council of Europe, the European

²⁸ see *Aumeeruddy-Cziffra and others v Mauritius*, Case No 35/1978; *Brooks v The Netherlands*, Case No. 172/1984, *Zwan-de-Vries v The Netherlands*, Case No 182/1984; *Ato del Avellanal v Peru*, Case No 202/1986.

²⁹ Case No 149/1999.

Union, the Organization of American States and the African Commission on Human and People's Rights. With the exception of the latter, decisions reached by these bodies are binding, whereas the decisions of United Nations treaty bodies are recommendatory views only. The jurisprudence of these institutions and in particular those of the Council of Europe and the Organization of American States with regard to discrimination against women is impressive and significant.

There are thus a number of arenas at both the international and regional levels in which discrimination against women may be raised, and would-be petitioners may need to make a choice as to the most appropriate mechanism to consider their communications. Such a choice should be based on strategic considerations, including whether pursuing the communication under the Optional Protocol to CEDAW would be more advantageous for the petitioner than another international mechanism or a regional mechanism. If immediate relief for an individual is sought, accessing a regional mechanism empowered to make binding decisions might be more appropriate. In the event the focus of the communication is to bring about legal or policy change at the national level through the pursuit of an exemplary case, one of the United Nations complaints procedures may be the more appropriate route. In these circumstances, again, a choice might have to be made as the petition might be admissible under more than one procedure. Again, such a choice would have to be based on strategic considerations, including with respect to the approach of the various treaty bodies.

III How to use the Optional Protocol: A Fictitious Case Study

Johanna Nelles, German Institute for Human Rights

After breaking away from a socialist federation of States, country X embraced independence in 1992. While changing its course to a parliamentary democracy and market economy, country X has undergone many significant changes. With the collapse of entire industries, job security no longer exists and unemployment rates have soared among unskilled workers. The government of X has introduced a social welfare system and provides minimum unemployment benefits. It has also introduced a public health care system based on the previous system which covered all necessary and available health care. Under the former system, costly operations, hospital care, dental care as well as ante-natal care were provided free of charge.

However, as government resources are scarce, the government of X has started to cut down on health spending and has reduced the provision of public health care to the bare minimum. The public health plan now covers initial doctor's visits only. It does not extend to follow-up care and entirely excludes dental care. Furthermore, patients are required to pay for 10 % of the cost of any operation. In order to maximise scarce resources, the government has issued a directive to understaffed public hospitals which make up 95 % of all hospitals in the country. This directive envisages that instead of increasing the ratio of surgeon per patient, all minor cases be dealt with by nurses in consulting rooms. Only in the event of complications shall they be referred to surgeons in the operating theatre. The directive has generally not had much impact, as nurses have referred most cases on as they have felt inadequately trained to replace surgeons. However, this directive is slowly being implemented in the maternity ward, as nurses have undergone a three week midwifery course and feel comfortable accompanying deliveries. Following the directive, maternity ward doctors and surgeons are only called to deliveries if complications arise.

A year after the directive became effective, several cases of medical malpractice during routine deliveries performed by nurses surfaced. These were due to a lack of adequate training, lack of equipment in the consulting rooms and a shortage of maternity ward doctors to deal with complications. The rising number of cases of malpractice has provoked a public outcry among the female population. However, the government has failed to respond and has simply advised those dissatisfied with public health care to sign up to private insurance companies' health care schemes which cover all medical costs and therefore guarantee

special hospital treatment related to pregnancy and delivery. However, monthly rates for these schemes exceed an average salary in country X by far. In view of the fact that the government of X has ratified both CEDAW and the Optional Protocol the following international remedies may be resorted to.

This scenario could possibly amount to a violation of CEDAW Article 12, which requires States parties to CEDAW to guarantee non-discrimination of women in the field of health care. This includes the provision of adequate access to all health services, particularly those in connection with pregnancy, confinement and the post-natal period. Although access to health care is granted to the population of X on an equal basis, the government directive placing greater responsibility on nurses has negatively affected the quality of such services. As this directive has been implemented predominantly in the field of pregnancy and post-natal health, it has affected women disproportionately. Despite the non-discriminatory purpose of the directive, it has however had a discriminatory effect. Subject to evaluation by the CEDAW Committee, there are two available avenues under the Optional Protocol to remedy this violation.

(a). Submission of an Individual Complaint in accordance with Article 2 of the Optional Protocol

To be considered by the CEDAW Committee, the individual complaint must fulfil the following admissibility criteria³⁰.

1. The communication must be in *writing* and may *not be anonymous*. It therefore needs to be submitted by an individual who is willing to unveil her identity. This means, the author of the individual complaint must be prepared to sign it with his or her name.
2. This individual must be *under the jurisdiction of a State party to CEDAW*, which is usually the case of citizens and residents. In this example all citizens and women lawfully residing in country X are under its jurisdiction. Problems may arise in connection with an individual complaint submitted by a person residing unlawfully within a State party. Whether or not he or she can be considered to be under the jurisdiction of the host country will have to be decided by the CEDAW Committee, once this issue arises.
3. The State party in question must also have ratified the Optional Protocol to CEDAW.
4. The individual must claim to be *victim of a violation of any of the rights of the CEDAW Convention*. As the right to appropriate services in connection with pregnancy is enshrined in Article 12 of CEDAW, a female citizen of country X who has experienced medical malpractice in connection with delivery at a state hospital may claim to be victim of a violation of Article 12 paragraph 2.
5. The individual must have *exhausted all available national remedies*. Before submitting an individual complaint to the CEDAW Committee, a victim of a violation of the CEDAW Convention must have tried to remedy the violation in national courts of law, administrative tribunals or other available institutions. Only in the event that such national remedies are unlikely to bring effective relief or are unreasonably prolonged shall the victim of a violation be granted direct access to the CEDAW Committee. In this case, the burden of proof is shifted onto the State party who will have to show that there are avenues of redress available at the national level, which the individual has not resorted to.
6. The CEDAW Committee will not consider an individual complaint, if it has *dealt with the same matter previously or if the same matter is being or has been examined by another international investigative procedure*. This means once a case of sex discrimination is brought to an international treaty body like the Human Rights Committee, it cannot be brought before the CEDAW Committee thereafter. As treaty bodies may differ in finding a violation of their respective treaty provisions, it is advisable to submit a complaint to a treaty body, which has previously dealt with similar issues and has therefore developed extensive jurisprudence on the subject. Furthermore, individuals from member States of the Council of Europe shall bare

³⁰ For details see the model communication form adopted by the CEDAW Committee, UN Document A/57/38 (Part I), No. 406 - 407.

in mind that as opposed to UN treaty bodies, the European Court of Human Rights is in a position to hand down binding decisions, which member States are obligated to respect. It is therefore extremely important to opt for the most promising route based on a clear assessment of the chances of success and the effect desired.

7. The issue at the heart of the individual complaint must be *compatible* with the provisions of the CEDAW Convention. This means, the right allegedly violated by a State party must be guaranteed by CEDAW.

8. The individual complaint must be *sufficiently substantiated and not manifestly ill-founded*. It is therefore advisable to submit any relevant information concerning the author, the victim of the violation (if not the author), the alleged violation including date and place of the violation as well as the provision of the Convention that were allegedly violated. Should more information become available after submission, it is important to present this as early as possible. In this example, an individual complaint would state detailed information concerning both the author and the victim, including name, date and place of birth, nationality, passport number, sex, marital status, profession, ethnic background, religious affiliation and present contact details. It would also state the circumstances surrounding the alleged violation by explaining the government directive, the effect it has had on women, the exact case of the individual putting forward the individual claim and how it constitutes, in her or the author's view, a violation of Article 12 of CEDAW. It would furthermore include a detailed account of domestic legal action pursued by the individual before submitting the communication to the CEDAW Committee.

9. If submitted long after the violation has occurred or if the communication has not been accompanied by any serious information concerning the matter, the CEDAW Committee may consider an individual complaint to constitute an abuse of the right to submit a communication. It is therefore advisable to act in proximity to the alleged violation, back up the individual complaint with all available information and treat the matter in a way that will not suggest an abuse of the communication procedure in any form.

10. The alleged violation must have occurred after entry into force of the Optional Protocol for the State party in question. An exception is made for alleged violations which have first occurred before entry into force but which have continued after this date.

Once the CEDAW Committee has declared the individual complaint admissible, it will forward the complaint confidentially to the government of X, followed by a request to submit written explanations concerning the matter and any remedies provided by the government of X to address it. After examining in closed meetings the information received from all parties, the CEDAW Committee will convey its views on the matter together with any recommendations to all parties concerned. The government of X shall then give due consideration to the views of the Committee and provide within six months a written response which includes information on measures taken in response to the views and recommendations of the CEDAW Committee. For long-term monitoring, the CEDAW Committee may ask the government of X to include information on such steps in its subsequent periodic State reports. As opposed to a binding court decision, the CEDAW Committee may only issue views and recommendations concerning the correction (reparation) of an individual violation, the implementation of which is encouraged, but not legally binding for the State party concerned.

(b) Institution of an Inquiry Procedure in accordance with Article 8 of the Optional Protocol

Instead of presenting the case from a victim's perspective as an individual complaint, it could also be presented to the CEDAW Committee as information indicating grave and systematic violations by a State party of the rights laid out in the Convention. This does not require a detailed account of an individual violation of any of the CEDAW provisions. Rather, it requires the presentation of as much reliable information concerning a systematic or a particularly grave violation by a State party of any of the rights enshrined in the CEDAW Convention. As an inquiry procedure has yet to be instituted, the exact requirements for such a procedure remain unclear. The wording of Article 8 of the Optional Protocol suggests that anyone may provide the CEDAW Committee with information concerning such grave and systematic violations of the rights set forth in the CEDAW Convention. As an *actio popularis* this means,

those putting forth the information do not need to be victims of the violation themselves. In terms of the threshold for the nature and number of violations, the CEDAW Committee will have to issue an interpretation of the terms, grave or systematic violations'. However, the terminology suggests that depending on the specific situation of a State party, a considerable number of violations rooted in the same law, decree, directive, practice or lack thereof must have occurred.

While presenting the above mentioned example to the CEDAW Committee, it would be important to include as much information as possible on cases of medical malpractice by nurses in public maternity wards all over the country. As a second step, it would be necessary to show the correlation between the government directive and the increase in cases of medical malpractice. Thirdly, the discriminatory element of this directive would have to be explained in order to show a violation of Article 12, paragraph 2 of the CEDAW Convention. It is by revealing the extent of the de facto discriminatory effect of the government directive that the systematic violation of the right of women of Country X to appropriate services in connection with pregnancy, confinement and the ante- as well as post-natal period can be demonstrated. Once the CEDAW Committee receives this information, it will invite the government of X to examine the material and respond to it. Upon receiving its response, the CEDAW Committee will decide whether to conduct an inquiry into the matter, which, given the consent of the government of X, may include a visit to its territory. After the inquiry has come to an end, the CEDAW Committee will transmit its findings with comments and recommendations to the government of X, which is granted a period of six months to submit observations on the findings of the inquiry as well as on the comments and recommendations. At the end of this period, the CEDAW Committee may seek information on steps taken by the government of X in response to the inquiry. As a long-term follow-up measure, the CEDAW Committee may ask the government of X to include in its periodic State reports information on such steps. The inquiry procedure therefore aims at eradicating any discriminatory laws, regulations or practices in close cooperation with the State party concerned. Contrary to the individual complaints procedure, it seeks to remedy systematic discrimination, thereby benefitting all individuals affected.

C. Aspects to consider in achieving gender equality by way of using the CEDAW Convention - Results of the Seminar

Comments, questions and general discussion during the Seminar have raised several important issues which should be borne in mind when addressing women's rights violations. In general terms, any attempt at remedying such violations should reflect a strategy based on an assessment of all available avenues of redress. First of all, it is recommended to carefully select which women's rights violation to remedy and the point in time when to pursue a particular issue. This choice should be made based on the political climate of a country, the cultural context and level of education of women in general. Thereafter, it is important to choose which route to take to achieve a climate of equality. This requires familiarity with the human rights treaty system and a certain degree of knowledge of treaty body jurisprudence. This allows activists to assess a complaint's possible chance of success. Apart from remedying individual violations of women's rights, it is important not to lose sight of projects and activities in support of a rights-based approach, such as monitoring the implementation of CEDAW, alternative reporting, awareness raising and lobbying activities. As the outcome of the Seminar, special areas of activity to focus on are listed at the end of this chapter.

I. Monitoring and reporting on the implementation of the CEDAW Convention:

Monitoring the implementation of CEDAW requires a daily review of government action. It is vital to set up a monitoring system, which allows the compilation of information concerning laws, practices and court cases with references to the CEDAW Convention. As the periodic government report is drawn up, the available information enables NGOs to easily compile a shadow or alternative report and submit it in due time to the CEDAW Committee. It should be

borne in mind that aside from the reporting system under CEDAW, other treaty bodies are equally willing to consider shadow reports. While it is not necessary to write a complete shadow report to the periodic State report to a particular treaty, it is nonetheless important to point out particular issues from a women's rights perspective.

Consequent daily monitoring also allows for swift recognition of systematic discrimination against women, either in law or in fact. It is therefore crucial to grasp the concept of discrimination on the basis of sex, which can exist in a direct and an indirect form. Although there are many abuses women suffer, not all are based on sex. As CEDAW covers discrimination on the basis of sex only, it is crucial to first address discrimination against women on the basis of sex before tackling discrimination on the basis of sexual orientation, age, or other distinctions. Systematic discrimination against women on the basis of sex is often difficult to detect although it may exist on a large scale. For example, the deterioration of health care services after privatisation in the former Soviet Republics is of concern to the CEDAW Committee, as it discriminates against women because funds have been allocated in a way which disadvantages women. Due to their special health needs, longer life expectancy and the fact that women constitute 51 % of the population, funds should be allocated to hospitals, institutions and training services in a way which reflects this reality.

II. Raising Awareness

Depending on the cultural context of a country, raising awareness of human rights of women may prove difficult, as the claim that inequality is supported by and based upon cultural traditions is widespread. It is therefore of importance to realise that the CEDAW Convention does not prescribe a one-size-fits-all solution to the elimination of discrimination against women. Rather, the CEDAW Convention is broadly worded in order to allow for a culturally acceptable implementation of its provisions - an implementation which may differ from country to country. Awareness-raising activities should consequently reflect the possibility of a culturally-sensitive implementation of CEDAW while at the same time empowering women to claim their own culture and religion as belonging to them as human beings with full capacity.

III. Lobbying

In order to achieve maximum output of lobbying activity, it is crucial to lobby for a particular cause. In the context of the CEDAW Convention, two particular issues deserve close attention. The first issue concerns the restriction placed on the CEDAW Committee in Article 20, paragraph 1 of the Convention, which limits the session meetings to three weeks per year. As a unique feature to the CEDAW Convention, it has contributed greatly to the back-log of State reports for consideration and has therefore been amended in 1996 by the United Nations General Assembly. However, as the ratification process of this amendment is extremely slow, it is of extreme importance to lobby governments to ratify in order for this amendment to enter into force. The second issue concerns the large number of reservations to particular provisions of the CEDAW Convention. As the CEDAW Committee is of the view that several of these run contrary to the object and purpose of the Convention, lobbying governments to officially object to these reservations can significantly contribute to their withdrawal.

IV. Suggested activities for non-governmental organisations

- Dissemination of material on and spreading knowledge of CEDAW and its mechanisms in home countries
- Stronger focus on CEDAW enforcement
- Make use of the individual complaints procedure of the Optional Protocol
- Compile information on the impact of CEDAW in home countries
- Compile and share best practices
- Lobby translation of General Recommendations and Concluding Comments into national language which is an obligation of States parties to CEDAW
- Increase networking activities with government representatives, including the opposition, and set up networking among law schools for training and teaching purposes.

E. List of Resource Persons

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