Felipe Gómez Isa and Koen de Feyter (eds.)

International Human Rights Law in a Global Context



HumanitarianNet

Thematic Network on Humanitarian Development Studies

International Human Rights Law in a Global Context

International Human Rights Law in a Global Context

Felipe Gómez Isa
Koen de Feyter
(eds.)

2009
University of Deusto
Bilbao

Any form of reproduction, distribution, public communication or transformation of the work can only be performed following authorisation by its owners, unless legally established otherwise. If you wish to photocopy or scan any part of this work please contact CEDRO (Centro Español de Derechos Reprográficos / Spanish Copyrights Centre) at www.cedro.org

Illustration of front page: Schalk Zuydam / AP / Radial Press

© University of Deusto
P.o. box 1 - 48080 Bilbao

I.S.B.N.: 978-84-9830-813-6

The Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol

Felipe Gómez Isa

Summary: 1. Introduction. 2. Historical overview. 2.1. Exclusion of Women's Rights from the Traditional Discourse on Human Rights. 2.2. The United Nations and the Principle of Non-discrimination. 3. The Convention on the Elimination of All Forms of Discrimination Against Women. 3.1. Substantive Provisions of CEDAW. 3.2. Addressing the Problem of States' Reservations to the Convention. 3.3. The Protection Mechanisms Under CEDAW Needed to be Strengthened. 4. The Optional Protocol to CEDAW. 4.1. The Negotiation Process. 4.2. Examining the Content of the Optional Protocol. 5. Conclusions.

1. **Introduction**

This article presents a very brief historical overview of the different stages through which women's rights have crossed at the international level. Thus, I fundamentally analyze the efforts, from 1945 to the present, of the United Nations towards the recognition of the principle of non-discrimination based on gender. I pay special attention to the Convention on the Elimination of all Forms of Discrimination Against Women, adopted in 1979 by the General Assembly of the United Nations[1]. Nevertheless, the main focus is the elaboration of an Optional Protocol to this Convention[2], which aims to reinforce the weak mechanisms that exist to protect the rights of women at the international level. The process of elaboration, which started at the beginning of the 1990s, has faced many obstacles and difficulties. However, in spite of these problems, the Optional Protocol was finally adopted by the Gen-

[1] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at http://www.un.org/womenwatch/daw/cedaw/states.htm [hereinafter CEDAW].

[2] *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at http://www.un.org/womenwatch/daw/cedaw/ protocol/op.pdf [hereinafter *Optional Protocol to CEDAW*].

© University of Deusto - ISBN 978-84-9830-813-6

eral Assembly through Resolution 54/4 on 6 October 1999 and entered into force on 22 December 2000.

2. **Historical overview**

2.1. *Exclusion of Women's Rights from the Traditional Discourse on Human Rights*

The concept of human rights arose relatively recently, dating from the liberal revolutions that took place throughout Europe and North America at the end of the 18th century[3]. The French Revolution undoubtedly lent a sense of legitimacy to the idea of human rights through the ratification of the *Déclaration des droits de l'homme et du citoyen* in 1789[4]. However, this important Declaration and the period of the Illustration are not especially favorable to the reinforcement of women's rights, especially with respect to their involvement in the political sphere[5]. Encarnación Fernández has pointed out that not acknowledging their right to participate in politics was an obvious contradiction of the revolutionary principles, above all, the principle of equal rights[6]. Nevertheless, the revolutionary impulse in France inspired the emergence of voices reclaiming the presence of women's rights. Two clear examples include Condorcet's *Essai sur l'admission des femmes au droit de cité* (1790) and Olympe de Gouges' *Déclaration des droits de la femme et de la citoyenne* (1791). Contemporaneously with the publication of the essays of Condorcet and Olympe de Gouges, Mary Wollstonecraft, one of the precursors of the British feminist movement, wrote *A Vindication of the Rights of Women* (1792). These contributions were arguably the first attempts at establishing legal rights for

---

[3] This does not mean that there were no attempts to acknowledge certain human rights before the 18th century. An example is the important contribution of the Salamanca School of International Law towards the recognition of the rights of indigenous peoples in the context of the colonization of the Americas. See Beuchot Puente, M.: *Los fundamentos de los derechos humanos en Bartolomé de las Casas*, Anthropos, Barcelona, 1994. An interesting contribution regarding the history of human rights can be found in Oestrich, G. & Sommermann, K-P.: *Pasado y presente de los derechos humanos*, Tecnos, Madrid, 1990.

[4] The title itself of this Declaration, with its exclusive reference to the rights of *man* and (male) *citizens*, indicates clearly the prevailing concept of human rights.

[5] On feminism during the Enlightenment, see Molina Petit, C.: *Ilustración y Feminismo: lo privado y lo público en el pensamiento liberal*, 1987 (unpublished Ph.D. dissertation, Universidad Complutense).

[6] Fernández, E.: "Los derechos de las mujeres", in Ballesteros, J. (ed.): *Derechos Humanos*, Tecnos, Madrid, 1992, p. 148.

© University of Deusto - ISBN 978-84-9830-813-6

women. The situation of women in the legal sphere has been–and in many countries remains–characterized by a deep sense of inequality[7]. From the French Revolution until today, society has seen a widespread development in the recognition of human rights, both nationally and internationally. Throughout this evolution, including the emergence of the three generations of human rights[8], there has been a gradual affirmation of principles of non-discrimination and the rights of women. However, according to many women writers, an *androcentric* concept of human rights has prevailed. This concept of rights is centered on the experiences and needs of men, which excludes women's vision of the world. Carmen Magallón, for example, believes that androcentrism is a defining characteristic in the tradition of Western thought and human rights principals[9]. Furthermore, the very structure of human rights, such as it has been historically designed, does not consider the needs of women. Even international human rights law and the set of international legal norms it encompasses has developed in such a way that it reflects the experiences of men, excluding those of women[10]. One reason for this marginalization is that women are underrepresented in the environments where these international norms are created, such as States' governments and International Organizations. Women are appallingly invisible and occupy very few of the important positions, which contributes to the predominance of a male perspective[11].

---

[7] A study of the historical stages of women's rights is included in BENSADON, N.: *Les Droits des Femmes des origines à nos jours*, Presses Universitaires de France, Paris, 1980. On the legal situation of women during specific periods in history, see GARDNER, J.F.: *Women in Roman Law and Society*, Routledge, London, 1990; JUST, R.: *Women in Athenian Law and Life*, 1994; GUERRA MEDICI, M.T.: I *Diritti delle donne nella società altomediaevale*, 1986; Sealey, R.: *Women and Law in Classical Greece*, The University of North Carolina Press, Chapel Hill, 1990.

[8] The first generation of human rights would be the civil and political rights born out of the 18th century liberal Revolutions. Second generation rights would include economic, social, and cultural rights resulting from the Communist and Socialist movements, which appeared during the second half of the 19th century. Lastly, the third generation of rights are those that arose during the 1960s as an attempt to bring solidarity to the international scene. For a brief review of these three generations of human rights, see Felipe Gómez Isa in this volume.

[9] MAGALLÓN, C.: "Los Derechos Humanos Desde el Género", in CENTRO PIGNATELLI (ed.): *Los Derechos Humanos, camino hacia la paz*, Diputación General de Aragón-Seminario de Investigación para la Paz, Zaragoza, 1997, p. 259.

[10] CHARLESWORTH, H.: "Human Rights as Men's Rights", in PETERS, J. & WOLPER, A. (eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, New York, 1995, p. 103.

[11] *Ibid.,* p. 104. The author includes data concerning the presence of women in various human rights bodies that clearly demonstrates discrimination occurring.

© University of Deusto - ISBN 978-84-9830-813-6

Another important reason why human rights have not met women's expectations is that the concept of human rights is based on the dichotomy between the public and the private spheres. Human rights generally concern only the public realm. International human rights law was originally intended to protect individuals against abuses by the State. Violations of rights that legal norms try to prevent are those that take place in the public sphere, since it is controlled by the State. However, women are generally relegated to the private sphere due to their subordinate status in society. Therefore, the principal violations of women's rights take place in the private sphere, fundamentally within the family. Traditionally, States have been reluctant to intervene in matters of the home and family life. Furthermore, according to the traditional theory of human rights, the State has no access to the private sphere. Feminist legal scholar Charlotte Bunch has stated that the dichotomy between the public and the private has been widely used to justify the subordination of women and to exclude human rights abuses committed in the private sphere from public view[12].

The traditional discourse on human rights has developed without considering its impact upon women. Transforming this discourse to a perspective that will consider the needs and vindications of women is absolutely essential[13]. The United Nations must play a central role in this transformative process.

2.2. *The United Nations and the Principle of Non-discrimination*

2.2.1. United Nations Charter

The United Nations was created following World War II. Its purpose and the basic principles it affirms, including the principle of non-discrimination, are set forth in the UN Charter[14]. In the Preamble, the peoples of the United Nations declare themselves to be "determined… to reaffirm faith in… the equal rights of men and women"[15]. Article 1 of the Charter establishes as a goal of the UN "promoting and encourag-

---

[12] Bunch, CH.: "Transforming Human Rights from a Feminist Perspective", in Peters, J. & Wolper, A. (eds.): *supra* note 10, p. 14.

[13] Freeman, M.A. & Fraser, A.S.: "Women's Human Rights: Making the Theory a Reality", in Henkin, L. & Hargrove, J. (eds.): *Human Rights: An Agenda for the next century*, The American Society of International Law, Washington, D.C., 1994, p. 104.

[14] U.N. Charter.

[15] *Ibid.,* Preamble.

© University of Deusto - ISBN 978-84-9830-813-6

ing respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[16]. As an attempt to apply the principle of non-discrimination to the workings of the Organization itself, Article 8 of the Charter states that "the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs"[17]. As we can see, from the very beginning the United Nations aimed for the recognition of the principle of non-discrimination[18].

2.2.2. The Commission on the Status of Women

The Commission on the Status of Women was created in 1946, just one year after the United Nations Charter entered into force[19]. This Commission, which deals with all matters concerning women, demonstrates the United Nations' commitment to the principle of non-discrimination in relation to women[20]. The Commission has played a very important role in the process of elaborating the human rights mechanisms adopted within the framework of the United Nations[21].

2.2.3. The Universal Declaration of Human Rights

The human rights provisions in the United Nations Charter were extremely vague and general; it soon became apparent that they would need to be specified. Therefore, interested States Parties drafted the Universal Declaration of Human Rights, which was adopted on 10 December 1948[22]. It is important to point out the significant role of the Commission on the Status of Women in the creation of the Universal

---

[16] *Ibid.,* Art. 1, para. 3.

[17] *Ibid.,* Art. 8.

[18] For a comprehensive study on the work of the United Nations regarding women, see Winslow, A. (ed.): *Women, Politics and the United Nations*, Greenwood Press, Westport, 1995.

[19] The UN Charter entered into force on 24 October 1945. U.N. Charter.

[20] For an overview of the work done by this Commission, see Galey, M.E.: "Promoting Non-Discrimination Against Women: The Commission on the Status of Women", 23 *International Studies Quarterly*, 1979, p. 273.

[21] This Commission, as discussed *infra* Part IV.A., later created the Working Group for the elaboration of an Optional Protocol to CEDAW.

[22] *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Art. 1, U.N. Doc. A/217 (1948). For a brief commentary on the Universal Declaration on its 60th anniversary, see Oraá, J. & Gómez Isa, F.: *La Declaración Universal de los Derechos Humanos*, Universidad de Deusto, Bilbao, 2008.

© University of Deusto - ISBN 978-84-9830-813-6

Declaration. Throughout the drafting process, the Commission constantly defended the inclusion of the female perspective into the text. Mrs. Bergtrup, who was President of the Commission, played an important role in this matter.

The Preamble to the Universal Declaration of Human Rights reaffirms the "equal rights of men and women," mentioned in the Preamble to the United Nations Charter[23]. Article 1 of the Declaration is particularly important from the point of view of women's rights. It states, "*all human beings* are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[24]. The expression "all human beings" sparked a great deal of controversy during the negotiations leading to the ratification of the Universal Declaration[25]. One of the initial proposals for Article 1 used the expression "all men"[26]. This would have been a poor beginning for the Universal Declaration, which would have adversely affected women. The Commission on the Status of Women and some delegations from countries more open to the vindications of women, pressured drafters of the Declaration to use inclusory language[27]. As a result, the expression that now appears in Article 1 of the Declaration was included, which demonstrates more respect for the rights of a group that constitutes half of the human race.

Article 2 of the Universal Declaration establishes the principle of non-discrimination. In its first paragraph, Article 2 states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This provision expands the prohibition against discrimination originally stated in Article 1.3 of the United Nations Charter. Another achievement of the women's movement was the inclusion of expressions such as "everyone," "all," and "no one," in all provisions of the Universal Declaration. The purpose of such language was to clar-

---

[23] "We the Peoples of United Nations Determined… to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women…", UN CHARTER pmbl.

[24] *Universal Declaration of Human Rights*, *supra* note 22 (emphasis added).

[25] For a discussion of the events surrounding these discussions and negotiations, see MORSINK, J.: "Women's Rights in the Universal Declaration", 13 *Human Rights Quarterly*, 1991, pp. 229-233.

[26] *Ibid.*

[27] *Ibid.,* pp. 234-235.

© University of Deusto - ISBN 978-84-9830-813-6

ify that the principle of non-discrimination applies to all of the human rights recognized by the Universal Declaration.

There are, nevertheless, some references in the Universal Declaration that are rather negative from the perspective of women's rights. For example, Article 23.3, concerning the recognition of the right to work, states "everyone who works has the right to just and favourable remuneration ensuring *for himself and his family* an existence worthy of human dignity…"[28]. This provision assumes that the man is the only wage earner and provider for the family[29].

Notwithstanding the negative references towards women included in the Declaration, Johannes Morsink argues that the Universal Declaration is a very progressive document in respect to women's rights[30]. According to Morsink, this is evidenced by the inside history of the writing process, and the struggle to reach the final product[31]. Such an optimistic view of the Declaration is not, however, shared by other writers[32].

2.2.4. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights

The United Nations adopted two International Covenants on human rights in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights[33]. In addition to promoting human rights, these covenants also contain specific references to the principle of non-discrimination. Article 2 of each document makes a general statement concerning non-discrimination on the basis of sex[34]. Article 3 of the ICCPR establishes, "the States Parties to the present Covenant undertake to ensure

---

[28] *Universal Declaration of Human Rights*, *supra* note 22, Art. 23.3 (emphasis added).

[29] This same logic is followed by Article 25 of the Declaration, which proclaims the right to an adequate standard of living. *Ibid.,* Art. 25.

[30] Morsink, J.: *supra* note 25, p. 255.

[31] *Ibid.*

[32] *Ibid.,* p. 233 (quoting Pollis, A. & Schawb, P.: *Toward a Human Rights Framework*, 1982, p. 7).

[33] International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 *I.L.M.* 360 (entered into force 3 January 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 135, 6 *I.L.M.* 360 [hereinafter ICCPR].

[34] Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
ICCPR, *supra* note 33, Art. 2.1.

© University of Deusto - ISBN 978-84-9830-813-6

the equal right of men and women" to the enjoyment of the rights set forth in the Covenant[35]. The language of the ICESCR is practically identical and was intended to have the same meaning[36].

2.2.5. The Development of Human Rights Instruments Specific to Women

A brief historical overview indicates that the United Nations has also done a commendable job recognizing certain aspects of women's rights[37]. The International Labour Organization (ILO), a specialized agency of the United Nations, was the first to create an instrument elaborating women's rights. With the intent to define women's rights in the labor field, the ILO approved a Convention dealing with women in the industrial sector who work night shifts on 9 July 1948[38]. Three years later, in 1951, the Convention on Equal Pay for Equal Work of Men and Women was adopted[39]. In 1952, the United Nations approved the Convention on the Political Rights of Women[40]. The Declaration of the General Assembly of the United Nations on the Elimination of Discrimination Against Women was issued in 1967. Most recently, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women. All of these international treaties, and many others, clearly demonstrate the United Nations' commitment to women's rights.

Without a doubt, the most important texts concerning the fight to eliminate discrimination against women are the Declaration of the General Assembly of the United Nations on the Elimination of Discrimi-

---

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICESCR, *supra* note 33, Art. 2.2.

35 ICESCR, *supra* note 33, Art. 2.

36 The ICESCR states "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." *Ibid.,* Art. 3. As we can see, the differences are in the wording alone; the meaning is identical in both.

37 For a complete analysis of the main instruments in this field adopted by the United Nations, see Stamatopoulou, E.: "Women's Rights and the United Nations", in Peters, J. & Wolper, A. (eds.): *supra* note 10, p. 37.

38 Night Work (Women) Convention (Revised), 9 July 1948, 81 U.N.T.S. 147, available at http://www.ilo.org/iolex/cgi-lex/convde.pl?c089.

39 Equal Remuneration Convention, 6 June 1951, 165 U.N.T.S. 303, available at http://www.ilo.org/ilolex/ english/convdisp1.htm.

40 Convention on the Political Rights of Women, 20 December 1952, 193 U.N.T.S. 135.

© University of Deusto - ISBN 978-84-9830-813-6

nation Against Women[41] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[42]. CEDAW completed and gave legal force to what was established by the Declaration of the General Assembly. The Declaration on the Elimination of Discrimination Against Women expressed the concern that extensive discrimination against women continued to exist despite instruments such as the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenants on Human Rights[43].

Certainly, great progress has been made in the context of legal equality in all countries compared to the much slower advances made in the field of *de facto* equality[44]. The most important Article of the Declaration is Article 1, which defines the principle of non-discrimination in a general sense. The rest of the Declaration attempts to specify this general principle in concrete areas such as political participation, nationality, legal capacity, education, and marriage. According to Article 1 of the Declaration, "discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity"[45].

2.2.6. UN Conferences and Other Special Efforts Related to the Rights of Women

The United Nations has sponsored activities aimed at promoting equality between men and women. Within this framework, the General Assembly of the United Nations proclaimed 1975 to be International Women's Year. That same year, the United Nations held the First International Conference on Women, which took place in Mexico. Once International Women's Year was over, the General Assembly declared the United Nations Decade for Women in order to follow up on the advancement of women. The Mexico Conference was followed by further conferences held in Copenhagen, Nairobi, and, most recently, in Beijing in 1995[46]. All

---

[41] *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/6880 (1967).

[42] CEDAW, *supra* note 1.

[43] *Ibid*., pmbl.

[44] Fernández: *supra* note 6, p. 155.

[45] *Declaration on the Elimination of Discrimination Against Women, supra* note 41, Art. 1.

[46] Elizondo Lopetegi, A.: "Veinte años de cooperación internacional para las mujeres: De México a Pekín (1975-1995)", in *Segundas Jornadas Municipales sobre la Coperación Norte-Sur: La Dimensión global de la solidaridad*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1995, pp. 185-211.

© University of Deusto - ISBN 978-84-9830-813-6

of these Conferences have been great steps forward along the tortuous path leading to the recognition and achievement of women's rights.

In June 1993, the World Conference on Human Rights was held in Vienna. The Vienna Declaration and Program of Action that resulted is the most explicit proclamation supporting the acknowledgement and expansion of women's rights[47]. This Declaration establishes:

> The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community… The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women…[48].

The UN has promoted human rights instruments relating specifically to the rights of women. CEDAW represents the most serious systematic attempt by the United Nations to fight decidedly for the rights of women.

3. **The Convention on the Elimination of All Forms of Discrimination Against Women**

3.1. *Substantive Provisions of CEDAW*

After lengthy and complicated negotiations, CEDAW[49] was approved by the General Assembly of the United Nations on 17 December 1979[50]. The ratification process as indicated by Article 27.1 resulted in this Convention entering into force[51] on 3 September 1981, following the

---

[47] At the World Conference on Human Rights, held in Vienna from 14-25 June 1993, the Vienna Declaration and Program of Action was written. It was adopted by the United Nations in 1994. G.A. Res. 121, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/121 (1994) [hereinafter *Vienna Declaration*].

[48] *Ibid.,* para. 18.

[49] For an interesting analysis of the negotiations over CEDAW, see FRASER, A.: "The Convention on the Elimination of All Forms of Discrimination Against Women (The Women's Convention)", in *Women, Politics and the United Nations*: *supra* note 18, p. 84.

[50] The results of the vote in the Assembly are symbolic of the problems surrounding its negotiation and the obstacles that the Convention would face: 130 States voted in favor, none voted against, and eleven abstained. The countries that abstained are mostly those with strong family and religious traditions: Bangladesh, Brazil, Comores, Djibouti, Haiti, Mali, Mauritania, Mexico, Morocco, Saudi Arabia, and Senegal.

[51] As of 15 February 2008, there were 185 States Parties to the Convention.

© University of Deusto - ISBN 978-84-9830-813-6

"deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession"[52]. CEDAW is composed of a Preamble and thirty Articles that establish different measures to be adopted by the States and by specific private parties. The purpose of these measures is the recognition and expansion of the principle of non-discrimination. In the Preamble itself, States Parties affirm the main goal of the Convention by declaring they are "determined to implement the principles set forth in the Declaration on the Elimination of Discrimination Against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations"[53].

One of the most important aspects of CEDAW is that it not only addresses the States, but also the private sphere. This field is where the most serious violations of women's rights take place. Donna Sullivan, an expert in these matters, has stated that the Convention plans for the restructuring of gender relations within the family, requiring the State to adopt positive measures to protect women against discrimination inflicted by private actors[54]. One of the more radical provisions in CEDAW, Article 5, urges the States "to modify the social and cultural patterns of conduct of men and women"[55]. Furthermore, this provision promotes establishing the "common responsibility of men and women in the upbringing and development of their children"[56]. Similarly, Article 16 promotes equality in all matters related to marriage and family relations.

The progressive nature of some of the provisions of CEDAW warrants further discussion[57]. Discrimination against women, as defined by Article 1 of the Convention, comprises:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights

---

[52] CEDAW, *supra* note 1, Art. 27. 1.

[53] *Ibid*., preamble.

[54] Sullivan, D.J.: "The Public/Private Distinction in International Human Rights Law", in *Women's Rights, Human Rights*: *supra* note 10, p. 129.

[55] CEDAW, *supra* note 1, Art. 5(a).

[56] *Ibid*., Art. 5(b).

[57] For studies of the main points of CEDAW, see Freeman & Fraser: *supra* note 13, p. 112; Wright, S.: "Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women", in Mahoney, K.E. & Mahoney, P. (eds): *Human Rights in the Twenty-First Century: A Global Challenge*, Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 75-88.

© University of Deusto - ISBN 978-84-9830-813-6

and fundamental freedoms in the political, economic, social, cultural, civil or any other field[58].

In Article 2 of CEDAW, the States Parties "condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women"[59]. In order to achieve this, States Parties agree to a series of measures to be specified in the various sections of the Convention. Thus, in Article 3 the States agree to "ensure the full development and advancement of women"[60]. Article 4 refers to special measures to attain "*de facto* equality between men and women"[61]. Article 6 discusses the suppression of "all forms of traffic in women and exploitation of prostitution of women"[62]. Article 7 refers to the elimination of any "discrimination against women in the political and public life of the country"[63]. The advancement of rural women is encouraged in Article 14[64]. The Convention, in Article 8, also refers to the need to ensure the participation of women at the international level[65]. It also addresses non-discrimination on the basis of nationality[66]. Additionally, CEDAW promotes equal rights in the fields of education[67], employment[68], and health care[69].

3.2. *Addressing the Problem of States' Reservations to the Convention*

A serious problem that has had a profound impact on the effectiveness of CEDAW is that States Parties expressed a great number of reservations concerning certain provisions[70]. This has turned CEDAW into the international human rights treaty with the greatest number of reservations. Furthermore, according to certain experts, some of these reservations go against the object and purpose of the Convention[71],

---

[58] CEDAW, *supra* note 1, Art. 1.
[59] *Ibid.,* Art. 2.
[60] *Ibid.,* Art. 3.
[61] *Ibid.,* Art. 4.
[62] *Ibid.,* Art. 6.
[63] *Ibid.,* Art. 7.
[64] *Ibid.,* Art. 14.
[65] *Ibid.,* Art. 8.
[66] *Ibid.,* Art. 9.
[67] *Ibid.,* Art. 10.
[68] *Ibid.,* Art. 11.
[69] *Ibid.,* Art. 12.
[70] COOK, R.J.: "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", 30 *Vanderbilt Journal of International Law*, 1990, p. 643.
[71] STAMATOPOULOU: *supra* note 37, p. 38.

© University of Deusto - ISBN 978-84-9830-813-6

which is expressly prohibited both by the Vienna Convention on the Law of Treaties[72] and by CEDAW Article 28.2[73]. The Committee for the Elimination of Discrimination Against Women has repeatedly expressed its concern regarding the large number of reservations that seem to be incompatible with the object and purpose of the Convention. The Committee issued a General Recommendation suggesting that all States Parties should reconsider their reservations with the aim of withdrawing them[74]. In this regard, considering the number of reservations and the significance of their content, the World Conference on Human Rights held in Vienna in June 1993 decided that "ways and means of addressing the particularly large number of reservations to the Convention should be encouraged"[75]. The Conference also urged the States to "withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law"[76].

3.3. *The Protection Mechanisms Under CEDAW Needed to be Strengthened*

The protection mechanisms for women's rights established by CEDAW are much weaker than those included in other international human rights treaties[77]. With respect to this, Theodor Meron has pointed out that CEDAW has become a second-class instrument with-

---

[72] Vienna Convention on the Law of Treaties, *opened for signature*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). Article 19 of the Convention proclaims that a State can express reservations, but not if "the reservation is incompatible with the object and purpose of the treaty". *Ibid.,* Art. 19.

[73] Article 28.2 states that "a reservation incompatible with the object and purpose of the present Convention shall not be permitted". CEDAW, *supra* note 1, Art. 28. 2.

[74] General Recommendation No. 4, The Committee on the Elimination of Discrimination Against Women (sixth session, 1987), available at http://www.un.org/ womenwatch/daw/cedaw/recomm.htm (last visited Apr. 25, 2003) [hereinafter CEDAW, General Recommendation 4].

[75] *Vienna Declaration*, *supra* note 47, para. 39.

[76] *Ibid.*

[77] *Cf.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 113 (entered into force 26 June 1987); CEDAW, *supra* note 1, Art. 17; First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171. For a very interesting study conducted by the Secretary General of the United Nations comparing the protection mechanisms for women's rights with those established by other human rights treaties see *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, 41st Sess., E/CN.6/1997/4, 1997.

© University of Deusto - ISBN 978-84-9830-813-6

in the family of United Nations human right treaties[78]. Various types of mechanisms exist for protecting human rights at the international level, such as periodical reports, individual complaints, inter-State complaints, and inquiry procedures. However, CEDAW only provides for the periodical reports mechanism. Article 17 of the Convention establishes a Committee for the Elimination of Discrimination Against Women, which aims to analyze the progress made by the States Parties in enforcing the Convention. In order to monitor the success of the States in fulfilling CEDAW, Article 18 of the Convention declares:

> States Parties undertake to submit to the Secretary General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect[79].

These reports, according to Article 18.1 (a) and (b), shall be presented "within one year after the entry into force for the State concerned; thereafter at least every four years and further whenever the Committee so requests".

Once the Committee for the Elimination of Discrimination Against Women[80] has analyzed the reports submitted by the States Parties to the Convention, the Committee "may make suggestions and general recommendations based on the examination of reports and information received from the States Parties"[81]. This is a rather weak mechanism, since all responsibility falls primarily on the State to submit information, and because the Committee's powers are quite limited. An added difficulty is that, according to Article 20.1 of CEDAW, "the Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted"[82]. This period of two weeks has

---

[78] MERON, TH.: "Enhancing the Effectiveness of the Prohibition of Discrimination Against Women", 84 *American Journal of International Law*, 1990, p. 213.

[79] CEDAW, *supra* note 1, Art. 18.

[80] CEDAW mandates that the Committee will include:

[T]wenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems, CEDAW, *supra* note 1, Art.17. 1.

[81] *Ibid.,* Art. 21. For a detailed analysis of the system of periodic reports set out by CEDAW see ILIC, Z. and CORTI, I.: "The Convention on the Elimination of All Forms of Discrimination Against Women", in *Manual on Human Rights Reporting under six major international human rights instruments*, United Nations, Geneva, 1997, pp. 305-365.

[82] CEDAW, *supra* note 1, Art. 20.1.

© University of Deusto - ISBN 978-84-9830-813-6

clearly proven to be insufficient for a calm, detailed analysis of the reports submitted by the States. This has been the reason for the Committee's considerable delay in the examination of the periodical reports[83]. For these reasons, the Committee for the Elimination of Discrimination Against Women recommended that the States Parties to the Convention adopt an amendment to Article 20.1 that would allow the Committee to hold as many meetings as needed to fulfill its duties properly[84]. Echoing this suggestion by the Committee, the eighth meeting of the States Parties to the Convention, 22 May 1995, resulted in a resolution recommending the adoption of said amendment. This amendment will enter into force once it has been ratified by at least two thirds of the States Parties to CEDAW. The General Assembly of the United Nations is fully conscious of the difficulties faced by the Committee due to the brief period allowed for its meetings. Therefore, in recent years, the United Nations has authorized the Committee to meet during two three-week sessions a year.

Since the beginning of the 1990s, the significant weaknesses in the protection mechanisms for women's rights established by CEDAW has motivated an increasingly insistent demand for the expansion of these mechanisms. The Commission on the Status of Women created a Working Group for the purpose of finding solutions to strengthen these mechanisms. As a result, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was developed and opened for ratification in October 1999.

4. **The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women**

4.1. *The Negotiation Process*

During the negotiation process of CEDAW, some States discussed the appropriateness of including individual complaints within the framework of the Convention[85]. Such a mechanism would allow a person to file a complaint of an alleged violation of a provision of the Con-

---

[83] For a study of the experiences of the Committee on the Elimination of Discrimination Against Women, see FRASER: *supra* note 49.

[84] General Recommendation No. 22, The Committee on the Elimination of Discrimination Against Women (fourteenth session, 1995), available at http://www.un.org/womenwatch/daw/cedaw/recomm.htm.

[85] The Netherlands was the biggest proponent of a mechanism for individual complaints under CEDAW.

© University of Deusto - ISBN 978-84-9830-813-6

vention before the Committee on the Elimination of Discrimination Against Women. However, ultimately this possibility was discarded[86]. Once CEDAW entered into force and the Committee started to carry out its functions, it was clear that it suffered from an excessive weakness in its protection mechanisms. For this reason, there has been a strong insistence on the need to strengthen these procedures since the beginning of the 1990s. Two possibilities for reform were put forth. Some argued for major reforms of CEDAW itself, while others advocated for the adoption of an Optional Protocol to the Convention, following the example of the International Covenant on Civil and Political Rights. It soon became clear that a reform of CEDAW would create many inconveniences, especially due to the large number of reservations to this instrument. In the face of these difficulties, an Optional Protocol was determined to be the more practical solution.

Both legal scholars[87] and the organs of the United Nations in charge of women's rights began to ask that a negotiation process be opened for an Optional Protocol. In 1991, at a meeting of experts organized by the Division for the Advancement of Women, it was first recommended that the United Nations Organization examine the possibility of adopting an Optional Protocol to CEDAW. The Committee on the Elimination of Discrimination Against Women took the lead. In Recommendation Number 4, the Committee addressed the World Conference on Human Rights to be held in Vienna, recommending that the right to petition be included in CEDAW[88]. The Committee stated that the Optional Protocol was necessary in order to make CEDAW equal to other human rights treaties ratified by the United Nations. Subsequently, the World Conference on Human Rights decided that new procedures to reinforce the international community's commitment to women's equality and human rights should be adopted. For this purpose, the Vienna Declaration and Plan of Action recommended the creation of an Optional Protocol to CEDAW:

> The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly

---

[86] See BYRNES, A. and CONNORS, J.: "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention", 21 *Brooklyn Journal of International Law*, 1996, p. 679. (discussing BYRNES & CONNORS: *The Adoption of a Petition Procedure under the Convention on the Elimination of All Forms of Discrimination Against Women*, Background Paper prepared for the Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in Law Project International Human Rights Group and the Maastricht Centre for Human Rights, 1994).

[87] MERON: *supra* note 78, pp. 216-217.

[88] CEDAW Recommendation 4, *supra* note 74.

© University of Deusto - ISBN 978-84-9830-813-6

> examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women[89].

In 1994, the Committee on the Elimination of Discrimination Against Women adopted Suggestion 5 recommending that the Commission on the Status of Women establish a group of independent experts to prepare a draft for the Optional Protocol. The Commission, however, ignored this recommendation by the Committee. That same year, the Human Rights Center in Maastricht and the International Human Rights Group called a meeting of women's rights experts. This meeting, financed by the governments of the Netherlands and Australia, resulted in the most serious and elaborate draft for an Optional Protocol. This draft became the basis for later discussions and negotiations[90]. In January 1995, the Committee on the Elimination of Discrimination Against Women issued Suggestion Number 7, which declared the different elements that must be included in an Optional Protocol to CEDAW[91].

Finally, in July 1995 the stage was set for Resolution 1995/29, in which the Social and Economic Council of the United Nations (ECOSOC) asked the Commission on the Status of Women to establish an Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW. In September 1995, the Fourth International Conference on Women held in Beijing, encouraged the Commission on the Status of Women to draft an optional protocol to CEDAW. The Conference also asked that the optional protocol enter into force in the near future, and include the right to petition[92]. In March 1996, in fulfillment of resolution 1995/29 of ECOSOC, the Commission on the Status of Women created an Open-Ended Working Group for the elaboration of a Draft Optional Protocol to CEDAW. This Working Group met in New York on March 11-22, and mainly examined Suggestion 7 made by the Committee on the Elimination of Discrimination Against Women. The

---

[89] *Vienna Declaration*, *supra* note 47, para. 40.

[90] A draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was adopted by The Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in the Law Project International Human Rights Group and the Maastricht Centre for Human Rights, which met 29 September-1 October 1994. For relevant portions of the draft, see *Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, U.N. Doc. E/CN.6/5, 1997.

[91] Suggestion 7, Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 50th Sess., Supp. No 38, at 8, U.N. Doc. A/38, 1995.

[92] *Report of the Fourth World Conference on Women*, Beijing Declaration, Annex I, at 116, U.N. Doc. A/Conf.177/20, 1995.

© University of Deusto - ISBN 978-84-9830-813-6

Committee also considered the opinions sent by several States to the Secretary General of the United Nations, which expressed support or opposition to an Optional Protocol to CEDAW. Some of the letters listed important characteristics that such a Protocol should have[93]. The Spanish expert who participated in this Working Group pointed out that, even though no government openly opposed the elaboration of an Optional Protocol, there were significant reservations concerning the project[94].

The second meeting of the Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW was held on 10-21 March 1997. During this second meeting, the President of the Working Group, Aloisia Wörgetter from Austria, presented a document that became a basis for the discussions[95]. This text was based on discussions held during the 1996 session, Suggestion 7 made by CEDAW Committee, and the opinions sent by the States to the Secretary General of the United Nations[96]. During this session, there was an initial reading of the document prepared by the President, which resulted in the elaboration of an official Draft Optional Protocol to CEDAW[97]. This Draft would become the basic document for the discussions and negotiations of the Working Group.

The Working Group held its third meeting on 2-13 March 1998. During this period, there was a second reading of the Draft Optional Protocol to CEDAW. Following the second reading, experts expressed the main reservations of some countries about this Optional Protocol. There was much hope at this time that the Working Group could reach a consensus before the fiftieth anniversary of the Universal Declaration of Human Rights. In her speech before the Commission on the Status of Women, Mary Robinson, United Nations High Commissioner for Human Rights, emphasized the great importance of ratifying the Optional Protocol to CEDAW. She stated that such action would signi-

---

93 These opinions appear in the REPORT OF THE SECRETARY GENERAL: *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. ESCOR, 40th Sess., Supp. No. 6, U.N. Doc E/CN.6/10, 1996.

94 *Ibid.*

95 *Working Group on the Elaboration of a Draft Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/WG/L.1, 1997 [hereinafter *Working Group*].

96 For new opinions on the Draft Optional Protocol, particularly those of the Spanish government, see *Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/5, 1997 [hereinafter *Additional Views*].

97 *Working Group*: *supra* note 95.

© University of Deusto - ISBN 978-84-9830-813-6

fy a great step towards better protecting the rights of women[98]. However, not all of these expectations were met. Since there were still differences of opinion, the ratification of the Optional Protocol had to be postponed[99].

The fourth meeting of the Working Group was held on 1-12 March 1999. Again, there were many hopes placed on this fourth meeting, and this time these hopes were not in vain: the Optional Protocol to CEDAW was finally born. At the opening session of the Working Group, several delegations expressed their desire for a definite adoption of the Optional Protocol to CEDAW. The European Union, a main contributor in the effort to ratify the Protocol, was fully confident that this could finally happen on the twentieth anniversary of the adoption of CEDAW. Furthermore, the European Union was convinced that the Protocol would be a very useful tool for supporting the enforcement of women's human rights[100]. Other delegations, such as the ones from Norway[101], Lesotho[102], and Namibia[103], made similar initial declarations. Notwithstanding their support, adoption of the Protocol turned out to be extremely complicated since the different delegations had clashing opinions on its most controversial aspects. The process involved two weeks of intense and complicated negotiations and seemingly impossible obstacles. Finally, the Optional Protocol to CEDAW was approved by consensus within the Open-Ended Working Group and the Commission on the Status of Women.

---

[98] *Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 3, 1998, at 3 (statement of Mary Robinson, U.N. High Commissioner for Human Rights); *see also Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 2, 1998 (statement of the Representative of the United Kingdom of Great Britain and Northern Ireland).

[99] See U.N. ESCOR, 43d Sess., U.N. Doc. E/CN.6/27, 1998. For an account of this session, see GÓMEZ ISA, F.: "El Proyecto de Protocolo Facultativo a la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer: hacia una mayor efectividad de los derechos de las mujeres en la esfera internacional", *II Congreso Internacional sobre Género y Políticas de Acción Positiva*, Emakunde, San Sebastián, 1999.

[100] *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Dr. Christine Bergmann, Federal Minister for Family Affairs, Senior Citizens, Women and Youth).

[101] *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by the Permanent Mission of Norway).

[102] *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Phakiso Mochochoko, representative of the Permanent Mission of the Kingdom of Lesotho).

[103] *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Netumbo Nandi-Ndaitwah, Mp Director-General, Dept. of Women's Affairs).

© University of Deusto - ISBN 978-84-9830-813-6

4.2. *Examining the Content of the Optional Protocol*[104]

Many problematic issues existed in the Draft Optional Protocol, which resulted in the postponement of its adoption. In fact, the text of the adopted Protocol does not satisfy all of the demands and assertions of all the delegations. The Optional Protocol to CEDAW is the result of a delicate negotiation; it reflects the balance, compromise, and consensus among the different opinions expressed by the members of the Working Group.

The inclusion of protection mechanisms in the Optional Protocol was one of the most intensely debated topics in the negotiations. Some consensus existed among the different delegations of the Working Group as to the importance of including the procedure of individual communications. However, no consensus was found on the issue of including an *ex officio* inquiry procedure by the CEDAW Committee. The procedure of inter-State communications was introduced in early drafts of the Protocol as an alternative to an *ex officio* procedure. Although some experts have emphasized its positive aspects, this alternative was soon discarded since this procedure has hardly been used in the international sphere[105]. As a result, the Optional Protocol to CEDAW includes a procedure for individual communications as well as an inquiry procedure.

4.2.1. Negotiations Over the Individual Communication Procedure

Early in the Protocol discussions, most parties agreed that the procedure of individual communications should be at the heart of the Protocol. Most government delegations accepted a mechanism that would allow women who had suffered violations of their rights to denounce their State before the CEDAW Committee. However, significant differ-

---

[104] For one of the most thorough studies of the Draft Optional Protocol project, see Byrnes and Connors: *supra* note 86; see also Sullivan, D.J.: *The Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, Center for Women's Global Leadership, 1997. The Inter-American Institute of Human Rights has likewise provided an article-by-article commentary of the Draft Optional Protocol, along with very interesting proposals, Instituto interamericano de Derechos Humanos: *Protocolo Facultativo. Documento de trabajo. Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer*, Instituto Interamericano de Derechos Humanos, San José, 1998 [hereinafter Protocolo Facultativo].

[105] For Theodor Meron, there is an enormous "symbolic significance" in this procedure, since it allows one State to accuse another State for violations of the rights of women. See Meron: *supra* note 78, p. 217. This opinion is shared by Byrnes and Connors: *supra* note 86.

© University of Deusto - ISBN 978-84-9830-813-6

ences of opinion remained concerning the details of this procedure. The most controversial points surrounding the individual communication mechanism were those of *active legitimation* and the question of *justiciability* of CEDAW provisions.

4.2.1.1. The Debate over Active Legitimation

The question of *active legitimation* (who can present an individual communication to the CEDAW Committee) is the most problematic element of the entire Optional Protocol. This thorny issue prevented the consensus and final development of a Protocol during the March 1998 sessions. The main focus of the controversy was whether someone other than the victim could present an individual communication before the Committee on behalf of the victim. Countries such as Mexico, Colombia, Cuba, China, Egypt, Tunisia, Morocco, Algeria, and India were concerned that international non-governmental organizations, which constitute real international networks, could use the individual petition procedure "on behalf of the victims". On the other hand, another important group of countries[106] supported allowing non-governmental organizations to petition the Committee. This group argued that such action was necessary in order for the mechanism to defend the human rights of *all* women, and not just of those who have the economic and intellectual resources to take action in the international sphere. Amnesty International is one of the NGOs that made the greatest efforts during the negotiation process and pointed out that this possibility is:

> [C]rucial if the Optional Protocol is to provide a real remedy for women victims of violations of the Convention. In Amnesty International's many years of working on behalf of victims of human rights violations, we have found that those most in need of redress, those whose rights have been most violated, are often those least able to come forward and speak of their suffering and obtain redress. Thus, the role of human rights defenders, including non-governmental organizations (NGOs), in facilitating victims claiming their rights is a crucial one. Women may be reluctant to complain because of fear of reprisal, such as in cases involving violence against women in the family. For example, permitting an organization which provides shelter and legal services to women subjected to violence in the family to raise such claims would minimize the risk of harm to individual wom-

[106] To view the opinions of countries such as Costa Rica, South Africa, Italy, Spain, Panama, and Chile, see *Additional Views*, *supra* note 96, p. 17.

© University of Deusto - ISBN 978-84-9830-813-6

> en. The concept of sufficient interest will also take into account the often systemic nature of gender discrimination and the particular obstacles women may face in seeking remedies, including danger of reprisals, low levels of literacy and legal literacy and resource constraints. National or international NGOs and groups with a "sufficient interest" in the matter may be less [reluctant to complain][107].

A similar opinion has been expressed by Andrew Byrnes and Jane Connors, who argued that Articles 1 and 2 of the Optional Protocol must be at least as extensive as those of other human rights Conventions[108]. For these authors, requiring a person to be a victim of a violation would excessively restrict the range of communications that can be received. Byrnes and Connors also point out that many forms of structural discrimination against women affect many, or perhaps all, women in a society[109]. An NGO would be better positioned than individual victims to bring such complaints.

Although not all parties were satisfied, consensus on this matter was finally reached. This result can be considered a good basis for employing the individual communication procedure by women victims of human rights violations. Articles 1 and 2 of the Optional Protocol describe how this mechanism will function. Article 1 simply supposes that every State that ratifies the Optional Protocol will accept the Committee's competence to receive communications. Article 1 states: "[a] State Party to this Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with Article 2".

Article 2, on the other hand, is much more controversial and led to many more discussions within the Working Group. This provision establishes who will be able to submit a communication. The disagreements were based on whether communications could be submitted on behalf of a person; and, in this case, whether that specific person's consent should be required. Finally, Article 2 stated:

> Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with

---

[107] AMNESTY INTERNATIONAL: *The Optional Protocol to the Women's Convention*, AI: IOR 51/04/97, Dec. 1997, at 10 [hereinafter Amnesty International].

[108] BYRNES and CONNORS: *supra* note 86.

[109] *Ibid.*

© University of Deusto - ISBN 978-84-9830-813-6

> their consent unless the author can justify acting on their behalf without such consent[110].

This was one of the most debated articles and nearly caused the negotiations to fall through once again. In the end, this second Article constitutes a fine balance between the different opinions held by the members of the Working Group. However, because many States were dissatisfied, this Article has raised the most interpretative statements.

4.2.1.2. The Need for Consent when Presenting Communications on Behalf of the Victim

Communications may be presented by individuals or groups of people, on their own or on behalf of someone. This means that a woman, or a group of women, whose rights have been violated by a State Party to the Optional Protocol can submit a communication to the Committee, either by themselves or through another person or organization acting on their behalf. The person, group, or organization that presents the communication, either for herself or on behalf of another, must be under the jurisdiction of the accused State. Article 2 states this provision in a somewhat confusing manner. If the communication is presented on behalf of a victim, "this shall be with their consent unless the author can justify acting on their behalf without such consent"[111]. Therefore, consent will be essential in submitting a communication to the Committee on someone's behalf. This requirement is not as progressive as other international human rights instruments[112], which make no specific mention of the need for consent. However, many of the delegations were not prepared to compromise on the issue of consent. For the sake of consensus, accepting the inclusion of the need for consent into the Protocol's text instead of into the Committee's rules of procedure was necessary.

As previously stated, Article 2 is one of the provisions that has elicited the greatest number of interpretative statements. For the Canadian government, "the CEDAW Committee has the authority to determine the question of consent according to the particular circumstances of each case and the Committee should interpret Article 2 in a way no less favorable than the existing practice and procedures of other hu-

---

110 *Optional Protocol to CEDAW*, *supra* note 2, Art. 2.

111 *Ibid*.

112 See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 77.

© University of Deusto - ISBN 978-84-9830-813-6

man rights treaty bodies"[113]. This view was shared by the European Union and by a group of African countries, including Ghana, Botswana, Kenya, Lesotho, Malawi, South Africa, and Uganda[114]. Denmark[115] also opposed the exclusion of NGOs from the text of Article 2 but interprets the expression "groups of individuals" to mean "NGOs alleging to be victims of a violation can bring a communication to the attention of the Committee"[116]. On the other hand, China wanted Article 2 to be as restrictive as possible, arguing that this provisions should prevent certain persons "from taking advantage of the special situation of the victims for their own purposes by acting in the name of the victims…; the will of the victims should be fully respected, and… their representatives, if any, should be from the same country as the victims"[117]. Clearly, China's opinion tries to greatly restrict any organization, especially international organizations, from representing a potential victim. The Indian representative issued a similar declaration that interpreted the word "consent" as "not acting contrary to the wishes of the victim and without violating her right to privacy should she so desire"[118].

4.2.1.3. Justiciability: Are Individual Communications to the CEDAW Committee Limited to Certain Rights in the Convention?

The other problematic issue in the context of the procedure for individual communications is that of *justiciability.* The question here was: which of the rights included in the Convention are eligible for individual communications, since many establish obligations of a programmatic nature for the States Parties? While there were conflicting opinions, these views were not as extreme as in the case of active legitimation. Most governments agreed that all of the Convention's substantive provisions should be justiciable since all human rights are considered, to a greater or lesser extent, justiciable[119]. Most NGOs and legal scholars that have analyzed this matter share this view[120]. However, reaching a consensus based on the opinions mentioned was not impossible; therefore, parties decid-

---

[113] U.N. ESCOR, 43d Sess., Annex 2, Supp. No. 7, at 60, E/CN.6/10/Annex 2, 1999 [hereinafter *Interpretative Statements*].

[114] *Ibid.,* p. 64.

[115] Denmark also spoke on behalf of Finland, Iceland, and Norway.

[116] *Interpretive Statements*, *supra* note 113, p. 62.

[117] *Ibid.,* pp. 61-62.

[118] *Ibid.,* pp. 64-65.

[119] *Additional Views*, *supra* note 96.

[120] PROTOCOLO FACULTATIVO: *supra* note 104, pp. 16-17; BYRNES and CONNORS: *supra* note 86; AMNESTY INTERNATIONAL: *supra* note 107, p. 20.

© University of Deusto - ISBN 978-84-9830-813-6

ed to adopt a far different solution than the one initially proposed. Therefore, communications may be presented when there is an alleged violation of "any of the *rights* set forth in the Convention"[121]. In other words, only provisions of the Convention that include rights, as established by Article 2 of the Protocol, may be defended before the Committee. Once again, this controversial matter has resulted in the formulation of interpretative statements by several delegations. The Danish delegation, also on behalf of Finland, Iceland, and Norway, opposed this compromise. As a result of their interpretive statements, the Committee will be able to accept communications from victims of those States concerning "each and every substantive provision set forth in the Convention"[122].

4.2.2. The Individual Communication Procedure in Action

An individual communication submitted to the CEDAW Committee must go through four stages: (1) the admission of the communication; (2) an in-depth examination of the matter; (3) the Committee's decision; and (4) the follow-up to this decision.

4.2.2.1. Admission of Communications

Articles 3 and 4 of the Optional Protocol establish the procedure for admission of individual communications. Article 3 states that communications must be submitted "in writing" and "shall not be anonymous"[123]. Also, in order for the Committee to study any communication, the communication must refer to a State that has ratified both CEDAW and its Optional Protocol. Article 4 requires "that available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief"[124]. Likewise, the Committee will not accept communications where the same matter has already been examined by the Committee or has been, or is being, examined under another procedure of international investigation or settlement[125]. The Committee will not accept communications incompatible with the provisions of the Convention[126]. A communication is not admissible if it is manifestly ill-founded or not

---

121 *Optional Protocol to CEDAW*, *supra* note 2, Art. 2 (emphasis added).
122 *Interpretative Statements, supra* note 113, p. 64.
123 *Optional Protocol to CEDAW*, *supra* note 2, Art. 3.
124 *Ibid.,* Art. 4.
125 *Ibid.*
126 *Ibid.*

© University of Deusto - ISBN 978-84-9830-813-6

sufficiently substantiated, nor if it is an abuse of the right to submit a communication[127]. Finally, if the alleged violation occurred prior to the entry into force of this Protocol for the State Party concerned, the communication is not admissible, unless the violation continued after that date[128]. The Protocol includes many of the same admission requirements normally included in international human rights treaties that allow individual communications.

The Committee's first step after admission of the communication is to take measures to protect the victim who made the communication. According to Article 5, once the Committee has received the communication, it may ask the State Party involved to "take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation"[129]. Furthermore, Article 5.2 of the Optional Protocol states that the Committee's adoption of certain provisional measures "does not imply a determination on admissibility or on the merits of the communication"[130].

4.2.2.2. In-depth Examination of the Matter

The second stage is the in-depth examination of the communication, established in Articles 6 and 7 of the Protocol. Once the Committee has decided that the communication fulfills all of the requisites for admission, it sends the communication, confidentially, to the State involved. Within six months, the State must present to the Committee "written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party"[131]. The Committee holds private sessions to study the communications. The interest of procedural fairness, communications are considered in light of the information received from all parties.

4.2.2.3. The Committee Reaches a Decision and Communicates with the State

After full consideration of all sides, the Committee reaches a decision. According to Article 7.3, once the Committee has decided on the merit of the communication, "the Committee shall transmit its views

---

127 *Ibid.*
128 *Ibid.*
129 *Ibid.*, Art. 5.
130 *Ibid.,* Art. 5, para. 2.
131 *Ibid.,* Art. 6, para. 2.

© University of Deusto - ISBN 978-84-9830-813-6

on the communication, together with its recommendations, if any, to the parties concerned"[132]. Therefore, the CEDAW Committee can make certain recommendations to a State Party to the Optional Protocol when it determines the State has violated the Convention. Furthermore, the State Party must give "due consideration to the views of the Committee, together with its recommendations, if any"[133].

4.2.2.4. Follow-up to the Committee's Decision

After the State receives the Committee's decision regarding the merits of the communication, it must respond with a report and actions to implement the recommendations. The State must submit to the Committee "within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee"[134]. The Protocol also allows for a follow-up by the Committee. Article 7.5 states that the Committee may invite the State Party "to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under Article 18 of the Convention"[135]. Therefore, the Committee will continue to track the fulfillment of its views and recommendations.

Several individual communications have been submitted before the Committee so far but, unfortunately, only in a limited number of cases the Committee has taken a final decision on the merits. In the first case before the Committee, *Ms. B-J v. Germany*[136], the author alleged that she was subject to gender-based discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage). According to her view, the regulations systematically discriminate against older women with children who are divorced after long marriages in which women usually assume the role of homemaker. She defended that the law does not take into account the improved or devalued "human capital" of marriage partners. She maintained that this constitutes discrimination, as it results in

---

[132] *Ibid.,* Art. 7, para. 3.
[133] *Ibid.,* Art. 7, para. 4.
[134] *Ibid.*
[135] *Ibid.,* Art. 7, para. 5.
[136] Communication no. 1/2003, Decision adopted on 14 July 2004, thirty-first session, A/59/38.

© University of Deusto - ISBN 978-84-9830-813-6

providing a husband with his wife's unremunerated labour. Unfortunately, the Committee decided to declare the communication inadmissible under Article 4.1, for the author's failure to exhaust domestic remedies, and Article 4.1.e), because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State Party and did not continue after that date[137].

Another interesting case that also was declared inadmissible is *Rahime Kayhan v. Turkey*[138]. In this case, the author, a teacher of religion and ethics, complained that she was a victim of a violation of Article 11 of CEDAW by Turkey by dismissing her and terminating her status as a civil servant for wearing a headscarf. Allegedly she is one of more than 1.500 women civil servants who have been dismissed for wearing a headscarf. It was a very interesting case from different angles, since it involved questions regarding freedom of religion, right to work, gender discrimination on religious grounds… It is a pity that once again the communication was declared inadmissible by the Committee under Article 4.1 of the Optional Protocol for failure to exhaust domestic remedies[139].

---

[137] *Ibid*., para 8.8. Two members of the Committee, Krisztina Morvai and Belmihoub-Zerdani, issued a dissenting individual opinion, considering the communication as "partly admissible". In their view, "the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact do meet all admissibility criteria". In the present case, proceedings as regards spousal maintenance and accrued gains had been ongoing for about five years. The author of the communication, as so many women in the world, devoted her whole adult life to unpaid work in the family, while her husband had advanced his career and his income. Her financial situation was very uncertain at the time of submitting the communication, since she is considered an "older woman" and, therefore, has very little chance to enter the labour market. Under all these circumstances, the domestic courts should have determined and granted her a decent maintenance a long time ago. Then, the two members conclude by defending that "for an older woman who raised three children and worked for the benefit of her spouse…, living in such uncertainty five years after the divorce is rightly considered to be unacceptable and a serious violation of her human rights". Taking all this into consideration, the opinion of the two dissenting members of the Committee is that "the application of domestic remedies is *unreasonably prolonged*". Therefore, the general rule in Article 4.1 concerning the exhaustion of all domestic remedies does not apply here, instead the "unreasonable prolongation" exception to the rule applies, and the communication should have been declared as partially admissible.

[138] Communication No. 8/2005, Decision adopted on 27 January 2006, thirty-fourth session.

[139] *Ibid.,* para. 7.9. Other challenging case that was declared inadmissible by the Committee had to do with the communication by a Spanish woman on the ground that, according to the historical rules of succession in Spain, men are given primacy over women in the ordinary line of succession of titles of nobility, see Communication No. 7/2005, Decision adopted on 9 August 2007, thirty-ninth session.

© University of Deusto - ISBN 978-84-9830-813-6

A very interesting case in which the Committee has adopted its views after considering the merits of the communication is *Ms. A.T. v. Hungary*[140], a case related to gender violence[141]. The author of the communication alleged that for more than four years she had been subjected to severe domestic violence by her husband. Although the life of the author has been threatened on several occasions, she did not go to a shelter, reportedly because no shelter in the whole country is equipped to take in a fully disabled child together with his mother and sister. On the other hand, the author also stated that there were no protection orders or restraining orders available under Hungarian law. On the contrary, her husband had not been detained at any time and no action had been taken by the Hungarian authorities to protect the author from him. In sum, the author alleges the violation of Articles 2.a), b) and e), Article 5.a) and Article 16 of CEDAW by Hungary, for its failure to provide effective protection from her husband. She claims that the State passively neglected its "positive" obligations under CEDAW and supported the continuation of a situation of domestic violence against her. At the same time, on 10 October 2003 the author of the communication also urgently requested effective interim measures, in accordance with Article 5.1 of the Optional Protocol, in order to avoid possible irreparable damage to her, namely to save her life from the violent conduct from her husband. On 20 October 2003, ten days after the request, the Committee sent a note verbale to the State Party for its urgent consideration, requesting the Government to provide immediate, appropriate and concrete preventive interim measures of protection of the author, as may be necessary, to avoid irreparable damage to her. The Committee invited Hungary to provide information no later than 20 December 2003 of the type of measures it had taken to give effect to the Committee's request of interim measures. On July 2004 the Working Group on Communications came to the conclusion that "the State Party had furnished little information on the interim measures taken to avoid irreparable damage to

[140] Communication No. 2/2003, Views adopted on 26 January 2005, thirty-second session.

[141] There are two other dramatic cases brought by the Vienna Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of victims of gender violence against Austria in which the Committee decided that the State violated the rights to life and to physical and mental integrity under Article 2 and Article 3 of the Convention read in conjunction with Article 1 and General Recommendation 19 of the Committee, see Communication No. 5/2005, Decision adopted on 6 August 2007, thirty-ninth session, para. 12.3, and Communication No. 6/2005, Decision adopted on 6 August 2007, thirty-ninth session, para. 12.3.

© University of Deusto - ISBN 978-84-9830-813-6

the author". Accordingly, the Working Group requested that the author "be immediately offered a safe place for her and her children to live and that the State Party ensure that the author receive adequate financial assistance, if needed"[142]. As a response to the communication by the author, the State Party assumes that "the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient". For that reason, Hungary instituted a comprehensive action programme against domestic violence in 2003, and on 16 April 2003 the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, to be followed by a number of legislative and other actions[143]. More than one year later after the adoption of the national strategy just mentioned, the State Party had to admit that "the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence"[144]. Once the Committee had ascertained that it had no reason to declare the communication inadmissible, it started with the consideration of the merits. First of all, it recalled its General Recommendation no. 19 on violence against women, in which the Committee addressed the question of whether States can be held accountable for the conduct of non-State actors. As stated in this very relevant general recommendation, "… discrimination under the Convention is not restricted to action by or on behalf of Governments…. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". The Committee noted that the State Party "has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner…"[145]. On the other hand, the Committee also noted that for four years and continuing to the time when it was considering the communication, the author felt threatened by her former partner, she was battered by him, and she was unsuccessful to temporarily or permanently bar her partner form the apartment where she and her children have continued to reside.

---

142 *Ibid*., para. 4.7.

143 *Ibid.,* para. 5.7. See the different initiatives taken by Hungary from para. 5.7 to para. 5.10.

144 *Ibid*., para. 7.4.

145 *Ibid*., para. 9.3.

© University of Deusto - ISBN 978-84-9830-813-6

The author could not have asked for restraining or protection order since neither option exist in the State Party. Finally, she could not flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. Last, but not least, the Committee also found the lack of effective legal and other measures to deal in an appropriate manner with its request for interim measures. In light of all these considerations, the Committee concluded that "the State Party has failed to fulfil its obligations and has thereby violated the rights of the author under Article 2.a), b) and e) and Article 5.a) in conjunction with Article 16"[146] of CEDAW, and made a number of recommendations to Hungary. The recommendations have a twofold nature: a) *recommendations concerning the author of the communication*: to take immediate and effective measures to guarantee the physical and mental integrity of the author of the communication and her family; to ensure that she is given a safe home, receives child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and the gravity of the violation of her rights, and b) *general recommendations*: to respect, protect, promote and fulfil women's human rights, including the right to be free from all forms of domestic violence; to assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence; to take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated; to take all necessary measures to provide regular training on CEDAW and its Optional Protocol thereto to judges, lawyers and law enforcement officials; to implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters; to investigate promptly, thoroughly and seriously all allegations of domestic violence and bring offenders to justice; to provide victims of domestic violence with safe and prompt access to justice, to provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods. As we can see, the Committee has recommended a very comprehensive and systematic set of measures to be able to deal

[146] *Ibid.*, para. 9.6.

© University of Deusto - ISBN 978-84-9830-813-6

effectively with the plague of domestic violence, one of the gravest forms of structural violation of women's rights and dignity. Finally, as mentioned before, the Optional Protocol provides for a mechanism of follow-up of the views and recommendations of the Committee. According to Article 7.4 of the Protocol, the State Party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in light of its views and recommendations. The State Party was also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

4.2.3. The Inquiry Procedure

4.2.3.1. Negotiations for Inclusion of an Inquiry Procedure in the Protocol and the Compromise of the Opt Out Clause

The inclusion of an inquiry procedure is one of the most sensitive matters for many States, due to the implications that such a procedure may have. Nonetheless, most of the countries that participated in the Working Group for the elaboration of an Optional Protocol to CEDAW supported its inclusion. Countries such as Cuba, China, India, and Egypt are among those who most vehemently opposed the introduction of the inquiry procedure[147]. The Chinese delegation believed there should only be one communication procedure in the Optional Protocol to the Convention[148]. On the other hand, other delegations, including the Spanish one, were firmly in favor of the inquiry procedure. The Spanish government thought that the Protocol should contain both procedures, and that the inquiry procedure would be essential to confront grave and systematic violations of women's rights[149].

The inquiry procedure is a protection mechanism for the rights of women that demands cooperation and transparency from the States. This provision gives the CEDAW Committee ample power to open an inquiry in those countries where it believes grave or systematic violations of women's rights are being committed. For this reason, inclusion of this procedure has been one of the main points for debate. This clash of opinions led the President of the Working Group to propose

147 *Additional Views*, *supra* note 96.
148 *Ibid.,* p. 16, para. 74.
149 *Ibid.,* p. 16, para. 76.

© University of Deusto - ISBN 978-84-9830-813-6

the inclusion of Article 10[150] during the March 1998 sessions. The proposed Article included an *opt-out clause,* which would allow any State to declare, at the moment of ratification of the Optional Protocol, that it did not want to be bound to this inquiry procedure. This solution seemed to satisfy the delegations opposed to inquiry, although the Chinese representative proposed including an opt-in rather than an opt-out clause[151]. According to this opt-in clause, each State, at the moment of ratification of the Optional Protocol, would declare that it acknowledges the competence of the CEDAW Committee to open an inquiry procedure. This proposal was supported by other delegations, including the Cuban and Algerian delegations. However, these same delegations, conscious of being in the minority, expressed their willingness to be "flexible" on this point[152].

As a result of this flexibility, the Optional Protocol to CEDAW has incorporated an inquiry procedure. However, in order to reach a minimum of consensus, the opt-out clause had to be accepted.

4.2.3.2. Operation of the Inquiry Procedure

This inquiry procedure is included in Articles 8, 9, and 10 of the Protocol. Article 8.1 describes the circumstances under which the Committee can initiate an inquiry and the extent of State cooperation that is required. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

Once the State has submitted its observations regarding the alleged violations the Committee will analyze them. Then, "the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee"[153]. Furthermore, "where warranted and with the consent of the State Party, the inquiry may include a visit to its territory"[154]. Although the procedure gives the CEDAW

---

[150] It was Article 11(b) of the Draft Optional Protocol proposed during the 1998 sessions, but has since become Article 10 in the adopted Protocol. See GÓMEZ ISA: *supra* note 99.

[151] *Additional Views*, *supra* note 96, p. 16, para 74.

[152] *Commission on the Status of Women Report on the 42d Session*, U.N. ESCOR, 42d Sess., Annex 2, Supp. No. 7, p. 78, U.N. Doc. E/CN.6/12, 1998.

[153] *Optional Protocol to CEDAW*, *supra* note 2, Art. 8, para. 2.

[154] *Ibid.,* Art. 8, para. 2.

© University of Deusto - ISBN 978-84-9830-813-6

Committee ample powers to investigate, it must always count on the cooperation of the State under investigation. Additionally, procedure requires this inquiry to "be conducted confidentially"[155].

When the inquiry is complete, the Committee will communicate its conclusions, comments, and recommendations to the State Party involved[156]. The State then has six months to submit its own observations to the Committee[157]. Furthermore, the Committee may invite the State to include in subsequent reports, required by Article 18 of CEDAW[158], "details of any measures taken in response to an inquiry"[159]. As discussed previously, an opt-out clause had to be admitted into the framework of the inquiry procedure due to the need for a consensus. Through this compromise, the States that objected to this type of procedure could accept the Protocol without being bound by the inquiry procedure. This was, obviously, a necessary sacrifice, if the inquiry procedure was to be included in the Protocol. Many States still absolutely refuse to accept the inquiry procedure, because of its potential implications. The opt-out clause is included in Article 10 of the Protocol, which states "[e]ach State Party may, at the time of signature or ratification of this Protocol or accession hereto, declare that it does not recognize the competence of the Committee provided for in Articles 8 and 9"[160].

The inquiry procedure has been used once by the Committee to investigate the abduction, rape and murder of women in and around Ciudad Juárez (Chihuahua, Mexico), and a very challenging report has been issued by the Committee with detailed findings and demanding recommendations to the Government of Mexico[161]. The procedure was initiated when the NGOs Equality Now and Casa Amiga, an international and a local NGO respectively, requested in October 2002 the Committee to conduct an inquiry under Article 8 of the Optional Protocol[162]. The two NGOs provided specific and precise information about the alleged violations of women's human rights. In January 2003 the Committee requested two members of the Committee (ac-

---

155 *Ibid.,* Art. 8, para. 5.

156 *Ibid.,* Art. 8, para. 3.

157 *Ibid.,* Art. 8, para. 4.

158 Under Article 18 of CEDAW, States must submit a report to the Committee within one year after ratification and every five years thereafter. CEDAW, *supra* note 1, Art. 18.

159 *Optional Protocol to CEDAW*, *supra* note 2, Art. 9, para. 1.

160 *Ibid.,* Art. 10.

161 CEDAW/C/2005/OP.8/MEXICO, 32nd session, 10-28 January 2005.

162 Mexico had ratified the Optional Protocol on 15 March 2002. Therefore, the inquiry procedure was applicable to Mexico.

© University of Deusto - ISBN 978-84-9830-813-6

cording with Article 82 of its Rules of Procedure) to undertake a detailed examination of the information provided. Taking into account this detailed examination by the two members, the Committee concluded that the information provided by the two NGOs "was reliable and that it contained substantiated indications of grave and systematic violations of rights set forth in the Convention"[163]. In accordance with Article 8.1 of the Optional Protocol, the Committee decided to invite the Government of Mexico to cooperate with it in the examination of the information and, in order to do that, to submit its observations by May 2003. On 15 May Mexico submitted its observations, including information about different actions taken to address the situation in Ciudad Juárez. In the observations, the Government also invited the Committee to visit the country and committed to guarantee the conditions and facilities necessary to conduct the inquiry in total freedom.

On June 2003 Casa Amiga, Equality Now and the Mexican Committee for the Defence and Promotion of Human Rights submitted additional information to the Committee. The new information referred to "newly-discovered murders, the ongoing impunity of those responsible, threats directed towards those calling for justice for women, growing frustration on account of the authorities' lack of due diligence in investigating and prosecuting the crimes in an appropriate manner and an emerging pattern of irregularities and incidents pointing to the possible complicity of the authorities in the continuing violence against women in Ciudad Juárez"[164]. In July 2003, after having examined carefully the information submitted by the Government and the new information provided by the NGOs just mentioned, the Committee decided to conduct a confidential inquiry under Article 8.2 of the Optional Protocol. For that purpose, it nominated two of its members (Ms. María Yolanda Ferrer Gómez and Ms. Maria Regina Tavares da Silva) to conduct the inquiry. According to Article 8.2 abovementioned, the Committee requested the Government of Mexico to consent to a visit by the two members to be carried out in October 2003. On August 2003 the Government replied positively and made a commitment to provide all the assistance necessary to guarantee the adequate conducting of the visit. The official visit of the two experts of the Committee took place from 18 to 26 October 2003, and visited both the Federal District and the State of Chihuahua (Chihuahua City and Ciudad Juárez). The

[163] CEDAW/C/2005/OP.8/MEXICO..., *op. cit.*, para. 4.
[164] *Ibid.*, para. 6.

© University of Deusto - ISBN 978-84-9830-813-6

experts conducted interviews with official authorities, organizations of civil society and the mothers of the victims.

In the light of all the information obtained by the experts both before and during the visit to Mexico, the Committee finds that the facts alleged "constitute grave and systematic violations"[165] of the provisions of the CEDAW. Besides, the Committee "is greatly concerned at the fact that these serious and systematic violations of women's rights have continued for over 10 years, and notes with consternation that it has not yet been possible to eradicate them, to punish the guilty and to provide the families of the victims with the necessary assistance"[166]. Finally, the Committee is also aware that the methods used in the murders and disappearances in Ciudad Juárez have been also used more recently in Chihuahua City and, apparently, in other parts of Mexico[167]. These facts have led the Committee to conclude that "we are faced not with an isolated although very serious situation, nor with instances of sporadic violence against women, but rather with systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity"[168].

Taking into consideration all these findings and conclusions, the Committee made a whole set of precise and concrete recommendations to the Government of Mexico. These recommendations include, among others, the following: the need of coordination and participation at all levels of authority, with respect to both their mutual relations and to their relations with civil society, with a view to increasing the effectiveness of the mechanisms and programmes adopted; incorporate a gender perspective into all investigations, policies to prevent and combat violence, bearing in mind the specific characteristics of gender-based violence against women; constant consultation and dialogue

---

165 *Ibid.,* para. 259.

166 *Ibid.,* para. 260.

167 There are some worrying reports of these methods being also used in other countries of the region. According to the UN Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, "the pattern of murders of women in Guatemala show similarities with those reported in El Salvador, Honduras and Mexico. The rate at which women are being killed, however, is much higher in Guatemala. Although 370 women were killed in Chihuahua, Mexico, over a 10-year period (1993 to 2003), nearly the same number of women was killed in Guatemala in 2003 alone", E/CN.4/2005/72/Add.3, 10 February 2005, *Mission to Guatemala*. See also AMNESTY INTERNATIONAL: "Intolerable killings. Mexico: 10 years of abductions and murder in Ciudad Juárez and Chihuahua", AMR 41/026, 2003.

168 *Ibid.,* para. 261.

© University of Deusto - ISBN 978-84-9830-813-6

with civil society organizations; investigate thoroughly and punish the negligence and complicity of public authorities in the disappearances and murders of women, the fabrication of confessions under torture, their tolerance of persecution, harassment or threats directed against victims' relatives, members of organizations representing them and other persons involved in defending them; establish early warning and emergency search mechanisms for cases involving missing women and girls in Chihuahua State; guarantee that the mothers and relatives of the victims be treated with due respect, consideration, compassion, and sympathy for their grief, and punish the authorities responsible for this cruel and inhuman treatment; urgently implement and strengthen effective measures for the protection of persons and institutions working to clear up the facts; sensitize all State and municipal authorities to the need for violence against women to be regarded as a violation of fundamental rights; organize, with the active participation of civil society, campaigns to eradicate discrimination against women, promote equality between women and men and contribute to women's empowerment; include in educational and training programmes information and sensitization modules on equality and on gender violence as a violation of human rights; promote training and capacity-building for public officials, judges and judicial personnel in the area of gender violence and human rights; set up violence prevention programmes and policies; measures of economic, medical and psychological reparation for victims of violence and the relatives of the murdered and abducted women…

As we can see, the inquiry procedure may become a useful tool to face this kind of grave and systematic violations of women's rights, as the case just analysed shows. On the other hand, the usefulness in practice of the procedure to really put an end to structural violations of women's dignity remains to be seen.

4.2.4. The Prohibition Against Reservations to the Optional Protocol

One final problem, discussed *ad nauseam* by the Working Group, was whether to allow reservations to the Optional Protocol to CEDAW. For many delegations it was essential that the Protocol, given its fundamentally procedural character, not allow for the possibility of including reservations. Allowing reservations could seriously weaken the Protocol, contrary to its aim of increasing the efficacy of CEDAW[169]. In this respect, the statements of Silvia Cartwright, an ex-

[169] *Commission on the Status of Women Report on the 42d Session*, *supra* note 141.

© University of Deusto - ISBN 978-84-9830-813-6

pert from the CEDAW Committee, were especially eloquent. In her opinion, one of the main reasons for the poor efficacy of CEDAW was that some of the States made a great number of reservations. In many cases, these reservations work against the object and purpose of the Convention itself. For this reason, Cartwright believed it would be desirable to include a provision that would expressly prohibit parties from establishing reservations at the moment of its ratification. One way to do this would be to insert the concerns of the States into the Protocol's text so that the parties would not have to resort to formulating reservations. With the goal of avoiding reservations at all costs, during the March 1998 sessions the President of the Working Group handed out a document that studied the possibility of including, within the Protocol itself, any problems that the States were likely to face[170]. As a result, the Optional Protocol to CEDAW rejects the possibility of formulating reservations. This is, without a doubt, one of the Protocol's most positive aspects, since this action may set a good precedent for future developments in international human rights law. Thus, according to Article 17, "[n]o reservations to this Protocol shall be permitted"[171].

Naturally, this Article has inspired a large number of interpretative statements. The Algerian government expressed one of the most interesting opinions, arguing that the limitation against reservations to the Protocol should not become a precedent to either the Vienna Convention on the Law of Treaties or customary international law prohibiting adhesion to international agreements[172]. This delegation emphasized that it accepted Article 17 of the Protocol simply because this action is optional, of a procedural nature, and because it did not want to break the consensus[173]. The delegations from China, Egypt, India, Israel, and Jordan[174] expressed a similar opinion. All indicated that the prohibition of reservations established by Article 17 of the Optional Protocol should not be considered a precedent for future instruments and for the development of international human rights law[175]. Lastly, the United States likewise made known its "serious concern with Article 17",

---

[170] This is an extremely valuable document because it attempts to address the various problems that the States likely would face in ratifying the Optional Protocol and tries to include these obstacles in the Protocol's text. *Reservations and the Draft Optional Protocol*, March 1998.

[171] *Optional Protocol to CEDAW*, *supra* note 2, Art. 17.

[172] *Interpretative Statements*, *supra* note 113, at 59.

[173] *Ibid*.

[174] *Ibid.,* p. 61.

[175] *Ibid.*

© University of Deusto - ISBN 978-84-9830-813-6

which it considered "contrary to the well established practice of permitting appropriate reservations"[176].

5. **Conclusion**

Ratification of the Optional Protocol to CEDAW will strengthen the protection mechanisms of women's rights. Furthermore, it will place the Convention alongside the most important human rights treaties adopted by the United Nations. The existence of more demanding protection mechanisms in the Protocol should also encourage better compliance from States Parties. Mechanisms such as the individual communications and inquiry procedures will force the States that ratify the Protocol to initiate significant efforts towards a better and more effective application of CEDAW. States Parties will take these positive steps, if only as a means to avoid being called before the CEDAW Committee. Likewise, the CEDAW Committee will contribute, through its opinions and recommendations, to a better understanding of the Convention. The Committee's expanded powers will lead, above all, to a better and more rigorous application of the Convention by the States. In this sense, the Committee will be responsible for developing a very interesting body of jurisprudence on diverse aspects of the Convention.

The active participation of States is required to strengthen the movement for the defense of women's rights. This need became clear during the process of creating and discussing the Draft Optional Protocol when States' participation was relatively scarce[177]. According to the Inter-American Institute of Human Rights, which has been an important lobby in support of the Optional Protocol, the women's movement has had limited participation in elaborating and negotiating the Protocol[178]. A small group of NGOs and women were involved in the technical and legal aspects of the Protocol. However, this process of elaborating the Protocol did not involve a defined political strategy from within the women's movement. The Institute has expressed concern that this process will not become strong until the women's movement claims the document as its own[179]. At this point, States Parties

---

176 *Ibid.,* p. 71.

177 This lack of participation has been especially serious in the case of Spain, which showed scarce familiarity with CEDAW and took almost no part in the discussions and negotiations surrounding the Optional Protocol.

178 PROTOCOLO FACULTATIVO, *supra* note 104, pp. 143-44.

179 *Ibid.*

© University of Deusto - ISBN 978-84-9830-813-6

must disseminate information about the Protocol's content in order to make women aware of the new protective mechanisms available to advance their human rights[180]. The Protocol itself establishes that "each State Party undertakes to make widely known and to give publicity to the Convention and this Protocol"[181].

Finally, as its name implies, the Protocol is an optional instrument. Therefore, the effectiveness of the new mechanisms depends on ratification by States Parties to CEDAW. Once the General Assembly of the United Nations adopted the text of the Protocol in October 1999, the process of ratification was swift and the Optional Protocol entered into force on 22 December 2000. As of 5 November 2008, ninety four States have ratified the Optional Protocol to CEDAW. However, as a result of the inclusion of stronger enforcement mechanisms, many States will be reticent to ratify this instrument. Obviously, those States that are responsible for serious violations of women's rights and that were the most obstructionist during the elaboration process are not likely to ratify the Optional Protocol. The international community should encourage these States to change their positions in this regard. All States Parties, organizations, and individuals have the responsibility to give this instrument life for use in the fight against discrimination of all women.

---

[180] We must admit that, in this case, the Spanish government has already adopted measures to transmit the content of both the Convention and the Protocol. In the first place, it has edited a bilingual English-Spanish version of CEDAW and the Protocol, MINISTERIO DE TRABAJO Y ASUNTOS SOCIALES-INSTITUTO DE LA MUJER: *La Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer y el Protocolo Opcional a la Convención*, 1999. Likewise there has been a Seminar on the Protocol, INSTITUTO DE LA MUJER: *El Protocolo Opcional a la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer*, 1999. The Seminar was held on 25 May 1999, with the participation of Jane Connors, from the Division for the Advancement of Women of the United Nations Social and Economic Affairs Department, and of Aloisia Wörgetter, President of the Working Group for the elaboration of an Optional Protocol to CEDAW.

[181] *Optional Protocol to CEDAW*, *supra* note 2, Art. 13.

© University of Deusto - ISBN 978-84-9830-813-6