

PART V

INDIVIDUAL COMPLAINTS UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN



5.1 Introduction

As its name suggests, the Convention on the Elimination of All Forms of Discrimination Against Women⁷⁵¹ (the “CEDAW Convention”) is primarily concerned with achieving equality between women and men through the elimination of discriminatory policies and practices. To this end, the CEDAW Convention sets out a series of obligations on States parties with the objective of ensuring both *de facto* and *de jure* equality for women in the enjoyment of their fundamental rights and freedoms. However, the CEDAW Convention does not set out any substantive obligations in respect of the prohibition of torture and ill-treatment. Therefore, this *Handbook*’s discussion of the Optional Protocol to the CEDAW Convention with a focus on such violations, requires a word of explanation.

Women are protected under Art. 7 of the ICCPR and by the CAT to the same extent as men, and the HRC and CAT Committee constitute the obvious fora for women in the context of violations relating to the prohibition of torture and ill-treatment. To be sure, a complaint alleging only substantive violations of the prohibition of torture or ill-treatment (without any element of discrimination) would not be admissible before the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the treaty body established by the CEDAW Convention to secure implementation at the national level. Nevertheless, the CEDAW Convention may offer an alternative avenue for redress in specific contexts where discrimination constitutes an important aspect of the underlying violation. Existing patterns of discrimination against women affect their ability to enjoy their rights, not least their right to be free from torture and other forms of ill-treatment, and discriminatory laws and policies may affect women’s abilities to seek redress before national courts for such violations. Complaints arising in both of these contexts are potentially admissible before the CEDAW Committee. Moreover, the CEDAW Committee has specifically provided, in General Recommendation 19 on the issue of violence against women, that the responsibility of States parties is engaged also by the conduct of *private actors* if the State fails to act with due diligence to “prevent

751 Convention on the Elimination of All Forms of Discrimination against Women 1979, reprinted in full at Appendix 6.

752 Optional Protocol to the CEDAW Convention (in Part V of this book, referred to as “Optional Protocol”).

violations of rights or to investigate and punish acts of violence”.⁷⁵³ Therefore, if the violations complained of occurred at the hands of private actors, there may be greater scope for a complaint under CEDAW than under CAT for instance, which limits “torture” to acts committed or authorised by agents of the State.

The purpose of this chapter is therefore to describe the individual complaints procedures established by the Optional Protocol to the CEDAW Convention, and in particular to analyse how such complaints procedures can be used by women in the context of violations of the prohibition of torture and ill-treatment.

This chapter will first highlight some of the essential elements of the CEDAW Convention. It presents the background to and content of the CEDAW Convention and the Optional Protocol. It describes the role of the CEDAW Committee. Finally, this chapter focuses on how to use the Optional Protocol; which procedures to follow and legal issues to address in order for the individual complaint to be successful and effective in its aims.

As the Optional Protocol to the CEDAW Convention is a relatively new instrument, only entering into force on 22 December 2000, the CEDAW Committee has not yet had the chance to develop extensive jurisprudence. Therefore, this chapter also draws on the approaches of existing human rights monitoring bodies with similar procedures, as the Optional Protocol is part of the comprehensive United Nations framework of mechanisms. Like the other treaty bodies, the CEDAW Committee seeks to ensure the implementation of human rights at the national level, and cannot be conceived as a stand-alone solution to address the human rights of women.

5.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention)

5.2.1 Background of the CEDAW Convention

The adoption of the CEDAW Convention on 18 December 1979 by the United Nations General Assembly signified an important step towards the recognition of women’s human rights as such. The CEDAW Convention was based on the acknowledgement that existing international human rights instruments did not effectively and comprehensively address the specific disadvantages and harms

⁷⁵³ General Recommendation 19, § 9.

faced by women despite the fact that their provisions apply equally to men and to women.⁷⁵⁴ It has been argued by many women's rights activists that the human rights discipline generally reflects a male perspective, which renders invisible the violations of women's human dignity and thus prevents this discipline from effectively promoting and protecting the human rights of women.⁷⁵⁵ In 1999, the World Organisation Against Torture (OMCT) published a study revealing that the treaty bodies were progressing at different rates in integrating a gender perspective in their work, some of them hardly showing any progress in this respect.⁷⁵⁶ As a consequence, violations of women's human rights often go unrecognised, and when recognised, often go unpunished and unremedied.⁷⁵⁷

The scope of the CEDAW Convention was larger and its language far more "radical" than international human rights treaties in existence when it was adopted. It provides for focused promotion and protection of the human rights of women and identifies areas of women's human rights which were either not guaranteed or well developed in existing instruments, or which were not

754 The Preamble to the 1945 Charter of the United Nations, the founding document of the UN, affirms the "equal rights of men and women", the "dignity and worth of the human person" and the "faith in fundamental human rights" as core United Nations principles and objectives. Article 1 (3) of the Charter proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" [emphasis added]. Article 55 (c) commits the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion" [emphasis added]. The International Bill of Human Rights reinforces and develops the principle of equal rights of men and women. The Universal Declaration of Human Rights of 1948, the founding document of human rights law, proclaims the entitlement of everyone to equality before the law and to the enjoyment of human rights and fundamental freedoms without distinction of any kind and proceeds to include sex among the grounds of such impermissible distinction. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted in 1966, clearly prohibit discrimination on the basis of sex. Article 2 of both Covenants contains a general clause specifying that rights should be guaranteed for all without discrimination, and article 3 elaborates on this general principle, emphasizing that equality of rights between men and women should be made reality in law and practice.

755 Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994; Kelly D. Askin and Dorean M. Koenig (eds.) *Women and International Human Rights Law*, New York, Transnational Publishers, 1999; Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in Julie Peters and Andrea Wolper, (eds.), *Women's Human Rights, Human Rights: International Feminist Perspectives*, Routledge, 1995; Hillary Charlesworth, Christine Chinkin and Shelly Wright, *Feminist Approaches to International Law* (1991) 85 *American Journal of International Law* 632.

756 Carin Benninger-Budel and Anne-Laurence Lacroix, *Violence against Women: A Report*, OMCT, 1999.

757 See Rebecca Cook, *State Accountability under the Convention on the Elimination of All Forms of Discrimination against Women*, in Rebecca Cook (ed.) *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994, p. 228.

properly implemented. For example, the Convention addresses the protection of women's human rights in both the public and private spheres, equality within the family, the equal rights and responsibilities of both parents in supporting their families, the right of women to undertake financial and other transactions in their own name and the rights of women to education, work, and political participation. It also imposes specific obligations on governments to ensure that private citizens and enterprises do not abuse women's rights, that the special needs of rural women are protected, and that steps are taken to transform social and cultural patterns in order to combat discrimination against women.

In order to monitor compliance with the obligations set forth in the Convention, it established in 1982, under article 17 of the CEDAW Convention, the CEDAW Committee, composed of 23 experts on women's issues from around the world. The Committee usually meets twice a year for two weeks.⁷⁵⁸ States parties nominate the experts, and every two years an election takes place during a meeting of the States parties. Re-election of an expert is possible. The experts of the Committee sit as individuals and not as government representatives. So far, only three men have been nominated and elected.⁷⁵⁹

States parties that have ratified the CEDAW Convention are legally bound by its terms.⁷⁶⁰ There are several procedures by which the CEDAW Committee monitors States parties' compliance with the Convention, the most recent of which are the individual complaints and the inquiry procedures under the Optional Protocol. Prior to the adoption of the Optional Protocol, the CEDAW Convention provided two monitoring procedures: the reporting procedure and the interstate complaints procedure. As outlined in article 18 of the CEDAW Convention, States parties are required to submit to the CEDAW Committee an initial report within the first year of ratifying the CEDAW Convention and periodic reports every four years thereafter. The purpose of this reporting mechanism is to examine progress the government has made, in law and practice, in giving effect to the Convention and to identify problem areas where compliance needs to be improved. During the review of the State party's

758 Following the World Conference on Women in Beijing in 1995, the General Assembly adopted an amendment to Article 20 allowing the CEDAW Committee to meet in two sessions each year. General Assembly resolution 50/202, 23 February 1996.

759 Mr Cornelis Flinterman, Mr Göran Melander and Mr Johan Nordenfelt.

760 The Vienna Convention on the Law of Treaties sets forth the rule of *pacta sunt servanda*, which makes treaties binding and requires parties to a treaty to perform in good faith.

report, the State and the Committee discuss obstacles in achieving improvements in the human rights situation of women, the potential for progress and further action that needs to be taken. The Committee issues Concluding Comments but does not have the authority to issue sanctions or to act as an arbitrator regarding interpretational disputes. In this connection, it is important to note that NGOs play a critical role in ensuring that the Committee receives information that supplements, and often challenges, the information provided for by the governments. Due to the proximity of NGOs to the “front lines”, they are well positioned to gather information that that would not otherwise be available to Committee members and that is normally absent from the reports of the States parties, thus assisting the Committees in achieving a more balanced assessment of the State party’s record of compliance.

The second enforcement mechanism is the interstate complaints procedure outlined in article 29. This provision provides that all conflicts dealing with the interpretation of the CEDAW Convention must be arbitrated. If the conflict cannot be resolved during arbitration it is sent to the International Court of Justice (ICJ). All ICJ decisions are binding on States parties. However, there is little incentive for a State party to bring a claim against another State party, as respect for sovereignty of nations and fear of retaliation act as strong deterrents.⁷⁶¹ Another drawback to this mechanism is that States parties may use a reservation to avoid having to respond to interstate claims. The impact of this mechanism remains to be seen as it has yet to be invoked.

Pursuant to article 21 of the CEDAW Convention, the Committee delivers General Recommendations interpreting and stressing the importance of certain rights under the Convention. Although these interpretations are not legally binding in and of themselves, they are legally authoritative comments that illustrate and provide detail on the content and scope of the provisions of the Convention. As such, States parties have an obligation to comply with them in good faith. As of 1 November 2006, the Committee has issued 25 General Recommendations.

Today, the CEDAW Convention is the principal international convention dealing with women’s human rights. As of 19 September 2006, 184 countries (over ninety percent of the members of the United Nations) are parties to the Convention.⁷⁶²

761 Laboni Hoq, “The Women’s Convention and its Optional Protocol: Empowering Women to Claim their Internationally Protected Rights” (2001) 32 *Colum. Human Rights L. Rev.* 699, p. 684.

762 At <http://www.un.org/womenwatch/daw/cedaw/states.htm>

5.2.2 Object and Purpose of the CEDAW Convention

The CEDAW Committee states in General Recommendation 25, regarding article 4, paragraph 1, that the overall object and purpose of the Convention is to eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of human rights and fundamental freedoms.⁷⁶³ The CEDAW Committee further states that:

“[A] joint reading of articles 1, 5 and 24, which form the general interpretative framework for all the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender⁷⁶⁴ relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals, but also in law, and legal and societal structures and institutions.”⁷⁶⁵

763 Committee on the Elimination of Discrimination against Women, General Recommendation 25, § 4.

764 The term gender refers to the way in which the roles, attitudes, values and relationships regarding men and women are constructed without foundation in biological necessity. The term is contingent on a particular socio-economic, political and cultural context and is affected by other factors such as age, race, class, sexuality or ethnicity. Sex typically refers to biological differences between men and women. Although the word “gender” is not mentioned in the CEDAW Convention, Hanna Beate Schöpp-Schilling, member of the CEDAW Committee, observes that the language used in articles 1 and 5 like “marital status”, “social and cultural patterns of conduct of men and women”, “prejudices and customary practices (...) based on the idea of inferiority of the superiority of either sexes”, “stereotyped roles for men and women”, and the understanding of maternity as not merely a biological but also a “social function” putting obligations on both women and men, which point to socially and culturally conditioned expectations attached to women and men which may constitute gender discrimination. In: Hanna Beate Schöpp-Schilling, *The United Nations Convention on the Elimination of All Forms of Discrimination against Women*, International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 2.

765 See CEDAW Committee, General Recommendation 25, §§ 6-7. A similar analysis of the Convention's object was adopted in the first National Report on CEDAW to the Dutch Parliament: L.S. Groenman, et al., *Het Vrouwenverdrag in Nederland anno 1997*, Vuga, Den Haag, 1997. The CEDAW Committee endorsed this analysis in the Concluding Comments on the situation in the Netherlands after its 25th session in July 2001. Rikki Holtmaat, *European Women and the CEDAW-Convention; the way Forward*, paper presented at the EWLA Conference, Paris, 2002, p. 3.

Rikki Holtmaat has also pointed out that the three objectives should not be separated or ranked, but should be read as three sub-objectives of one and the same general object of the CEDAW Convention: the elimination of all forms of discrimination against women.⁷⁶⁶ The sub-objectives identify three different strategies that should be used in combination in order to achieve this overall purpose.⁷⁶⁷ Holtmaat argues that measures under the first obligation are to ensure that men and women are equal before the law and in public and private life as provided in article 2 of the CEDAW Convention. On the basis of this article, governments are obliged to make sure that their laws and practices do not discriminate against women and that discrimination is not allowed between citizens. Holtmaat has indicated that fulfilment of this first obligation is a necessary precondition to reach equality between men and women, but measures pursuant to the second obligation have to be developed to ensure that this formal equality before the law and in public administration can also be realised in reality (see articles 3, 4 and 24 of the CEDAW Convention).⁷⁶⁸ These policy measures are intended to give *de facto* equal rights and opportunities to women and to guarantee that women have full enjoyment of all human rights. These measures can either be of a structural and permanent nature or of a temporary nature as provided for under article 4(1) of the CEDAW Convention. However, as Holtmaat points out correctly, the situation of women will not improve as long as the root causes of discrimination against women are not effectively addressed. Measures taken without addressing prevailing gender relations and the persistence of gender-based stereotypes (see article 5(a) of the CEDAW Convention) will be ineffective.⁷⁶⁹ Obligations under articles 2, 3, 4, 5 and 24 are discussed in detail in Section 2.4 of this chapter.

5.2.3 Definition of Discrimination against Women in Article 1 of the CEDAW Convention

The CEDAW Convention defines discrimination against women in article 1 as:

“[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

766 Rikki Holtmaat, above note 765, p. 4.

767 *Ibid.*

768 *Ibid.*

769 *Ibid.*

status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The definition refers to both the effect as well as the purpose, thus directing attention to the consequences of measures as well as the intentions underlying them, and thus envisioning not only equal opportunity (formal equality) but also equality of outcome (*de facto* equality). Equal opportunity refers to the obligation of the State to offer women access to the means, e.g. laws, policies and procedures, on equal terms with men, for the achievement of a desired goal. Equality of outcome refers to the obligation of the State to achieve a certain outcome by means it determines to be appropriate.

The definition is not limited to discrimination through State action or actions by persons under the colour of law. The definition’s concluding phrase, “or any other field”, further expands the range of fundamental freedoms and political, economic, social, cultural and civil rights by contributing to the interpretation of women’s human rights. Although the CEDAW Committee has not formulated a General Recommendation that interprets the article 1 definition, Hanna Beate Schöpp-Schilling observes that the inclusion of discrimination of effect creates great potential for complaint and inquiry procedure under the Optional Protocol.⁷⁷⁰

The phrase “on the basis of equality of men and women” contains a central principle of the CEDAW Convention which has not been without critique.⁷⁷¹ The conventional understanding of “equality of men and women” is the right of women “to be equal to men” and as such to be treated in an identical manner in order to achieve equality. As a consequence, traditional male standards are applied to women while the fact that women are different from men in nature and circumstance is ignored.⁷⁷² Another approach to equality adopts the protectionist angle. This approach reconstitutes the differences between men and women as weaknesses in women, viewing the woman’s gender as a problem, which has to be addressed, rather than acknowledging and challenging the environment which poses a threat to women.⁷⁷³

770 Hanna Beate Schöpp-Schilling, above note 773, p. 1.

771 See e.g. Hillary Charlesworth, “What are ‘Women’s Human Rights’?”, in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, 1994, p. 64-65. She criticizes the male-centered view of equality in the CEDAW.

772 See IWRAP Asia Pacific: Optional Protocol, at <http://www.iwraw-ap.org/protocol>.

773 *Ibid.*

5.2.4 States Parties' Obligations under the CEDAW Convention

Articles 2 to 5 of the CEDAW Convention, together with the definition of discrimination under article 1, provide the general framework for the implementation of the substance and context recognised in articles 6 to 16. Articles 2 to 5 refer to actions that must be undertaken in order to comply with the substantive articles.

a) Article 2 – The General Undertaking Article

The scope of obligations under article 2 of the CEDAW Convention is an extensive one. Rebecca Cook observes that the article generally requires States parties “to ensure” compliance by their governments’ organs and to take “all appropriate measures” to effect the elimination of all forms of discrimination by “any person, organisation or enterprise” and to “modify or abolish laws, regulations, customs and practices.”⁷⁷⁴ Article 2 of the CEDAW Convention states:

“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 and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

774 Rebecca Cook, above note 780, p. 230.

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.”

In pursuing a policy of eliminating all forms of discrimination against women as required by article 2, States parties are obliged to address the specific nature of each instance of discrimination.⁷⁷⁵ In order to eliminate all forms of discrimination against women, one should go beyond gender-neutral norms and treatment, characteristics of women and their vulnerability to discrimination, including gender-based violence, are distinct. The very important element here is that violence against women is recognised as a form of discrimination and thus indeed a human rights violation. This recognition may justify specifically targeted responses. As the Committee states in General Recommendation 25 on temporary special measures, “a purely formal legal or programmatic approach is not sufficient to achieve women’s *de facto* equality with men, which the Committee interprets as substantive equality. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.”⁷⁷⁶

Under the CEDAW Convention, States parties clearly have to assume obligations of both results and means. States parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and therefore must comply with an obligation of result to eliminate discrimination against women in all its forms. The seven sub-sections of article 2 and subsequent articles outline the assumed obligations of means. For example, obligations under article 2(c) “to pursue by all appropriate means and without delay... [t]o *establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination*” grant States parties a choice of means, and create at the same time a legal duty to exercise that choice diligently (emphasis added).⁷⁷⁷

⁷⁷⁵ *Ibid.*, pp. 235-36.

⁷⁷⁶ See General Recommendation 25.

⁷⁷⁷ Rebecca Cook, above note 780, p. 232.

Through this two-fold obligation, States parties have to take the measures prescribed in the sub-sections and to realise reasonable results in eliminating all forms of discrimination.

Article 2 has not been the subject of a General Comment by the CEDAW Committee specifying the character of States parties' obligations. On the other hand, two other Committees – the HRC and the CERD Committee - have both issued General Comments on their respective treaties concerning general undertakings. The CERD Committee notes in its General Comment 3, *The nature of States parties' obligations (Article 2, para. 1)*, adopted in 1990, the following:

“that the phrase by all appropriate means must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the ‘appropriateness’ of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most ‘appropriate’ under the circumstances.”⁷⁷⁸

In General Comment 31, on The Nature of the General Legal Obligation Imposed on States parties to the Covenant, the HRC provides the following analysis of Article 2 of the ICCPR: “States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant”.⁷⁷⁹ The phrase “without delay” highlights the immediate need to take measures to ensure equality. Regarding the obligation of immediate implementation, General Comment 31 of the HRC states the following:

“the requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.”⁷⁸⁰

778 ESCR Committee, General Comment 3. The Nature of States Parties' Obligations (art. 2, par.1), adopted in 1990, UN Doc. E/1991/23.

779 HRC, General Comment 31, § 13.

780 *Ibid.*, § 14.

This principle is in accordance with the basic rule of the Vienna Convention on the Law of Treaties, which requires that treaty obligations be fulfilled in good faith.

In addition to formal (*de jure*) compliance, Article 2 (a) refers to the practical (*de facto*) realisation of non-discrimination. This implies that national constitutions, laws, regulations and other written policies are not, standing alone, sufficient to ensure compliance with non-discrimination under CEDAW. Rather, States must ensure that their administrative and judicial systems are designed to comply with this obligation in practice as well.⁷⁸¹ According to Marsha Freeman, compliance involves the training and monitoring of administrative staff, those who deal with the public, policy makers and the judiciary, in order that they understand the non-discrimination principle. It further entails ensuring that service delivery programmes are equally accessible by women in terms of location, hours and costs. Some reallocation of resources may be necessary to meet this obligation.⁷⁸²

As mentioned above, an important aspect of the CEDAW Convention is the fact that the prohibition of discrimination affects not only State actors but non-state actors as well (article 2(e)). States can be held responsible for discrimination by non-state actors, i.e. individuals, organisations and enterprises. The appropriate measurers of the State include the prevention, investigation, prosecution and punishment of private acts of discrimination and to ensure reparation for the victim. The State can be held accountable for acts by non-state actors, not because of the act itself, but because of the lack of due diligence to prevent or respond to the violation of women's human rights as enshrined in the CEDAW Convention.

b) Article 3 – De Facto Equality

Article 3 of the CEDAW Convention requires States parties to:

“[E]nsure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

781 Marsha Freeman, *States Parties' Obligations under CEDAW Convention Articles 2, 3, 4, 5 and 24*, in *The Optional Protocol to CEDAW: mitigating violations of women's human rights*, International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 5.

782 *Ibid.*

Article 3 reaffirms that States parties are obliged to fulfil both positive and negative obligations. Besides ensuring non-interference in the exercise of the rights of women, States parties must adopt measures in order to achieve women's legal equality as well as their *de facto* equality in the enjoyment of human rights and fundamental freedoms. Article 3 of the CEDAW Convention is analogous to article 3 of the ICCPR and the ICESCR, which provide for the equal enjoyment of rights in the respective treaties. The HRC and the ESCR Committee have developed their own positions and jurisprudence regarding this obligation. This jurisprudence may be useful to examine for purposes of identifying appropriate measures when preparing an individual complaint.

c) Article 24 - The Capstone

Article 24 serves as a capstone of the CEDAW Convention. It is a general undertaking obligation for compliance with the Convention. It states:

“States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”

d) Article 4 - Temporary Measures

The corrective approach of substantive equality recognises that women and men must sometimes be treated differently in order to achieve an equal outcome. This goal is reinforced by article 4:

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

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

Article 4 (1) provides that States parties may adopt temporary special measures to accelerate *de facto* equality and that such measures shall not be considered discriminatory. Article 4 (2) specially addresses measures that must be in place regarding maternity protection. While the equality clause and the right to non-discrimination generally prohibit unequal treatment, article 4 explicitly permits it. General Recommendation 25 provides guidance to States on the use of

this important tool to implement the substantive obligations of the Convention. Although the language of article 4 is not mandatory, in order to fulfil women's human rights, equality and non-discrimination at a *de facto* level should be promoted through all appropriate means, including proactive measures and conditions to ensure the full development and advancement of women (see article 3 of the CEDAW Convention) and temporary special measures. Thus temporary measures should be regarded as a primary means to accomplish the Convention's objectives.

e) Article 5 - Elimination of Discriminatory Customs and Practices

Article 5 of the CEDAW Convention is unique among the United Nations human rights treaties. Article 5 (a) requires States parties to take all appropriate measures to:

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

General Recommendation 21 of the CEDAW Committee highlights the fact that the Convention, compared to other treaties and declarations “goes further by recognizing the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights of women.”⁷⁸³ Many discriminatory practices, including violence against women, are specifically rooted in custom and stereotypes. Because stereotyped views will not change by themselves, it is necessary to develop an active policy in which every legal measure and every public policy is critically examined to ensure the elimination of fixed gender stereotypes.⁷⁸⁴ Moreover, States parties often attempt to legitimise social and cultural practices violating the human rights of women by raising arguments of custom and culture. However, article 5 (a) contains a fundamental obligation that clearly disqualifies any such defence.

783 General Recommendation 21, § 3.

784 See Rikki Holtmaat, above note 774, p. 4.

f) The State Obligations under the Substantive Articles 6-16

The Convention refers to a range of areas in which States parties must work towards the elimination of discrimination: political and public life (article 7), international organisations (article 8), education (article 10), employment (article 11), health care (article 12), financial credit (article 13 (b)), cultural life (article 13 (c)), the rural sector (article 14), the law (articles 9 and 15) and the family (article 16). Indeed, the CEDAW Convention explicitly affirms women's rights to equality within the family, unlike other human rights instruments, such as the Universal Declaration on Human Rights (article 16) and the ICCPR (article 23), which merely designate the family as a unit to be protected.⁷⁸⁵ States parties shall take all appropriate measures to “suppress all forms of traffic in women and exploitation of prostitution of women” (article 6).

g) Obligation to Respect, Protect and Fulfil

Obligations of States in respect to civil, political economic, social and cultural rights and with respect to violence against women may be divided into three categories: the obligations to respect, protect and fulfil. The CEDAW Committee affirmed in its General Recommendation 25 that:

“States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil [the] right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of *de jure* as well as *de facto* equality with men.”⁷⁸⁶

785 Hillary Charlesworth and Christine Chinkin, *The Boundaries of International law, A Feminist Analysis*, Juris Publishing Manchester University Press, 2000, p. 218.

786 This aspect of State obligations was elaborated in a General Comment on the Right to Health by the Committee on Economic, Social and Cultural Rights: “all human rights [impose] three types or levels of obligations on States parties: the obligation to respect, protect and fulfil. In turn, the obligation to fulfil contains the obligation to facilitate, provide and promote”. ESCR Committee, General Comment 14, § 33. See also CEDAW Committee, General Recommendation 24, § 13: “The duty of States parties to ensure, on a basis of equality between men and women, access to health care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12.”

The obligation to *respect* requires States parties not to interfere in the enjoyment of human rights. For example, this obligation requires that a State should abstain from using violence. Rape of women and girls by a state official, for example, a prison guard or a security or military official always constitutes torture, for which the State is directly responsible. Other forms of sexual or physical abuse of women by State officials, such as virginity testing, fondling, deliberate use of threats, threats of bodily searches, sexual threats or sexually degrading or humiliating language, also constitute torture or ill-treatment.⁷⁸⁷

The obligation to *protect* requires that a State party take measures that counteract or prevent activities and processes that have a negative effect on the enjoyment of human rights. For example, the rights of women should be protected through the prevention of potential violations by establishing a judicial framework, including adopting effective laws and policies, bringing perpetrators to justice and guaranteeing women redress.

The obligation to *fulfil* entails the State's obligation to adopt appropriate legislative, judicial, administrative, budgetary and other measures towards the full realisation of human rights. In order to fulfil women's human rights, equality and non-discrimination should be promoted through all appropriate means including proactive measures and conditions to ensure the full development and advancement of women.

5.2.5 Justiciability

Because it is the purpose of the Optional Protocol to allow specific claims alleging a failure to comply with the obligations under the CEDAW Convention, the issue of justiciability will arise.

The CEDAW Convention does not contain a list of women's rights, but it identifies States parties' obligations to take measures to eliminate discrimination

787 The Special Rapporteur on torture has referred to acts of rape, sexual abuse and harassment, virginity testing, forced abortion or forced miscarriage as gender-specific forms of torture in his interim report to the General Assembly in 2000. Professor Kooijmans, the first Special Rapporteur on Torture, noted in his oral introduction to his 1992 report to the Commission on Human Rights, that "[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture," quoted in the Report of the Special Rapporteur, Mr. Nigel S. Rodley. Moreover, the Special Rapporteur on torture has pointed out that the fear of physical torture may constitute mental torture", in: Report on his visit to Azerbaijan.

against women. It has been argued that due to the vagueness of the obligations under the CEDAW Convention, in particular regarding economic, social and cultural rights, they are not justiciable. It has also been maintained that the manner in which a State carries out its obligation of result, such as the obligation to take “all appropriate measures” to achieve a stated goal, is not conducive to meaningful external scrutiny by international bodies. In other words, these obligations allegedly cannot be measured or ascertained as they leave a large degree of discretion to the States parties. The CEDAW Convention indeed does not merely provide women the right to equality and non-discrimination in all areas of public and private life, although some of the provisions do impose this type of specific obligations. Many of the obligations under the CEDAW Convention are formulated as obligations to take “all appropriate measures” towards the goal of eliminating discrimination. Consequently, the question is not whether guarantees of non-discrimination are justiciable, but whether obligations to work towards the elimination of discrimination are justiciable. The phrase “all appropriate measures,” requires States to identify the existing situation and on that basis determine the “appropriate measures” to correct that specific situation.

Andrew Byrnes and Jane Connors have analysed the justiciability issue in relation to the provisions under the CEDAW Convention and have come to the conclusion that the concerns about the justiciability of obligations contained in the Convention should not be overemphasised because a number of obligations are clearly justiciable. Even in the case of obligations “to take all appropriate measures”, it is possible for the Committee to exercise a meaningful level of scrutiny over steps taken by States parties to achieve the stated goals.⁷⁸⁸ Ineke Boerefijn has observed that the CEDAW Committee in spelling out the obligations deriving from economic, social and cultural rights in its General Recommendations and Concluding Comments under the reporting procedure has clearly demonstrated that it is very well possible to address these rights in terms of violations and real guarantees, particularly when dealing with the obligation to eliminate discrimination in the enjoyment of these rights.⁷⁸⁹ Thus, while States have a certain margin of choice in determining an appropriate

788 See Andrew Byrnes and Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?* (1995-96) 21 *Brooklyn Journal of International Law* 697, p. 713.

789 See Ineke Boerefijn, *State obligations under articles 10-14: women's economic, social and cultural rights*, The Optional Protocol to CEDAW: mitigating violations of women's human rights. International training seminar for NGOs and women's rights activists, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 16.

strategy, they are at the same time under the legal duty to exercise that choice diligently. States have to assess areas where discrimination persists and develop and apply measures for its elimination with due diligence.

Monitoring the obligation to work towards the elimination of discrimination against women may not always be that simple. However, the CEDAW Committee is able to express itself on the actions of States parties and although it may on occasion be unable to identify the appropriate measures in a specific situation, it is able to determine whether a State has taken the minimum steps necessary to demonstrate a bona fide fulfilment of its obligation.⁷⁹⁰ Byrnes and Connors observe that this is particularly true considering that the goal of equality and non-discrimination is not vague or open-ended, but is itself a justiciable guarantee.⁷⁹¹ Moreover, Boerefijn has underlined that guarantees of equality and non-discrimination are widely accepted as justiciable no matter whether the discrimination takes place in the sphere of civil and political rights or economic, social and cultural rights.⁷⁹² The General Recommendations and the Concluding Comments adopted by the CEDAW Committee under the reporting procedure may contribute to a more precise definition of the steps a State must take in order to carry out its obligations in good faith.

5.2.6 Violence Against Women

The CEDAW Convention does not directly refer to violence against women. In order to compensate for this omission, the CEDAW Committee issued at its eleventh session in 1992 General Recommendation 19 on Violence against Women.⁷⁹³ The Recommendation states:

“Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”

According to General Recommendation 19:

“The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion

⁷⁹⁰ *Ibid.*, p. 12.

⁷⁹¹ Andrew Byrnes and Jane Connors, *supra* note 41, p. 717.

⁷⁹² Ineke Boerefijn, above note 799, p. 11.

⁷⁹³ General Recommendation 19, § 1.

and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”

Violence against women is a subset of gender-based violence, which also includes violence against men in some circumstances, and violence against both women and men on the grounds of sexual orientation.⁷⁹⁴ The Recommendation further clarifies that:

“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.”

Examples of gender-based violence mentioned in General Recommendation 19 include: family violence and abuse, forced marriage, dowry deaths, acid attacks, female circumcision, sexual harassment, compulsory sterilization or abortion or denial of reproductive health services, battering, rape and other forms of sexual assault, and in certain circumstances, the abrogation of family responsibilities by men. The General Recommendation emphasises that “the full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women” (Paragraph 4).

⁷⁹⁴ See Amnesty International, “Making rights a reality: the duty of states to address violence against women”, 2004.

Textbox iii
***Special Rapporteur on Violence against Women,
its Causes and Consequences***⁷⁹⁵

Following the recognition that women's rights are human rights at the Vienna World Conference on Human Rights in 1993, and the adoption of the UN Declaration on the Elimination of All Forms of Violence against Women, the fight against violence against women was further strengthened with the appointment of the first ever Special Rapporteur on violence against women, its causes and consequences, by Resolution 1994/45, adopted by the UN Human Rights Commission on 4 March 1994.

According to her mandate, the main activities of the Special Rapporteur are :

- a) Seeking and receiving credible and reliable information from Governments, treaty bodies, the specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations (NGOs), including women's organizations;
- b) Making urgent appeals to Governments to clarify the situation of individuals whose circumstances give grounds to fear that treatment falling within the mandate of the Special Rapporteur is occurring or might occur;
- c) Transmitting to Governments information of the sort mentioned in (a) above indicating that acts falling within her mandate may have occurred or that legal or administrative measures are needed to prevent the occurrence of such acts;
- d) Carrying out visits in situ with the consent of the Governments concerned; and
- e) Reporting to the Commission on Human Rights and recommending measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes and to remedy its consequences.⁷⁹⁶

The Special Rapporteur works towards

the elimination of all forms of gender-based violence in the family, within the general community and where perpetrated or condoned by the State,

⁷⁹⁵ This *Textbox* was compiled using information available on the website of the Office of the High Commissioner for Human Rights (OHCHR), www.ohchr.org.

⁷⁹⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Towards an effective implementation of international norms to end violence against women, (Ms. Yakin Ertürk), (2003) UN doc. E/CN.4/2004/66.

emphasiz[ing] the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed groups or warring factions, and to provide access to just and effective remedies and specialized, including medical, assistance to victims.⁷⁹⁷

From 1994 to 2003, Ms Radhika Coomaraswamy (Sri Lanka) held the post of Special Rapporteur on violence against women. She undertook thematic studies of violence against women in the family, including cultural practices in the family that are violent towards women; violence against women in the community; violence against women during armed conflict; and the issue of international trafficking in persons. More specifically, she investigated the legacy of comfort women in Japan and Korea, led a mission to the US to report on violence against women in state and federal prisons, published reports concerning policies that impact on violence against women (economic and social policies and policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women), and also developed a framework for model legislation on domestic violence.⁷⁹⁸

In 2003, Ms Coomaraswamy was succeeded by Dr Yakin Ertürk (Turkey). Dr Ertürk has carried on the mandate of the Special Rapporteur by placing emphasis on “the *universality* of violence against women, the *multiplicity* of its forms and the *intersectionality* of diverse kinds of discrimination against women and its linkage to a system of domination that is based on subordination and inequality”⁷⁹⁹. Dr Ertürk has continued to explore the issues of violence against women perpetrated by security forces in situations of armed conflict, having carried out missions to the Darfur region of Sudan, the Occupied Palestinian Territory, Afghanistan, and the Chechen Republic; the problem of trafficking in women and girls, visiting both countries of origin and destination (the Russian Federation, Netherlands, Sweden), and cultural practices repressing women (among others, the widespread practice of forced marriage in Turkey). Further, Dr Ertürk has extensively researched the interplay between the diverse forms of discrimination connected to HIV/AIDS and their impact on violence against women. Of great contribution to the operation of the Special Rapporteur's mandate, has been Dr Ertürk's report on the due diligence standard⁸⁰⁰, in which she advocates for its application at

797 Human Rights Commission Resolution 2003/45.

798 Report of the Special Rapporteur on violence against women, its causes and consequences, A framework for model legislation on domestic violence, (Ms. Radhika Coomaraswamy), (1996) UN doc. E/CN.4/1996/53/Add.2

799 Report of the Special Rapporteur on violence against women, its causes and consequences, *supra* note 796.

800 Report of the Special Rapporteur on violence against women, its causes and consequences, The due diligence standard as a tool for the elimination of violence against women, (Ms. Yakin Ertürk), (2006) UN doc. E/CN.4/2006/61.

multiple levels, reaching beyond a State-centric approach limited to requiring States to punish the perpetrators, to pushing States to take positive action to prevent violence against women, provide compensation to the victims, and also to holding non-state actors accountable for their acts of violence.

Submitting a complaint to the Special Rapporteur on violence against women

As mentioned above, a part of the Special Rapporteur's mandate is to transmit urgent appeals and communications (allegation letters) to States concerning allegations of violence against women. Allegations may relate to individuals or groups of individuals or may document a general situation in which violence against women is being perpetrated or condoned.

These complaints may be sent to:

THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN
OHCHR-UNOG

8-14 Avenue de la Paix
1211 Geneva 10,
Switzerland

Fax: + 41 (0) 22 917 9006
E-mail: urgent-action@ohchr.org

Once received, the Special Rapporteur will assess the reliability of information transmitted and the degree of danger posed to a woman's life or personal integrity. If danger or threat of danger appears imminent, the Special Rapporteur will appeal to the government concerned requesting that urgent action be taken to ensure effective protection to those at risk. If the allegation concerns acts of violence against women which have already occurred, the Special Rapporteur will transmit an allegation letter to the government concerned seeking clarification on the substance of the alleged acts.

In order to submit a complaint to the Special Rapporteur, the "individual complaint form" made available on the Special Rapporteur's website should be completed. In addition to this, it is helpful to attach a summary of your case. Should further developments unfold upon submission of your case to the Special Rapporteur, these should also be brought to her attention.

For further details, please visit the Special Rapporteur's website, which contains useful information and advice on what points should be addressed in complaints:

<http://www.ohchr.org/english/issues/women/rapporteur/complaints.htm>

5.2.7 Reservations upon Ratification or Accession to the CEDAW Convention

The CEDAW Convention is subject to a large number of reservations. The principles regulating the making of reservations to treaties, objections to reservations and the legal relations among reserving, objecting and acquiescing States are contained in the Vienna Convention on the Law of Treaties.⁸⁰¹ The CEDAW Convention contains no article which prohibits reservations, nor does it classify any rights as non-derogable. Article 28 (2) of the CEDAW Convention follows the Vienna Convention by prohibiting reservations which are “incompatible with the object and purpose” of the CEDAW Convention. However, many of the reservations made by the States parties to the CEDAW Convention are clearly contrary to the object and purpose of the CEDAW Convention. This is in particular true of those reservations to central provisions such as articles 2 and 16 on the ground that national law, customs or religion are not congruent with the CEDAW principles. Consequently, a number of these reservations actually have the effect of reinforcing inequality between men and women preventing the full advancement of women and perpetuating their subordinate position relative to that of men. However, unlike article 20 (2) of the Convention to Eliminate All Forms of Racial Discrimination, which provides that a reservation shall be considered incompatible if at least two-thirds of States parties object, the only procedure provided for under the CEDAW Convention which could be used to rectify this problem is that under article 29 (1), which provides for referral of any dispute regarding the application or interpretation of the Convention to the ICJ. However, this provision is to subject to a large number of reservations and has never been applied.

The CEDAW Committee has adopted two General Recommendations on reservations. General Recommendation 4 expresses concern about the significant number of reservations that appear to be incompatible with the object and purpose of the Convention and suggests that States parties reconsider such reservations with a view to withdrawing them.⁸⁰² In General Recommendation 20, the CEDAW Committee recommends that States should:

“a) Raise the question of the validity and the legal effect of reservations to the Convention in the context of reservations to other human rights treaties;

801 Articles 19-23.

802 General Recommendation 4.

- (b) Reconsider such reservations with a view to strengthening the implementation of all human rights treaties;
- c) Consider introducing a procedure on reservations to the Convention comparable with that of other human rights treaties.”⁸⁰³

The CEDAW Committee’s Reporting Guidelines contain a paragraph on reservations. The Guidelines require as follows:

“Any reservation to or declaration as to any article of the Convention by the State party should be explained and its continued maintenance justified. Taking account of the Committee’s statement on reservations adopted at its nineteenth session (see A/53/38/Rev.1, part two, chap. I, sect. A), the precise effect of any reservation or declaration in terms of national law and policy should be explained. States parties that have entered general reservations which do not refer to any specific article, or which are directed at article 2 and/or 3 should report on the effect and the interpretation of those reservations. States parties should provide information on any reservations or declarations they may have lodged with regard to similar obligations in other human rights treaties.”⁸⁰⁴

In its statement on reservations the Committee articulates that it considers articles 2 and 16 to be core provisions of the Convention and expresses its particular concern at the number and extent of reservations entered to those articles. In General Recommendation 21, the Committee requires that States, in order to be consistent with articles 2, 3 and 24, withdraw their reservations in particular to articles 9 (on nationality), 15 (on legal capacity) and 16 (on marriage and family relations).⁸⁰⁵

The Committee, in its examination of States’ reports, enters into dialogue with the State party concerned and makes Concluding Comments that routinely express concern at the entry of reservations, in particular to articles 2 and 16, or the failure of the States parties to withdraw or modify them.⁸⁰⁶ However,

803 General Recommendation 20, § 2.

804 UN Doc. HRI/GEN/2/Rev. 1/Add.2, 5 May 2003.

805 General Recommendation 21.

806 See, for example, the comment of the Committee at its 34th session in 2006 on Thailand’s maintenance of its reservations to article 16, UN Doc. CEDAW/C/THA/CO/5, or the comment of the Committee at its 32nd session in 2005 on Algeria’s reservation to articles 2, 9(2), 15(4) and article 16. In relation to Algeria, the Committee noted that “reservations to articles 2 and 16 are contrary to the object and purpose of the Convention”, UN Doc. CEDAW/C/DZA/CC/2.

only a few States have withdrawn or modified their reservations in relation to articles 2 and 16.⁸⁰⁷ One problem is that the Concluding Comments, like the General Recommendations, are not legally binding; another problem is the lack of guidelines to determine what is and is not compatible with the object and purpose of the CEDAW Convention. Moreover, there are no procedural limitations on making reservations, and the consequences of incompatible reservations are not spelled out.

Despite its concern, the CEDAW Committee has not adopted a recommendation similar to that of the Human Rights Committee with respect to reservations to the ICCPR.⁸⁰⁸ The Human Rights Committee holds:

“It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”⁸⁰⁹

The Human Rights Committee states further that in order that the “reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law.”⁸¹⁰ Moreover, the Human Rights Committee also criticises imprecise,

807 See, for example, the comments of the CEDAW Committee at its 35th session in 2006 on Malaysia’s decision to withdraw its reservation to articles 2 (f), 9 (l), 16 (b), (d) (e) and (h) of the Convention, UN Doc. CEDAW/C/MYS/CO/2 or the comments of the CEDAW Committee at its 32 session in 2005 on Turkey’s decision to withdraw its reservations, including to article 16 paragraphs 1 (c), (d), (f), (g) of the Convention,

808 Human Rights Committee, General Comment 24.

809 *Ibid.*, para 18.

810 *Ibid.*, para 19.

general reservations and emphasises that the effect of reservations on the treaty as a whole should be weighed.

The effect of reservations in terms of the Optional Protocol to the CEDAW Convention will be discussed hereunder.

5.3 Introduction to the Optional Protocol to the CEDAW Convention

The Optional Protocol to the CEDAW Convention, adopted by the General Assembly on 6 October 1999,⁸¹¹ was a response to calls for stronger enforcement mechanisms that could provide a means through which women might directly access justice at the international level. States parties to the CEDAW Convention are not automatically States parties to the Optional Protocol. Instead, States are required either to ratify or accede to the Optional Protocol in order to become a party. The Optional Protocol entered into force on 22 December 2000, following the ratification of the tenth State party to the Convention. As of 20 September 2006, the Optional Protocol had been ratified or acceded to by 81 States parties.⁸¹² See *Table 2* below for the status of ratification of the Optional Protocol, presented by region.

811 UN Doc. GA Res. 54/4, 15 October 1999.

812 <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>.

Table 2
*Ratifications of the Optional Protocol to the CEDAW*⁸¹³
(Countries by Region)

<i>Country (by region)</i>	Optional Protocol to CEDAW ⁸¹⁴
Africa	
Burkina Faso	10 October 2005
Cameroon	7 January 2005
Gabon	5 November 2004
Lesotho	24 September 2004
Libyan Arab Jamahiriya	18 June 2004
Mali	5 December 2000
Namibia	26 May 2000
Niger	30 September 2004
Nigeria	22 November 2004
Senegal	26 May 2000
South Africa	18 October 2005
United Republic of Tanzania	12 January 2006
Americas	
Optional Protocol to CEDAW	
Antigua & Barbuda	5 June 2006
Belize	9 December 2002
Bolivia	27 September 2000
Brazil	28 June 2002
Canada	18 October 2002
Costa Rica	20 September 2001

813 Table compiled using information available on the UN Treaty Bodies Database (see <http://www.unhchr.ch/tbs/doc.nsf>); information in table is current as of 1 November 2006.

814 For States which ratified the Optional Protocol to the CEDAW before its entry into force on 22 December 2000, the present Protocol entered into force three months from this date. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol entered into force three months after the date of the deposit of its own instrument of ratification or accession (Article 16, Optional Protocol to CEDAW).

Dominican Republic	10 August 2001
Ecuador	5 February 2002
Guatemala	9 May 2002
Mexico	15 March 2002
Panama	9 May 2001
Paraguay	14 May 2001
Peru	9 April 3002
St Kitts and Nevis	20 January 2006
Uruguay	26 July 2001
Venezuela	13 May 2002
Asia	Optional Protocol to CEDAW
Bangladesh	6 September 2000
Maldives	13 March 2006
Mongolia	28 March 2002
New Zealand	7 September 2000
Philippines	12 November 2003
Republic of Korea	18 October 2006
Solomon Islands	6 May 2002
Sri Lanka	15 October 2002
Thailand	14 June 2000
Timor Leste	16 April 2003
Europe / Central Asia	Optional Protocol to CEDAW
Albania	23 June 2003
Andorra	14 October 2002
Armenia	14 September 2006
Austria	6 September 2000
Azerbaijan	1 June 2001
Belarus	3 February 2004
Belgium	17 June 2004
Bosnia and Herzegovina	4 September 2002

Bulgaria	20 September 2006
Croatia	7 March 2001
Cyprus	26 April 2002
Czech Republic	26 February 2001
Denmark	31 May 2000
Finland	29 December 2000
France	9 June 2000
Georgia	1 August 2002
Germany	15 January 2002
Greece	24 January 2002
Hungary	22 December 2000
Iceland	6 March 2001
Ireland	7 September 2000
Italy	22 September 2000
Kazakhstan	24 August 2001
Kyrgyzstan	22 July 2002
Liechtenstein	24 October 2001
Lithuania	5 August 2004
Luxembourg	1 July 2003
Netherlands	22 May 2002
Norway	5 March 2002
Poland	22 December 2003
Portugal	26 April 2002
Republic of Moldova	28 February 2006
Romania	25 August 2003
Russian Federation	28 July 2004
San Marino	15 September 2005
Serbia and Montenegro	31 July 2003
Slovakia	17 November 2000
Slovenia	23 September 2004
Spain	6 July 2001
Sweden	24 April 2003
The Former Yugoslav Republic of Macedonia	17 October 2003

Turkey	29 October 2002
Ukraine	26 September 2003
United Kingdom of Great Britain and Northern Ireland	17 December 2004

The Protocol contains two procedures: a communication and an inquiry procedure. The first procedure offers the individual or a group of individuals the possibility to submit a complaint to the CEDAW Committee claiming that a State party has violated the complainant's rights under the Convention. It provides a means of seeking redress for *specific* violation(s) which result from an act or omission by a State party.

The inquiry procedure enables the CEDAW Committee to initiate inquiries into situations of grave or systematic violations of women's rights. In either procedure, States must be parties to the Convention and the Protocol. The two procedures are not mutually exclusive: it is not prohibited to submit an individual communication based on a human rights situation which is already the subject of an inquiry procedure. Article 17 of the Protocol explicitly provides that no reservations may be entered to its terms. However, the Protocol contains an "opt-out clause", allowing States upon ratification or accession to declare that they do not accept the inquiry procedure.

The original Maastricht draft of the Optional Protocol was modelled on existing treaty complaints mechanisms, but offered in many respects a broader procedure.⁸¹⁵ For example, the draft enlarged the category of those who could bring complaints to include individuals, groups or organisations claiming to be affected by a violation, as well as individuals, groups or organisations "with a sufficient interest".⁸¹⁶ This broader standing provision, which would have also allowed complaints of systematic discrimination in addition to individual complaints, was deleted at the meeting of the Commission on the Status of Women in 1998.⁸¹⁷ The Maastricht draft contained another innovative provision which placed an obligation on States to take steps to remedy violations identified

815 For a discussion on the Maastricht draft and a copy of the draft, see Andrew Byrnes and Jane Connors, above note 798, pp. 747-797.

816 *Ibid.*, article 2 (1) (b) of the Maastricht draft.

817 *Ibid.*, see GA Res. 54/4, 15 October 1999, article 2.

through the complaints mechanisms.⁸¹⁸ As views adopted by treaty monitoring bodies under existing complaints procedures are not expressly regarded as binding on concerned States, and instead are regarded simply as recommendations, this provision met resistance and consequently was dropped. As a result, instead of such a requirement, States are encouraged to give due consideration to CEDAW's views and to respond to them.⁸¹⁹ The third improvement in the Maastricht draft survived and has given the CEDAW Committee the power to inquire into allegations of systematic violations of the CEDAW Convention without a prior specific complaint.⁸²⁰

The CEDAW Committee has adopted a set of official guidelines on the administration of communications and inquiries under the Optional Protocol, referred to as the "Rules of Procedure".⁸²¹ From the moment the Committee receives an individual complaint or initiates an inquiry, it must follow this set of rules and procedures, which regulates the Committee members' approach to and assessment of the communications received. According to Rule 62 of the Rules of Procedure, the Committee may establish one or more working groups, each comprising no more than five of its members, and may designate one or more rapporteurs to make recommendations to the Committee and assist in any matter as the Committee may decide. In accordance with this Rule, the CEDAW Committee has established a Working Group on Communications, comprised of five CEDAW Committee members. The Working Group works closely with the Secretariat (the Division for the Advancement of Women) and meets prior to the regular sessions of the CEDAW Committee.

The tasks of the Working Group are to:

- Determine whether a communication should be registered. Such a decision can be made on a majority basis within the Working Group;
- Declare whether a communication is admissible under the Optional Protocol. In accordance with Rule 64 of the Rules of Procedure, this decision must be made unanimously. If the decision cannot be made unanimously at this stage, then the entire CEDAW Committee must by simple majority decide whether the communication is admissible;

818 *Ibid.*, article 8 of the Maastricht draft.

819 See article 7 (4) of the Optional Protocol.

820 See article 8 of the Optional Protocol.

821 They can be found at <http://www.un.org/womenwatch/daw/cedaw/index.html>.

- Request the State party, where necessary, to take interim measures in order to avoid irreparable damage to the victim or victims of the alleged violation, in accordance with Rule 63 of the Rules of Procedure;
- Make recommendations, in accordance with Rule 72 of the Rules of Procedure, to the CEDAW Committee on the merits of a communication.⁸²²

The current members of the Working Group on Communications under the Optional Protocol, whose two-year terms end on 31 December 2006, are: Magalys Arocha Dominguez (Cuba); Cornelis Flinterman (Netherlands); Krisztina Morvai (Hungary); Pramila Patten (Mauritius); Anamah Tan (Singapore).

5.4 Stages of the Communications Procedure⁸²³

5.4.1 Submission of a Communication

Although the communication need not follow a set format, there exists a model form containing guidelines for submission of communications to the CEDAW Committee.⁸²⁴ It is highly recommended that complainants follow these guidelines carefully when filing a petition. The model form identifies eight types of information that are necessary for a proper consideration of the case:

1. Information concerning the author(s) of the communication;
2. Information concerning the alleged victim(s) (if other than the author);
3. Information on the State party;
4. Nature of the alleged violation(s);
5. Steps taken to exhaust domestic remedies;
6. Other international procedures;
7. Date and signature of author(s) and/or victim(s);
8. List of documents that are attached to the communication form.

822 See IRAW Asia Pacific at <http://www.iwraw-ap.org/protocol/working.htm>.

823 International Women's Rights Actions Watch Asia Pacific also includes on its website a comprehensive overview of the different stages of the communications procedure at: <http://www.iwraw-ap.org/protocol/overview.htm>

824 This model form can be found at <http://www.un.org/womenwatch/daw/cedaw/protocol/modelform-E.PDF>.

The communications must be signed and submitted to:

Committee on the Elimination of Discrimination against Women
c/o Division for the Advancement of Women
Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza, DC-2/12th Floor
New York, NY 10017
USA
Fax : 1-212-963-3463

All communications submitted to the CEDAW Committee are first received and reviewed by the Secretariat of the Committee, i.e. the Division for the Advancement of Women (DAW). The Secretariat's role and responsibilities in the administration of the communications procedure are defined in detail in the abovementioned Rules of Procedure. The Secretariat can be contacted at daw@un.org.

The Secretariat determines the initial admissibility of the communication. In doing so the Secretariat will consider whether sufficient information has been provided in the communication. If the communication lacks information the Secretariat will seek further details from the author(s) of the petition in accordance with Rule 58 of the Rules of Procedure. Under Rule 59 of the Rules of Procedure, the Secretariat prepares a summary of the communication with a view to registration.

The Committee examines a complaint in two different stages. The first stage concerns the admissibility of the communication. A number of conditions must be fulfilled before the merits of the alleged violation can be considered. In accordance with Rule 64 of its Rules of Procedure, the Committee shall decide whether the communication is admissible or inadmissible. The second stage of consideration concerns the merits of the claim, i.e. whether the alleged facts constitute a violation of the CEDAW Convention. All documents relevant to both stages of inquiry should accompany the initial communication. Thus, relevant national laws and details of any administrative or judicial decisions with respect to the matter at the national level, including copies of such decisions, should be sent together with the communication. It is critically important to fulfil all formal admissibility requirements in order to avoid having the case declared inadmissible at the outset. The admissibility requirements are therefore set out in detail below.

5.4.2 Admissibility Requirements

a) Pre-admissibility Requirements

i. *Author of the Communication*

Article 2 of the Optional Protocol and Rule 68 of the Rules of Procedure establish that a communication may be submitted:

- By 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; or
- On behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received.

The communication must demonstrate that the complainant has been directly affected by the law, policy, practice, act or omission of the State party which she claims has violated, or is violating, her rights under the CEDAW Convention.⁸²⁵ A communication that challenges a law or policy which has not been applied to the complainant will be deemed inadmissible. Rather, the complainant or complainants must show that the law, policy or practice victimises her or them as an individual or group of individuals.⁸²⁶ This is also sometimes referred to as the rule against “*actio popularis*”.

The individual or group of individuals submitting the communication must demonstrate that she or they are under the jurisdiction of the State party concerned. This is of particular importance in cases of alleged violations of the rights of female immigrants, non-nationals and individuals residing in States other than their own.⁸²⁷ However, the individual who claims to be a victim of a State violation does not have to be a national or even a resident of the State concerned. States are legally responsible for respecting and implementing international human rights law within their territories and in territories where they exercise effective control in respect of *all* persons and regardless of a particular individual’s citizenship or migration status.⁸²⁸ The violations must

825 See Jane Connors, *Introduction to the Optional Protocol and its Mechanisms*, in *The Optional Protocol to CEDAW: mitigating violations of women’s human rights. International training seminar for NGOs and women’s rights activists*, 13-15 March, 2003, Berlin, Seminar documentation, Berlin: German Institute of Human Rights, 2003, p. 18.

826 *Ibid.*

827 *Ibid.*

828 See for example Article 12, International Law Commission’s Articles on responsibility of states for internationally wrongful acts, and Human Rights Committee General Comment 31.

have occurred during the time when the individuals(s) was subject to the jurisdiction of the State against which the communication is brought.

Although the Optional Protocol allows for individuals or groups of individuals to submit a communication on their own, the assistance of a lawyer or other trained advocate (NGO, etc.) may be advisable given the legal and procedural complexity of complaints. Moreover, some complainants might face other obstacles including illiteracy, fear of retaliation by family or community members, or even lack of financial resources. Article 2 of the Optional Protocol provides that communications may be submitted on behalf of individuals or groups of individuals, with their consent. The requirement of consent is again a safeguard against an *actio popularis* because it ensures that the communication is brought by those who have a sufficiently close connection to the original alleged violation and that the authors are committed to representing the best interests of the alleged victims of the violation. Evidence of consent can be in the form of an agreement to legal representation, power of attorney or other documentation indicating that the victim has authorised the representative to act on her behalf.⁸²⁹ In certain situations, a complaint may also be submitted where the consent of the individual or group of individuals has not been obtained, if the author can reasonably justify the lack of consent. For example, where a communication is brought on behalf of a very large group of individuals, one may argue that it is unreasonable to obtain consent from each individual victim. Other examples include cases in which a victim runs the risk of reprisals if she consents to the communication on her behalf or where the victim is unable to give her consent for reasons such as detention or other confinement, serious ill health or the lack of legal authority to consent.⁸³⁰

It should be noted, however, that the United Nations does not provide legal aid or financial assistance for complainants, and the CEDAW Committee does not mandate that States parties provide legal aid. Complainants should verify whether legal aid in their countries is available for bringing complaints under international mechanisms and whether NGOs or women's organisations offer assistance free of charge.

829 Inter-American Institute of Human Rights, *Optional Protocol. Convention on the Elimination of All Forms of Discrimination against Women*, San Jose, 2000, pp. 41-44, at IWRAP Asia Pacific, <http://www.iwraw-ap.org/protocol/jurisdiction.htm>.

830 *Ibid.*

ii. Format of the Communication

Article 3 of the Optional Protocol and Rule 56 of the Rules of Procedure establish that in order to be considered by the Committee, the communication:

- Must be in writing;
- May not be anonymous;
- Must refer to a State which is a party to both the Convention on the Elimination of Discrimination against Women and the Optional Protocol.

In terms of confidentiality, decisions concerning inadmissibility, discontinuation and merits are public documents. However, under Rule 74 of the Rules of Procedure, the CEDAW Committee may decide that “the name or names and identifying details of the author or authors of a communication or the individuals who are alleged to be the victim or victims of a violation of rights set forth in the Convention shall not be made public by the Committee, the author or the State party concerned.” However, the identity of the victim and the author of the complaint must be provided to the State party. In terms of submissions, the author of the complaint and the State party may make any submissions or provide any information related to the complaint available to the public unless the Committee decides “to keep confidential the whole or part of any submission or information relating to the proceedings.”

b) Infringement of a Right Protected by the CEDAW Convention – Violence against Women

Article 2 of the Optional Protocol states: “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*” (emphasis added).

In order to substantiate the individual complaint:

- The alleged violation in the communication must infringe a right (or rights) that is protected by the CEDAW Convention;
- The specifics of the communication must reveal discrimination based on sex or gender (how the alleged violation is linked to article 1 of the CEDAW Convention).

The CEDAW Convention does not contain a list of women’s rights, as discussed above. By becoming a State party to the CEDAW Convention, a State accepts a range of legally binding obligations to eliminate all forms of

discrimination against women and to establish equality between women and men. In that sense, the formulation of article 2 is somewhat peculiar as it refers to “*the rights set forth in the Convention*”. The authors of the individual complaint thus have to identify and define the right(s) and subsequently the violation of the right(s) on the basis of a careful analysis of obligations set forth in the CEDAW Convention and the particular circumstances of the alleged victim(s). Hence, the claim should provide information on the perpetrator of the violation and what action or inaction resulted from the violation in order demonstrate clearly the responsibility of the State. The claim should also describe how the violation has had a negative effect on the fulfilment of other obligations set out in the CEDAW Convention, as they are all interrelated.

It is extremely important to understand that a communication concerning arbitrary detention, torture, summary and extra-judicial executions, forced disappearances and other serious human rights violations will not be admissible under the Optional Protocol unless the complainant can show that there are elements of discrimination on the basis of sex or gender. The CEDAW Convention does not otherwise protect against these human rights violations. In other words, the Convention does not consist of obligations to ensure the enjoyment of independent human rights by women, but rather obliges States parties to afford women equality with men in the enjoyment of rights and to eliminate discrimination against women.⁸³¹

The analysis of violations should go beyond the obligations set out in the articles of the CEDAW Convention. The CEDAW Convention is not a static document. It is a living instrument, and therefore the jurisprudence of the CEDAW Committee, including General Recommendations, Concluding Comments adopted by the Committee in the State reporting process as well as views adopted by the CEDAW Committee in the individual communications and inquiry processes, are important to take into account while arguing a case. General Recommendations adopted by the CEDAW Committee have expanded the meaning of the provisions of the CEDAW Convention, of particular importance in the area of violence against women.⁸³² As also mentioned above, while the CEDAW Convention does not contain a provision protecting women from violence, General Recommendation 19 explicitly affirms that “the definition of discrimination [as laid down in article 1 of the Convention]

831 A. Byrnes and J. Connors, above note 798, p. 716.

832 In Communication No. 2/2003, *Mrs A.T. v. Hungary* (2/2003), the Committee explicitly considers the merits of the case against the backdrop of General Recommendation 19. This case is discussed hereunder.

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”⁸³³

i. Protection of Women from Violence by State Actors

As mentioned above, General Recommendation 19 provides that “[g]ender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include (...) the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.”⁸³⁴

General Recommendation 19 also states: “The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach State obligations under general international human rights law and under other conventions, in addition to breaching this Convention.” Thus a case of a woman who is tortured or has been subjected to ill-treatment by a State official can be the basis of a communication to the CEDAW Committee, provided, as mentioned above, that the facts of the violation disclose discrimination based on sex or gender. In isolation, some acts of violence are not necessarily identifiable as gender-based. Thus, communications may require an evaluation of how certain acts affect women in comparison with men and how gender affects the act of violence. Other acts are commonly gender-specific, such as forced abortion and forced sterilisation.

According to the UN Declaration on the Elimination of Violence against Women, the term “violence against women” means:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”⁸³⁵

833 General Recommendation 19.

834 *Ibid.*

835 Article 1 of the UN Declaration on the Elimination of Violence against Women.

Elements upon which gender often has a determinative impact and which should be examined in determining whether an act of torture or ill-treatment is gender-based include: (a) the form of the violence, for example, if the torture and ill-treatment of a women is sexual in nature (although men are also targeted with sexual violence, sexual forms of torture and ill-treatment are more consistently perpetrated against women); (b) the circumstances under which the violence occurs, for example, violence against women of a certain group in a situation of armed conflict, or punishments such as flogging and stoning, particularly those imposed by religious (e.g. *Sharia*) and *ad hoc* courts, and which are disproportionately applied to women, largely as a result of laws that criminalise adultery and sexual relations outside of marriage;⁸³⁶ (c) the consequences of the torture. Examples include threats of expulsion from their homes or communities or risk of being killed or subjected to other acts of violence at the hands of family members or communities (secondary victimisation) based on concepts of honour, fear and shame, and as a consequence silence of the victim and impunity for perpetrators; and (d) the availability and accessibility of reparation and redress. Factors might include lack of legal aid, need of male family member support to access the justice system, or to provide the financial means for such access.

ii. Protection of Women from Violence by Private Actors

Although the main focus of this guide is torture and ill-treatment by State actors, some words need to be devoted to the subject of violence against women by non-state actors, as violence against women occurs to a great extent in the domestic/private or general community sphere.

Over the past decade, a growing body of international human rights standards has recognised State responsibility for human rights violations by private actors when the State fails to exercise due diligence in preventing, investigating, prosecuting, punishing or granting redress for human rights violations. The “due diligence” standard has become the primary human rights test to

836 These punishments are disproportionately applied to women, largely as a result of laws that criminalise adultery and sexual relations outside of marriage. These laws are often used as means to circumscribe and control female sexuality. Evidentiary rules that provide that pregnancy constitutes irrefutable “evidence” of adultery or that give less weight to the testimony of women than to that of men, reinforce gender discrimination in the administration of justice. As a result, women are sentenced to corporal or capital punishment in far larger numbers than men. Punishments like flogging and stoning are indisputably in violation of international standards that prohibit torture and other cruel, inhuman or degrading treatment or punishment.

determine whether a State has met or failed to meet its obligations in combating violence against women. Women face violence to a great extent in the domestic and the community sphere, such as domestic violence, marital rape, trafficking, rape, violence against women in the name of honour and female genital mutilation. The recognition that States have certain positive obligations to prevent rights violations perpetrated by private actors, and that a State's failure to take measures to this end puts the State in breach of its responsibilities under international human rights law, plays an absolutely crucial role in efforts to eradicate gender-based violence. This recognition is perhaps one of the most important contributions of the women's movement to the human rights field.⁸³⁷ This is particularly true because violence against women by private actors continues to attract limited government attention. It is therefore not surprising that the trend towards holding States responsible for actions of private actors is specifically reflected in the gender specific instruments, such as the CEDAW Convention, which explicitly provides that States parties are under an obligation to take appropriate measures to eliminate discrimination by any person, including private persons.⁸³⁸ Also, General Recommendation 19 emphasises that:

“Under general international human rights law, 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 providing compensation.”⁸³⁹

Furthermore, Article 4 (c) of the Declaration on the Elimination of Violence against Women explicitly proclaims that States should:

“exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”

Issues of State responsibility where non-state actors have committed human rights violations have been considered with increasing frequency in recent years by international human rights bodies.⁸⁴⁰ The *Velásquez Rodríguez* case

837 See Report of the Special Rapporteur on violence against women to the Commission on Human Rights, (Ms. Radhika Coomaraswamy), (1995), UN Doc. E/CN.4/1995/42, para. 107.

838 Article 2 (e).

839 General Recommendation 19, § 9.

840 See, e.g., *Velásquez Rodríguez v. Honduras*, Series C, No. 4, judgment of the Inter-American Court of Human Rights of 29 July 1988.

has become a classic judicial opinion in international human rights law because it highlighted the State's duty to exercise due diligence with respect to violence committed by non-governmental actors.⁸⁴¹ In this case, the Inter-American Court of Human Rights held that:

“An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”⁸⁴²

The Court further stated:

“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.”⁸⁴³

In a 2001 case, the Inter-American Commission on Human Rights concluded that Brazil had failed to exercise due diligence to prevent and respond to a domestic violence case in spite of the clear evidence against the accused and the gravity of the charges. The Commission found that the case could be viewed as:

“part of a general pattern of negligence and lack of effective action by the state in prosecuting and convicting aggressors” and that it involved “not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.”⁸⁴⁴

Since its decision in *Osman v. the United Kingdom*, in which threats against an individual were brought to the attention of the police, who failed to intervene, the European Court of Human Rights has developed jurisprudence in relation to the obligations of States to provide protection against human rights

841 *Osman v. the United Kingdom*, No. 23452/94, Eur. Ct. of Hum. Rts. (28 October 1998); *Z. and Others v. United Kingdom*, No. 39392/95, Eur. Ct. of Hum. Rts. (10 May 2001); *E. and Others v. the United Kingdom*, No. 33218/96, Eur. Ct. of Hum. Rts. (26 November 2002); *X & Y v. Netherlands*, No. 91-A, Eur. Ct. of Hum. Rts. (26 March 1985).

842 *Ibid.*, para. 172.

843 *Ibid.*, para. 174.

844 Inter-American Commission on Human Rights, *Maria da Penha Maia Fernandes*, Report no. 54/01, Case 12.051, (Brazil), 16 April 2001, para. 56.

violations by non-state actors.⁸⁴⁵ According to the European Court, a failure to take reasonable available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State. It is sufficient to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

While not every infringement by an individual establishes a State's lack of due diligence and is considered a violation of human rights for which the State can be held responsible, States have to undertake their obligations seriously. This requirement includes the duty to provide and enforce adequate remedies to survivors of private violence. The existence of a legal system criminalising and providing sanctions for violence in the private sphere would not in itself be sufficient to pass the due diligence test; the government would also have to perform its functions effectively to ensure that incidents of family violence are *de facto* investigated, punished and remedied. The due diligence standard means that when a private actor commits an abuse to which the State fails to respond with due diligence, the State itself is responsible for the human rights violation.

The Optional Protocol to the CEDAW Convention offers great potential to seek justice for suffering violence at the hands of non-state actors for which the State can be held responsible. The individual complaint should clearly demonstrate the link between the alleged violations of the CEDAW Convention and the responsibility of the State concerned. The second individual communication dealt with by the CEDAW Committee concerned a domestic violence case.⁸⁴⁶

Ms. A.T., a Hungarian national born in 1968, mother of two children, one of whom was severely brain-damaged, claimed that for four years she had sought help against her violent husband L.F., with no result. Despite repeated threats to kill her, the complainant had not gone to a shelter as there was none that could accommodate the needs of a disabled child. Protection and restraining orders were not available under Hungarian law. In 1999, L.F. moved out of the

845 European Court of Human Rights, *Osman v. the United Kingdom*, 23452/94, 28 October 1998; European Court of Human Rights, *Z. and Others v. United Kingdom*, 39392/95, 10 May 2001, European Court of Human Rights, *E. and Others v. the United Kingdom* 33218/96, 26 November 2002. See also European Court of Human Rights, *X & Y v. Netherlands*, Judgment of 26 March 1985, Series A, No. 91-A.

846 *Mrs A.T. v. Hungary*, above note 832.

family apartment, but he continued to threaten A.T., forced himself into the apartment and used violence. The author had produced several medical certificates documenting her injuries between 1998 and July 2001, when she was subjected to such a severe beating that she needed to be hospitalised. There had been civil proceedings regarding L.F.'s access to the family residence and the distribution of the common property. With regard to L.F.'s access to the family residence, the Budapest Regional Court decided on 4 September 2003 that L.F. was authorised to return and use the apartment. The judges reportedly based their decision on the following grounds: (1) lack of substantiation of the claim that L.F. regularly battered the author and (2) that L.F.'s right to the property, including possession, could not be restricted. The author submitted a petition for review of this decision that was pending at the time of her submission of supplementary information. The civil proceeding regarding the division of property was suspended. Moreover, there had been two criminal ongoing procedures against L.F. concerning battery and assault causing her bodily harm. L.F. was however never detained in this connection, and the authorities had not taken any measures to protect the complainant or her children. She had also requested assistance from local child protection authorities, but this request had also been to no avail.

In its consideration of the merits, the CEDAW Committee recalled its General Recommendation 19 which addresses whether States parties can be held accountable for the conduct of non-state actors:

“[D]iscrimination under the Convention is not restricted to action by or on behalf of Governments ... [U]nder 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.”

Against this backdrop, the CEDAW Committee faced the issue of whether the author of the communication was the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleged, for the past four years the State party had failed in its duty to provide her with effective protection from serious risk to her physical and mental health and her life by her former common-law husband. The Committee concluded:

“9.3 With regard to article 2 (a), (b) and (e), the Committee notes 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 husband and, furthermore, that legal and insti-

tutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.(...) The Committee further notes that the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author may have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comment from August 2002 on the State party's combined fourth and fifth periodic report that States. "... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion order or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party that are set out in article (a), (b), and (e) of the Convention extend to the prevention of, and protection from violence against women and, in the instant case, remain unfulfilled and constitute a violations of the author's human rights and fundamental freedoms, particularly her rights to security of person."

"9.4 The Committee addresses articles 5 and 16 together in its general recommendation 19 in dealing with family violence. (...) It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002, and was concerned about 'the persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family ...'. In respect of the instant case before the committee, the facts of the communication reveal aspects of the relationships between the sexes and the attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband - the father of her two children. The author has been battered by the same man, i.e. her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L.F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in

the State party. She has been unable to flee to a shelter because none are equipped to take her in together with her children, one of whom is fully disabled.(...) [C]onsidered together, [these facts] indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.”

“9.6 ...[T]he Committee is of the view 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 of the Convention on the Elimination of All Forms of Discrimination against Women ...”

c) Exhaustion of Domestic Remedies

Article 4 (1) of the Optional Protocol specifies that “[t]he Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted.” This basic rule of international law requires that a complainant first attempt to remedy the alleged violation through the domestic legal system of the State party. Only when all domestic remedies have been exhausted may the complainant resort to the CEDAW Committee for remedy. This rule guarantees that that State party has the opportunity to remedy a violation of any of the rights set forth under their legal system before the Committee considers the violation. In *Rahime Kayan v. Turkey*,⁸⁴⁷ the CEDAW Committee followed the requirements of the Human Rights Committee⁸⁴⁸ and noted that “[t]his would be an empty rule if authors were to bring the substance of a complaint to the Committee that has not been brought before an appropriate local authority.”

This case concerned the dismissal and termination of a civil servant for wearing a headscarf, and none of the complaints made before domestic authorities by the author raised the issue of discrimination based on sex. The first time that the author referred to filing an appeal, she stated that in her petition to the court she declared that the penalty for her infraction should have been a warning and not a “higher prosecution”. On the next occasion, the subject of sex-based discrimination, when the author defended herself while she was under

847 *Rahime Kayan v. Turkey*, (8/2005).

848 See for example, Human Rights Committee, *Antonio Parra Corral v. Spain* (1356/05), § 4.2.

investigation for having allegedly entered the classroom with her hair covered, the author focused on political and ideological issues. Her lawyer defended her before the Higher Disciplinary Council by arguing a mistake in the law. Her lawyer also referred to violations of rights to freedom of work, religion, conscience, thought, choice, the prohibition of discrimination, immunity of person and the right to develop one's physical and spiritual being. The lawyer further referenced national and international principles of law. When the author appealed against her dismissal she based her claim on nine grounds, none of which were based on sex discrimination. Also in her appeal to the Council of State she failed to raise sex discrimination. No further domestic remedies were pursued. Therefore, the CEDAW Committee concluded:

“7.7 In Sharp contrast to the complaints before the local authorities, the crux of the author's complaint made to the Committee is that she is a victim of a violation by the State party of article 11 of the Convention by the act of dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women. By doing this, the State party allegedly violated the author's right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security pensions rights and equal treatment. The Committee cannot but conclude that the author should have put forward arguments that raised the matter of discrimination based on sex in substance before the administrative bodies she addressed before submitting a communication to the Committee. For this reason the Committee concludes that the domestic remedies have not been exhausted for purposes of admissibility with regard to the author's allegation relating to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.”

However, the requirement that all domestic remedies must be exhausted is not absolute. Article 4 (1) of the Optional Protocol allows exceptions to the obligation of exhaustion of domestic remedies when “the application of such remedies is unreasonably prolonged or unlikely to bring effective relief”. The meanings of “unreasonably prolonged” and “unlikely to bring effective relief” allow for some amount of discretion by the CEDAW Committee. If it is alleged that domestic remedies have proven inadequate or unavailable, the communication must include evidence and a full, detailed description of all steps taken at the domestic level. Rule 69, paragraph 9, of the Rules of Procedure provides that where a claimant under the Optional Protocol claims to have exhausted domestic remedies or invokes one of the exceptions to this requirement, and the State party disputes that claim, the State party is required to provide details of the remedies available in the particular circumstances of that case.

In *A.T. v. Hungary*,⁸⁴⁹ discussed above, domestic proceedings were still pending at the date of the submission of the communication. In the civil matter regarding the husband's access to the family apartment, the petition for review by the Supreme Court was dismissed at the time of the Committee's consideration of admissibility (but after the date of submission), and the civil matter regarding the distribution of the common property was suspended based on the issue of registration for an undisclosed period of time. The Committee found:

“[T]he eventual outcome of this proceeding is not likely to bring effective relief vis-à-vis the current life threatening violation of the Convention of which the author has complained.”

Moreover, two criminal proceedings against the perpetrator on charges of assault and battery were decided by convicting him and imposing a fine after the submission of the communication. Nonetheless, the Committee found:

“[S]uch a delay of over three years from the dates of incidents in question would amount to an unreasonably prolonged delay within the meaning of article 4, paragraph 1, of the Optional Protocol, particularly considering that the author has been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.”

d) Inadmissibility for Concurrent Examination of the Same Matter

Article 4, paragraph 2 establishes another five criteria by which a complaint shall be declared inadmissible by the CEDAW Committee, the first of which is where “the same matter has already been examined by the CEDAW Committee or has been or is being examined under a procedure of another international investigation or settlement”. This admissibility criterion aims to avoid duplication at the international level. At the same time, it underlines the importance of steering communications to the most appropriate treaty body, the one which can provide the most appropriate remedy for the victim. In many cases, victims of human rights violations have also the possibility of issuing the claim under other procedures, such as the First Optional Protocol to the ICCPR, the CAT, the International Convention on the Elimination of All

849 *Mrs A.T. v. Hungary*, above note 832.

Forms of Racial Discrimination or regional procedures (the Council of Europe, the Organisation of American States and the African Union).

Regarding the meaning of “the same matter”, the HRC Committee has noted in its jurisprudence that this phrase implies that the same claim has been advanced by the same person.⁸⁵⁰ In Communication *Fanali v. Italy*, the HRC Committee held,

“[T]he concept of the ‘same matter’ within the meaning of article 5 (2) (a) of the Optional Protocol has to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing act on his behalf before the other international body.”⁸⁵¹

The CEDAW Committee has followed the HRC Committee in *Rahime Kayan v. Turkey*.⁸⁵² The communication was found admissible under Optional Protocol article 4, paragraph 2 (a), as the author was a different individual than the woman which the State party named in its argument that the communication was inadmissible because of a similar case before the European Court of Human Rights.

The criterion allows some discretion by the CEDAW Committee as to the meaning of the phrase “under a procedure of another international investigation or settlement.” The HRC Committee has taken the position that inasmuch as the ICCPR provides greater protection than is available under other international instruments, facts that have already been submitted to another international mechanism can be brought before the HRC Committee if broader protections are invoked. Thus mechanisms such as the 1503 procedure of the Human Rights Council, the communications procedure of the Committee on the Status of Women or those developed by special procedures will fairly clearly not be meant by this definition.⁸⁵³ The HRC Committee also takes the view that if an individual complaint is dismissed by another international procedure, not on the merits but on procedural grounds, the same facts may be brought before the HRC Committee. The CEDAW Committee will likely take a similar view on these issues.⁸⁵⁴

850 *Rahime Kayan v. Turkey*, *supra* note 847.

851 Human Rights Committee, *Fanali v. Italy* (75/80).

852 Communication No. 8/2005, decision adopted at the 34th session, 27 January 2006.

853 Jane Connors, above note 825, p. 18.

854 In an interview on 9 December 2006, this view was also expressed by Cees Flinterman, member of the CEDAW Committee and Working Group dealing with communications under the Optional Protocol.

e) Other Admissibility Requirements under Article 4(2)

Article 4(2) states that the Committee shall also declare a communication inadmissible where:

- “(b) It is incompatible with the provisions of the Convention;
- (c) It is manifestly ill-founded or not sufficiently substantiated;
- (d) It is an abuse of the right to submit a communication;
- (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date.”

With regard to the last admissibility criterion, the violation must have taken place after both the Convention and the Optional Protocol came into force (which is three months after ratification or accession). This criterion may cause difficulties because a communication may also be based on a continuing violation, one that began before the Optional Protocol came into force for the State party concerned and that continued thereafter. Details of such continuing violations should be clearly presented to the CEDAW Committee.

*B.-J. v. Germany*⁸⁵⁵ dealt with the consequences of divorce, particularly equalisation of accrued gains, equalisation of pensions, and maintenance after termination of marriage. Considering the issues and proceedings before the CEDAW Committee concerning the admissibility of the communication, it notes that the divorce became final together with the matter of the equalisation of pensions before the entry into force of the Optional Protocol in respect of the State party. The Committee further found that the author has not made any convincing arguments that would indicate that the facts continued after this date. The Committee concluded that:

“[I]n accordance with article 4, paragraph 2 (e) of the Optional Protocol, it is precluded *ratione temporis* from considering the part of the communication that relates to the equalization of pensions.”

In *A.T. v. Hungary*⁸⁵⁶, discussed above, most of the incidents complained of also took place prior to the date on which the Optional Protocol entered into

855 *B.-J. v. Germany* (1/2003).

856 *Mrs A.T. v. Hungary*, above note 832.

force for the State party. However, the CEDAW Committee decided differently. It was persuaded that it was:

“competent *ratione temporis* to consider the communication in its entirety, because the facts that are the subject of the communication cover the alleged lack of protection/alleged culpable inaction on the part of the State party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present.”

With regard to *Rahime Kayan v. Turkey*⁸⁵⁷ the State party argued that the crucial date was 9 June 2000, when the author was dismissed from her position as a teacher. This date preceded the entry into force of the Optional Protocol for Turkey on 29 January 2003. The CEDAW Committee noted, however, that:

“7.4 ...[A]s a consequence of her dismissal, the author has lost her status as a civil servant in accordance with article 125 E7a of the Public Servants Law No. 657. The effects of the loss of her status are also at issue, namely her means of subsistence to a great extent, the deductions that would go toward her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee therefore considers that the facts continue after the entry into force of the Optional Protocol for the State party and justify admissibility of the communication *ratione temporis*.”

f) The Effect of Reservations on the Admissibility of Individual Complaints

Although the Optional Protocol prohibits reservations to its terms, as discussed above, the CEDAW Convention is subject to a large number of reservations. Many of these reservations are incompatible with the object and purpose of the CEDAW Convention and are thus prohibited by article 28 (2). It is to be expected that communications will address provisions of the CEDAW Convention to which the State party concerned has submitted general or specific reservations which affect the whole CEDAW Convention. In such a circumstance, the CEDAW Committee has to determine whether the communication is inadmissible or whether it may continue to consider the communication on the basis that the reservations are contrary to the object and purpose of the CEDAW

⁸⁵⁷ *Rahime Kayan v. Turkey*, above note 847.

Convention. In the latter circumstance, the Convention will be operative for the reserving State party without benefit of the reservation.⁸⁵⁸

5.4.3 Submission of the Communication to the State Party

When a communication has/have been deemed admissible, in accordance with article 6 (1) of the Optional Protocol and Rule 69 of the Rules of Procedure, the Committee shall bring the communication confidentially to the attention of the State party concerned. The identity(ies) of the complainant(s) will also be communicated to the State party if the complainant(s) has consented to disclose her or their identity.

5.4.4 Consideration of the Complaint by the CEDAW Committee

According to article 6 (2) of the Optional Protocol, States must respond within six months from the time that the Committee sends the complaint to them. Article 7 of the Optional Protocol outlines the process of the complaint consideration. Rule 69 of the Rules of Procedure details the procedure with regards to the communications received.

Normally the Committee asks the State to respond to the admissibility and merits of the case. This request shall include a statement that no decision has been reached on the question of admissibility of the communication. Upon receipt of the State's response, the Committee will send the response to the complainant, who will then have an opportunity to respond within a time frame determined by the Committee. Article 7 (1) stipulates that any information submitted to the CEDAW Committee for consideration in relation to the

858 The HRC Committee follows this line of thought. Where an individual communication is based on a provision to which the State party in question has entered a reservation, this reservation will be without effect for the reserving State party when the reservation is contrary to the object and purpose of the ICCPR, and the individual communication will therefore not be precluded from consideration. See General Comment 24; *Rawle Kennedy v. Trinidad and Tobago* (HRC 845/1999). Cees Flinterman, member of the CEDAW Committee and Working Group dealing with communications under the Optional Protocol, in an interview on 9 December 2006 explained that he could very well imagine that the CEDAW Committee would follow the same track.

complaint must also be made available to all concerned parties. This allows both parties to respond to the information presented. If the Committee requests further information from either party, the other party will have an opportunity to respond to the information submitted, and the same holds if the Committee requests information from third parties.

Depending on the case, the Committee has the discretion to request that the State party only respond on the issue of admissibility, but in such cases the State party may nonetheless submit a written explanation or statement that relates also to the merits of the complaint, provided that such a written explanation or statement is submitted within the original six-month deadline. Alternatively, the State has two months upon receipt of a complaint to request that the communication be deemed inadmissible. This request does not affect the State party's obligation to respond to the merits of the complaint within the original six-month period unless the Committee decides that an extension of time is appropriate.

The Committee then decides whether to rule the communication inadmissible or deal with the two issues separately. After the complainant comments on the State party's response, the Committee reviews all the information and decides whether the complaint is admissible or not. If the complaint is ruled inadmissible, the complaint ceases; however, the complainant may seek a review of the decision if the circumstances that deemed the complaint inadmissible no longer exist. After deciding that a communication is admissible, the Committee considers the merits. The Committee may, after reviewing the State party's merits arguments, revoke its initial decision deeming the communication admissible. The Committee informs both parties of its decision.

In accordance with article 7 (2) of the Optional Protocol, the Committee holds closed meetings when examining the communications. The final views and recommendations are adopted by the full CEDAW Committee and will be transmitted to the parties concerned as mandated by article 7 (3) of the Optional Protocol and Rule 72 of the Rules of Procedure.

5.4.5 Interim Measures

According to article 5 (1) of the Optional Protocol and Rule 63 of the Rules of Procedure, the Committee can request, *at its discretion*, that a State party take interim measures to avoid irreparable damage to a complainant at any time after the receipt of a communication and before the merits determination.

Article 5 (2) of the Optional Protocol states that that such a request does not have any bearing on the determination of admissibility or merits of the communication.

5.4.6 Views and Recommendations of the Committee

When the CEDAW Committee has come to the conclusion that the State party has violated a right set forth in the Convention as alleged in the communication, the Committee will recommend to the State party actions to address the violation. The recommendations may have a direct impact on the individual woman and/or may advance women's human rights under the jurisdiction of the State party in general. It should of course be underlined that in contributing to the jurisprudence of the CEDAW Committee, each remedy suggested will have an impact on the advancement of human rights of women generally.

As the CEDAW Committee is a quasi-judicial body, its views are of a recommendatory rather than obligatory character. However, although not legally enforceable within the jurisdiction of States parties, the recommendations of the CEDAW Committee authoritatively indicate the content of rights under the CEDAW Convention. They should be implemented by States parties as they have assumed international legal obligations to remedy violations of rights enshrined in the Convention.

5.4.7 Follow up

Article 7 (4) of the Optional Protocol stipulates that the State party should give due consideration to the views and the recommendations of the Committee and shall provide the CEDAW Committee within six months a written response regarding any actions it has taken in response to the Committee's views or recommendations. The Committee may request that the State party provide further information if it is not satisfied and may also ask the State to give updates on measures taken in light of the Committee's earlier expressed views and recommendations under Article 18's reporting obligation (article (5)).

5.5 The Optional Protocol to the CEDAW Convention in Relation to Other Complaint Procedures - Choosing the Most Appropriate Avenue

The Optional Protocol to the CEDAW Convention constitutes but one part of the framework of the United Nations human rights monitoring mechanisms, which seek to provide protection to women from torture and related violence at the national level. As mentioned above, the HRC and the CAT Committees provide scope for claims concerning violence against women, including torture.⁸⁵⁹

In addition to procedures under the auspices of the United Nations, the Council of Europe, the European Union, the Organisation of American States and the African Commission on Human and Peoples Rights provide protection against sex discrimination, and their decisions, with the exception of the latter, are legally binding. In particular, the Council of Europe and the Organisation of American States have developed strong jurisprudence with regard to discrimination against women.

Thus women who have been subjected to torture or other forms of violence may be able to choose among a number of procedures at both the international and regional levels. Such a choice should be based on strategic considerations, the specific facts, the admissibility conditions under the several procedures as well as the approach of the various bodies with respect to women subjected to torture and other forms of violence. If, for example, immediate relief for an individual is sought, it may be more appropriate to file an individual complaint with a regional procedure empowered to make legally binding decisions. On the other hand, when the purpose of an individual complaint is also to effect legal or policy change at the national level, a United Nations procedure may be the more effective avenue.⁸⁶⁰

With regard to the facts specific to the violation, as mentioned above, before choosing the Optional Protocol to the CEDAW Convention, the applicant must be confident that the alleged violation in the communication infringes a

859 The Committee on Migrant Workers, which monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, will also under certain circumstances consider individual communications claiming violations of rights under the Convention, once 10 States parties have accepted this procedure in accordance with article 77 of that Convention.

860 See Jane Connors, above note 67, p. 22. Another route would be the inquiry procedure under the Optional Protocol to the CEDAW Convention.

right(s) protected by the CEDAW Convention, and the violation must entail discrimination on the basis of sex or gender, whether direct or indirect. Sometimes it is difficult to detect discrimination against women based on sex or gender when dealing with a torture case. In light of the fact that women often experience torture and other cruel, inhuman and degrading treatment or punishment in gender-specific ways or for reasons that are related to gender, it is essential to “gender” the victim, the form, the circumstances and the consequences of torture as well as the availability of remedies and reparations. Should there be no discrimination based on sex or gender, the case would be inadmissible under the Optional Protocol to the CEDAW Convention but could very well be admissible under the communications procedures of the HRC or CAT Committee.

The admissibility requirements and procedures of the other UN treaty bodies are similar to those under the Optional Protocol to the CEDAW Convention. Because the Optional Protocol to the CEDAW Convention is relatively new compared to the other mechanisms, one should make sure that the violation of rights(s) dealt with in the communication took place after the Optional Protocol entered into force for the State party concerned.

The identification of the scope of the human rights obligations under the different treaties by the respective treaty monitoring bodies should also be taken into account before choosing the appropriate avenue. The sources one can draw from are: the relevant provisions of human rights treaties, the General Recommendations adopted by the treaty monitoring bodies, the Concluding Comments adopted by the treaty monitoring bodies under reporting procedures and the views adopted by the treaty monitoring bodies under communication and inquiry procedures.

The CEDAW Committee is at the forefront of efforts to develop standards by which States have positive duties to protect individuals from violence at the hands of non-state actors. In addition to the article 2 (e) provision for protection from human rights violations by private individuals, General Recommendation 19 on violence against women and General Recommendation 24 on women and health, have emphasised the obligations of States to prevent and punish private discrimination. Therefore, the Optional Protocol to the CEDAW Convention raises particularly high expectations in relation to communications dealing with violence against women perpetrated by private individuals.

While the CEDAW Committee has given limited attention to the issue of gender-based violence at the hands of State agents during its examination of initial

or periodical government reports, the CEDAW Convention contemplates such claims. In accordance with General Recommendation 19, States parties to the CEDAW Convention are under the obligation to refrain from gender-based torture and cruel, inhuman or degrading treatment or punishment. Accordingly, the CEDAW Committee is amenable to receiving such claims in order to protect women from such violence and to ensure that the gendered dimensions of torture and cruel, inhuman or degrading treatment or punishment are fully considered within the framework of its mandate.⁸⁶¹

861 Expressed by Committee Member Cees Flinterman in an interview, 9 December 2006.