Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation

Report

Kuala Lumpur, Malaysia
14-16 February 2007

Organised by
International Women's Rights Action Watch Asia Pacific
(IWRAW Asia Pacific)
in collaboration with
University of New South Wales, Australia

International Women's Rights Action Watch Asia Pacific
(IWRAW Asia Pacific)
80B Jalan Bangsar
59200 Kuala Lumpur, Malaysia
Tel: +603-2282 2255
Fax: +603-2283 2552
Email: iwraw-ap@iwraw-ap.org
URL: http://www.iwraw-ap.org

Australian Human Rights Centre
Faculty of Law, University of New South Wales
Sydney 2052 Australia
Tel: + 61-2-9385-1803, +61-2-9385-3637
Fax: +61-2-9385-1778
Email: ahrc@unsw.edu.au
URL: http://www.ahrcentre.org/

Table of Contents

Overview 1

Welcome and Introductions 3

TOPIC A: UNDERSTANDING CONCEPTS AND STANDARDS THAT RELATE TO STATE OBLIGATION IN INTERNATIONAL LAW

Session 1: Locating the Discussion: "State Obligation" and the International and National Law of State Responsibility 4

Session 2: The CEDAW Committee's Approach to Clarifying and Defining the Principle of State Obligation 9

Session 3: Affirming Progressive Elements of State Obligation Identified by Other Treaty Bodies 13

Session 4: Evolving Understanding of Women's Human Rights and Emerging Human Rights Standards: Non-State Actors 17

Session 5: Discussion on Guidelines (Working Groups) 21

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS

Session 6: General Issues of Applicability of the Convention 23

Session 7: Findings and Lessons from the Treaty Incorporation Project 29

Session 8: Legal Obligations and Remedies 34

Session 9: Obligations Relating to the Adoption, Enforcement and Implementation of Laws, Policies and Programmes 36

Session 10: Discussions on Guidelines (Working Groups) 38

Sessions 11 and 12 (combined): 39
- **(a) Judicial, Quasi-judicial and Related Use of the Convention**
- **(b) Institutional Mechanisms and Processes for Implementing the Convention and Recommendations of the CEDAW Committee**

Session 13: Discussion on Guidelines (Working Groups) 46

Session 14: Plenary – Review of Draft Elements Document 46

Final Comments and Closing 61

Annexes 62

List of Annexes

Annex 1: List of Participants

Annex 2: Expert Group Meeting Agenda

Annex 3: Final Elements Paper

Annex 4: Background Discussion Paper Table of Contents

Annex 5: Supplementary Materials Table of Contents

Annex 6: Paper distributed by Dianne Otto

Annex 7: Paper distributed by Elizabeth Evatt

Annex 8: Slides presented by Harry L. Roque Jr.

Annex 9: Paper distributed by Nurjaanah @ Janet Chew

Annex 10: Slides presented by Jesus Agura Villardo III

Annex 11: Paper distributed by Christine Forster

Overview

International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific), in collaboration with the Australian Human Rights Centre of the Faculty of Law, University of New South Wales, convened an expert group meeting (EGM) from 14 to 16 February 2007 in Kuala Lumpur, on the theme *CEDAW Article 2: National and International Dimensions of State Obligation*. The participants in the meeting included women's human rights activists and advocates, international law experts, academics, and past and present members of the Committee on the Elimination of Discrimination against Women ("CEDAW Committee" or "the Committee"), the body responsible for monitoring compliance with the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW", "CEDAW Convention" or "the Convention").[1]

The meeting was in the context of the decision of the CEDAW Committee to elaborate a general recommendation on article 2 of the Convention. The purpose of the meeting was to explore the possible form and content of such a general recommendation, and to put forward for the consideration of the CEDAW Committee a series of elements and issues that participants thought would be usefully addressed in the Committee's deliberations.[2] The EGM had the following objectives:

- to analyse and explicate the elements of State obligation under the CEDAW Convention, in particular article 2;
- to share the main findings of IWRAW Asia Pacific's treaty incorporation research project and analyse their relevance to the content and development of the concept of State obligation under the Convention;
- to identify particular elements of States' obligations in relation to the incorporation and implementation of the Convention at the national level, as well as enforcement of the Convention through domestic courts and tribunals and its use by other national bodies; and
- to adopt a set of guidelines and principles relating to the obligations of the State under the Convention in order to contribute to the drafting process of the general recommendation on article 2.

The consultation took place over three days and consisted of presentations followed by discussion and workshop sessions specifically aimed at drafting guidelines and principles for consideration by the plenary at the end of the meeting. A paper produced on the third day of the meeting, "Possible Elements for a General Recommendation on Article 2 of the CEDAW Convention", represented the range of issues which participants recommended that the CEDAW Committee consider in its deliberations on the general recommendation. The elements in this paper and the discussions at the EGM have been integrated into a revised elements document[3] that will be submitted to the CEDAW Committee.

The participants had available a number of background materials for the meeting, including a background discussion paper prepared by the Australian Human Rights Centre and supplementary documents compiled by IWRAW Asia Pacific.[4] In addition, presentations made by participants and subsequent discussions added to the meeting's consideration of elements that should be included in a general recommendation. This report summarises the presentations and discussions that took place during the EGM.

---

[1] The list of participants is attached at Annex 1.
[2] For the complete programme, see Annex 2.
[3] See Annex 3 for the text of the elements document.
[4] See Annexes 4 and 5 for the table of contents of the background discussion paper and the supplementary materials. Contact IWRAW Asia Pacific for a copy of the background paper.

Background to article 2 of the CEDAW Convention

Article 2 is one of the core articles of the CEDAW Convention, enumerating the general obligations and the legal and practical steps that a State party must take to implement the Convention and to achieve actual realisation of women's human rights. Article 2 reads:

> 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 realisation 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, organisation or enterprise;
>
> (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 order to assist States to fulfil their obligations under the Convention, the CEDAW Committee has consistently used the reporting process to clarify the content of States parties' general obligations under the Convention ("State obligation"). Through this process, the Committee has interpreted the provisions contained in article 2 as they relate to specific contexts and circumstances. The Committee has also engaged in discussions around the issue of reservations by States parties to article 2 of the Convention, in particular the issue of whether a reservation to such a fundamental provision of the Convention is incompatible with the object and purpose of the treaty.

The CEDAW Committee has the power under article 21 of the Convention to make suggestions and general recommendations elaborating the Committee's view of the obligations assumed under the Convention. At the twenty-ninth CEDAW Session, the Committee decided that its next general recommendation would be on article 2 of the Convention. In July 2004, the Committee held a Day of General Discussion on the elements that should be included in a general recommendation on article 2.[5] Taking all of these opportunities and challenges into consideration, this EGM was organised to help contribute to the Committee's process of drafting a general recommendation on article 2.

[5] See Report of the Committee on the Elimination of Discrimination against Women, thirtieth session (12-30 January 2004) and thirty-first session (6-23 July 2004), A/59/38, paras. 449-450.

Welcome and Introduction

Speakers: Anuradha Rao and Andrew Byrnes

Anuradha Rao, Executive Director of IWRAW Asia Pacific, welcomed the participants to the Expert Group Meeting on State Obligation and invited them to introduce themselves. After introducing the Australian Human Rights Centre at the University of New South Wales, Andrew Byrnes outlined the provisional purposes the meeting, the structure of the meeting and the anticipated outcomes, and then went through the agenda.

Andrew defined the provisional purposes of meeting as: (1) identifying issues that the participants in their various roles (activists, academics, lawyers, CEDAW Committee members) consider important in relation to obligations under the Convention; (2) drawing together relevant materials that are useful in terms of State obligation, both for the CEDAW Convention and other human rights bodies; and (3) indicating substantive recommendations or actions that the CEDAW Committee might want to consider including in its general recommendation on State obligation.

In terms of outcomes, Andrew said that the organisers envisioned three documentary outcomes. First, the secretariat would produce a report of meeting, summarising the gist of discussions and accompanied by documentation that speakers prepared or brought with them. Second, the secretariat would revise the background paper that had been circulated prior to the meeting. Third, and most importantly, the secretariat would produce an elements paper that identifies issues that the participants in the EGM agree are critical to be addressed within a general recommendation on article 2 or some related general recommendation. Although the elements paper would not officially be “adopted” at the meeting, it will contain the ideas, elements and concerns articulated during the meeting.

TOPIC A: UNDERSTANDING CONCEPTS AND STANDARDS THAT RELATE TO STATE OBLIGATION IN INTERNATIONAL LAW

Session 1: Locating the discussion: “State obligation” and the international and national law of State responsibility

Speakers: Shanthi Dairiam and Andrew Byrnes
Chair: Anuradha Rao

Presentation by Shanthi Dairiam, CEDAW Committee member, Malaysia

Shanthi Dairiam began the meeting by raising questions both from her perspective as a CEDAW Committee member for the past two years and even more from her own activism with the Convention and observing the Committee.

The topic of State obligation includes two interrelated notions: (1) State responsibility for the actualisation of human rights; and (2) Accountability for these responsibilities under treaty law. In relation to these two issues, there are a number of relevant questions: What exactly is a State obligated or responsible for and how do we make it responsible for any breach of its obligations? To whom is a State accountable? Who can challenge a State on its failures and make it explain the breach of obligation? What explanation does it have to give and to whom? As a result of such challenges, how do we make a State commit itself to its obligations and to remedy the situation? These questions were raised in order to further examine the fora, institutions and international and national processes and procedures through which a State can be held accountable.

Understandings of State obligation and accountability have been created over a long period of time through the reading of the text of the Convention, including its intention, and through interpretations of the treaty bodies through their dialogues with States parties, concluding comments, general recommendations, decisions under complaint and inquiry mechanisms and subsequent State practice.

Normally a State is supposed to give effect to its treaty obligations through the reordering of its domestic law and policy guided by its constitutional provisions such as whether a treaty in that legal system is self-executing or whether it requires transformation into municipal law, or through the provisions of its treaty law if such a law exists. Constitutional and legal systems vary tremendously from country to country. When a treaty is not self-executing, it is often not clear how the legal system can or should be reordered to give effect to the treaty. The CEDAW Committee often asks how States parties give effect to the Convention, but doesn’t often get satisfactory answers. Perhaps States parties need more guidance on this.

Another aspect to consider is the difference between general international law and human rights law. Many aspects of general international law have no direct relevance for individuals within a country, citizens or non-citizens. This is because international law may involve relationships and reciprocity between and among States dealing with matters of dispute settlements, treatment of citizens of one State by another State, the attribution of a criminal act to a particular State such as acts of aggression by one State against another State, etc. But international law became much more significant for individuals when the notion of international human rights law came into being. While it is a fact that legally, international human rights law also depends on interstate relationships for dispute resolution, the subject of the dispute is not purely matters pertaining to interstate relationships but the duty of a State to its own people. So the usual rules of international

law on State responsibility and accountability do not become so relevant. In any case, within the dynamics of human rights law, interstate procedures have never been used to hold another State accountable, though a State is still technically responsible to another State for breach of responsibility to the people. In this context, the role of these people becomes critical and the struggle then is to ensure accountability of the State to its people. Therefore the pressing question is to whom the State is accountable at the end of the day for human rights.

This is an extremely critical question, because citizens and rights holders have to become key players in drawing accountability from the State. The obligation of the State should include facilitating the participation of citizens in the process of accounting for its responsibility for implementing human rights treaties. The CEDAW Committee has raised these questions with States parties, asking whether NGOs were consulted in the writing of the report, whether there is transparency in the process, how citizens are informed about the treaty, etc. There is a standard paragraph in the concluding comments that urges the State party to widely publish the concluding comments and translate them into local languages so everyone knows about it and there is some level of accountability.

The next question is: what is a State specifically responsible for when it has ratified the CEDAW Convention? The State undertakes to eliminate all forms of discrimination against women and to reorder domestic law and policy to facilitate this. In many countries, the treaty does not automatically become law, and the State has not made any efforts to transform the treaty into domestic law. Existing domestic law continues to be the applicable law, thus entrenching the status quo. There is no movement forward.

Besides this, several other impediments exist. First of all there is a lack of understanding of States parties of the purpose and intention of the Convention, including an understanding of discrimination. States parties think they have fulfilled the terms of the Convention because they have a provision that prohibits discrimination on certain grounds and have formalistic guarantees. But they do not understand the meaning of non-discrimination, the notion of indirect discrimination or the notion that neutrality can be discriminatory in itself. The Committee itself is often not precise enough in its concluding comments to help States parties. The concluding comments say that the State has to give effect to the treaty or include a definition of indirect discrimination, but States parties do not understand what this means.

States not only have a conceptual problem giving meaning to the right to equality and non-discrimination, but they also do not understand that they have an obligation of results or an obligation to ensure the practical realisation of rights, so that women can exercise their rights. What are the measures a State must put in place to make this happen? This refers to the obligation of means. The State must also identify non-State duty holders such as individuals and private institutions and organisations and put in place measures to regulate them so that their actions will also be in compliance with the principles of the Convention. Besides, whereas the separation of powers between the various branches of government – legislative, executive and the judiciary – is a desirable feature ensuring checks and balances, the State at the central level may plead that it has no authority, precisely because of the separation of powers. Or in a federated system, the State can again absolve itself of its human rights obligation by citing the devolution of power and decentralisation as an excuse. The question is how to ensure that such political structures work to protect and not impede the fulfilment of the human rights of the people. As part of the obligation of means, the State has to inform, educate, monitor and hold accountable

all its organs, vertically and horizontally. There must be intrastate mechanisms, both legal and administrative, to make this possible. [6]

There are other impediments that the State may say it faces, such as poverty or culture and tradition, to prevent it from fulfilling its human rights obligations. But poverty is a manifestation of the denial of human rights and cultural practices may be contributing to human rights violations. So in these contexts it is even more imperative to emphasise human rights and not allow States to use these as excuses for not fulfilling obligations.

A very critical feature of State obligation is the collection of appropriate data as evidence of discrimination and for monitoring the effectiveness of State action. The State has to be assessed on what it has achieved and not merely on what it does. The State therefore must monitor who benefits or is able to exercise their rights and how. This becomes complicated when there is diversity within a country. Discrimination occurs not only on the basis of sex but also on other grounds as well including minority status and disability. So various kinds of data disaggregated not only by sex but also by other categories such as ethnicity, minority status, disability or caste must be collected.

The Committee raises these questions in the constructive dialogues with States parties, asking about institutional measures, procedures, and the knowledge and awareness of State actors and of women themselves. The weakness is that concluding comments are sometimes rather broad or general, so the dialogue is not adequately reflected. Sometimes the concluding comments say that States should draft or develop an integrated plan for the implementation of the Convention. What does this mean? The delegation itself may understand it through the dialogue, but the delegation, especially in huge countries or federated systems, will not transfer this understanding horizontally or vertically to other government agencies or officials. It is the concluding comments that will give all organs of the State party guidance, so the concluding comments must be more precise about what an integrated plan to implement the Convention is. If the concluding comments do not give detail, they are not going to be used by States parties. There are many strong international organisations that do better follow up on their plans – like the MDGs or BPFA – so States will give more attention to those plans.

Finally, the question of accountability of the State to the people and women in particular must be examined. Such accountability has been legitimised by the fact of the increasing numbers of women coming to the Committee with their observations. The treaty bodies themselves have contributed to this phenomenon. In the absence of a formal role for NGOs and women's groups, the CEDAW Committee and other treaty bodies have been exploring how to establish a more clearly defined relationship with NGOs. At the sixth meeting of the chairs of the treaty bodies, in 1995, the central role NGOs had been playing in providing information to the treaty bodies was stressed. The chairs recommended that the Secretariat facilitate the exchange of information between the NGOs and treaty bodies. In 1997, the CEDAW Committee made a decision to include the role of NGOs in providing information to it in its Rules of Procedure. The presence of NGOs during the review of States parties' compliance with their obligations under the Convention has added value to the dialogue and the treaty reporting process and has contributed to States parties beginning to take the reporting process more seriously. This is evidenced by the quality of the delegations becoming better than what it used to be.

A State's accountability to its people under treaty law has to be strengthened at the national level. A major weakness in accountability is in the follow up after the review.

---

[6] For example in the Indian Constitution, article 253 empowers the centre to give instructions to the states with matters pertaining to the human rights of the people.

There is a need for the development of mechanisms by which States parties will collaborate with NGOS to establish indicators and benchmarks and to set up monitoring processes for the implementation of the Convention. This is also partly due to a lack of emphasis on this aspect by NGOs. So NGO activism is crucial to ensure fulfilment of State obligation to fully implement the Convention at the national level and not only to enhance the effectiveness of the reporting process. In this respect, the obligation of the State is to facilitate spaces for NGO activism, to establish a culture of accountability to its people for implementing their international human rights obligation and to be transparent in the information they provide to the treaty bodies.

Presentation by Andrew Byrnes, University of New South Wales, Australia

Andrew Byrnes' presentation was primarily to give participants an overview of the issues outlined in the background discussion paper, which was an attempt to bring together formal and substantive dimensions of article 2 using CEDAW practice and relevant practice of other human rights organs. He raised a number of issues that the Committee should grapple with in developing a general recommendation on article 2.

The term "State obligation" is used a lot in the CEDAW context by women's human rights activists, but with a different meaning than the term in international law. The opening paragraphs of the general comment of the Human Rights Committee on State obligation assert the interest of other States in the implementation of the Covenant, which is a classic aspect of international law. It does not talk about accountability to a constituency, but this is an aspect that could be included in a general recommendation.

International legal literature on State obligation includes a range of academic attempts to develop typologies like the obligation of means/conduct and the obligation of results, or the obligation of immediate effect versus the obligations subject to progressive realisation. The framework for State obligation that dominates is the tripartite or quadripartite framework of protect, respect, fulfil and promote rights. This was developed in the ESCR context, but is seen as relevant in all other contexts in some way. Are these typologies useful or do they just complicate the situation? How do these fit into the obligations in CEDAW, where that framework has not been extensively used?

Generally, there are two different dimensions of State obligation: the nature of the State's obligation to understand specific provisions of the Convention, and the general obligations of the State under the Convention. In terms of the first, CEDAW uses different formulations to categorise the State's obligation: shall ensure/accord/grant the right, undertake to, or shall take all appropriate measures. Each raises different issues about what is nature of the State's obligation to understand specific provisions, and each line up differently with those of immediate effect, progressive realisation, and respect, protect, fulfil. The second dimension is the State's general obligations under the Convention, which go beyond article 2 to articles 3, 24, 1, 4 and 5. All of these use different terms and different particularities to explain the obligation. The Committee must grapple with how these fit together, and how the existing general recommendations (like the one on temporary special measures) fit in with the proposed general recommendation.

Related to these are the issues of scope and coverage. What is the State's territorial obligation? Does it cover just activities that take place within a State, or activities or effects outside the State? Will it cover situations of armed conflict or emergencies?

There are a number of general comments from other treaty bodies (pages 7-9 of the background paper) that may be relevant in considering a general recommendation on article 2. These differ in style and coverage, which implicates the audiences that might

use the general comments, since readers will have different levels of familiarity of international law. The Human Rights Committee's general comment 31 of HRC uses an international lawyer's style. General comment 5 of the Committee on the Rights of the Child has international law elements, but is also oriented toward implementation, policies and programmes. Others to consider are the Human Rights Committee's general comment on article 3, the CERD general recommendation number 31 on basic access to justice, the CRC general comment 2 on National Human Rights Institutions, which raises a series of issues on the institutions that should be set up for implementation of the Convention, and general comment 16 of the ESCR Committee on article 3.

There are several bodies of law involved in this issue: (1) the CEDAW Convention itself; (2) the law on treaties; (3) the law of State responsibility, which is subject to recent clarification in 2001 International Law Commission articles on State responsibility; and (4) general international law.

Finally, with regard to the territorial or extraterritorial scope of obligation under the Convention, there are a number of issues:

- It is clear that States have extra-territorial obligations related to embassies, passports, birth certificates, etc. This is the normal application of the treaty.
- What are a State's obligations in relation to the design and implementation of development assistance for both aid and actions like sanctions? The ESCR Committee has dealt with sanctions and with water.
- What are the obligations of States when they participate in international organisations? How far do these obligations go?
- There are also technical and substantive dimensions regarding the relationship of CEDAW in situation of emergencies (i.e., the tsunami) and conflict.
- There are also doctrinal questions, such as whether international humanitarian law and treaty law can coexist.

There are a couple of issues that were not included that might need to be addressed in a general recommendation on article 2. These are:

- *Reservations*. The CEDAW Committee already given fairly extensive views and addresses this issue in its dialogues with States parties. The Human Rights Committee has adopted a general comment on reservations and also made reference to reservations in general comment 31, which is on State obligation.
- *The relationship between obligations under the CEDAW Convention and other treaties or instruments*. Very often other obligations are put forward as a reason that obligations under CEDAW cannot be implemented. Is it useful to address these under a general recommendation on article 2?

Discussion

On reservations

- There was discussion about whether the Committee will consider doing a general recommendation on reservations.
- A CEDAW Committee member stated that the Committee is considering a general recommendation on reservations in the long term. Currently, there is discussion among the various treaty bodies about how they can become more unified and develop a common approach to the issue of reservations. The International Law Commission has been working on reservations for 14 years, with an ILC Rapporteur studying all of the treaty bodies. The gap that existed in the approaches of the treaty

bodies is narrowing. Once a common approach is developed between the treaty bodies, the CEDAW Committee could adopt its own general recommendation.

On a general framework for human rights and the rights-based approach

- The general recommendation might be a good place to implement the idea of the rights-based approach to governance and development, in order to look at article 2 in a holistic sense. Article 2 incorporates the essence of accountability in the area of human rights in terms of the obligations of the State to respect, protect, promote and fulfil human rights. A general recommendation on article 2 can give focus in an overarching sense, with regard to all of the State's mechanisms for accountability.

On separation and devolution of powers

- Increasingly, the issue of devolution of powers in a federalist system has relevance for realising human rights. What are the responsibilities of the states versus the centre, and how does the centre oversee the states and hold them accountable?
- There are difficulties involving State obligation that relate to the balance between the legislature and the judiciary. It is important to have an independent judiciary, but in many countries the judiciary is forgetting the balance of power, and people's rights are being eroded in the name of an independent judiciary. For instance, in the recent *Singarasa* case in Sri Lanka, rights were challenged in order to uphold the sovereignty of the judiciary. In what ways can the judiciary be held accountable?
- In issues of planning, the executive sometimes rejects/ignores human rights.

On specificity within concluding comments and general recommendations

- A general recommendation cannot become too specific or detailed, or the thrust of it will be lost. It is important that the detailed recommendations go into concluding comments and the more general ideas go into general recommendations.

On obligations related to other regimes

- Government officials are often confused between treaty obligations and non-human rights obligations like WTO obligations. States will often advance the argument that they cannot implement human rights because of these other obligations. The general recommendation is a golden opportunity to address this.
- The Montreal Principles say that when a State initiates a discussion of international obligations, due diligence must be observed so they will not violate treaty obligations when they enter into other obligations. The recommendation can elaborate on this.
- One way to reach government officials and help them understand State obligation is through transnational networks that link communities, judges, legislators, etc., across subject areas instead of within a government.

Session 2: The CEDAW Committee's approach to clarifying and defining the principle of State Obligation

Speakers: Dubravka Šimonović and Cees Flinterman
Chair: Shanthi Dairiam

Presentation by Dubravka Šimonović, CEDAW Committee member, Croatia

Before beginning her presentation, Dubravka Šimonović took a moment to remember Angela King, the former United Nations Assistant Secretary-General who contributed so much to the work of the CEDAW Committee, who passed away on 5 February 2007.

Ms. Šimonović said that in her presentation, she would be expressing her personal views and not those of the Committee.

The Committee is completing 25 years of work and there are many new developments in the last few years. The Committee's efficiency has increased considerably. Recently, the Committee completed the 37th CEDAW session, during which it reviewed 15 countries and worked in dual chambers. There was a huge backlog in reviewing State party reports, with some States parties to the Convention that have not submitted reports, but with the increased efficiency and capacity of the CEDAW Committee some of this backlog has been cleared. Working in dual chambers has greatly helped and the Committee has proposed 3 sessions per year with one session to be conducted in dual chambers. State parties should be obligated to submit their reports in a timely manner, and should be present during the review. States have been taking the review process seriously, with representation by high-level delegations. Recently the UN agencies have begun to submit joint reports to the Committee. The Committee has also made decisions under the Optional Protocol and has used concluding comments and general recommendations when deciding on cases.

There is little time for the Committee to work on general recommendations, so much of the work is done intersessionally by working groups of interested members. A working group on the proposed general recommendation on article 2 has been constituted within the Committee with Mr. Cees Flinterman as its Chair and Ms. Shanthi Dairiam and Ms. Šimonović as members. The working group will consider the results of this meeting.

The ongoing UN treaty body reform is relevant for the CEDAW Committee. The treaty bodies have accepted harmonised reporting guidelines for some aspects of State party reports, and the Committee has been working on treaty-specific guidelines. The CEDAW Committee will be shifting to Geneva, where the Office of the High Commissioner for Human Rights will take over the servicing of the Committee from the Division for the Advancement of Women. This will help increase cooperation and harmonisation with the other treaty bodies. The Commission on the Status of Women will remain in New York, and there is a proposal to establish a new entity for women's rights. It is important for the CEDAW Committee to establish linkages with all inter-governmental bodies responsible for women's rights and human rights.

The issue of reservations must be addressed, as reservations limit the scope of States parties' obligations, making application of CEDAW problematic. The CEDAW Committee adopted statements on reservations in 1994 and 1998 and reservations are discussed in general recommendations. The CEDAW Committee has pronounced that reservations on article 2 go against the scope and objective of the Convention. The Committee's approach has been in line with the International Law Commission. One encouraging aspect is that some States parties have either withdrawn or narrowed their reservations. Reservations are often used as "bridges" to full acceptance of the treaty.

Lawyers have been addressing the issue of incorporation of the Convention into national legal systems and implementation at the national level. Theoretically there are two types of systems: monist, in which treaties are directly applicable because international and national law are considered as one; and dualist, where they need transformation to incorporate the Convention. The monist system is often just theoretical, because in order for incorporation to be effective, there must be additional laws that provide remedies.

There are countries with dualist systems in which they have not explicitly “incorporated” the Convention, but they already have laws that are compatible with the Convention. The situations are not always clear, and the Committee is trying to distinguish different situations by having clear concluding comments. It is important to distinguish between incorporation and implementation, since we sometimes mix those words.

Members of the CEDAW Committee sometimes see certain issues a bit differently from scholars, NGOs or States parties. The background paper is trying to connect articles 2, 3 and 24, but the CEDAW Committee generally tries to connect articles 1 and 2. Under article 2, States parties have a duty to incorporate the principle of equality between women and men into their constitutions and laws; under article 1, they have a duty to incorporate the definition of discrimination. The two together provide a framework.

The obligation to modify and abolish laws is seen as an “immediate” obligation of States parties, though in practice it requires time to effect changes. There must be competent tribunals to examine women’s rights issues and this has been sadly lacking, with States not providing information about cases relating to discrimination and equality.

Presentation by Prof. Cess Flinterman, CEDAW Committee member, Netherlands

Professor Flinterman began the session by recalling the day of General Discussion in August 2004, during which there were many contributions from IWRAW Asia Pacific and others on State obligation. It was an interesting day and it became clear from the presentations that there was a need for a general recommendation to article 2.

The delay in finalising a general recommendation on article 2 came both because of turnover within the working group, with Professor Flinterman becoming chair in 2006, and because the work of the Committee has grown considerably in the last few years. In 2006, the Committee met for three sessions and in dual chambers in one session, considering 46 State party reports over thirteen months (from January 2006 – January 2007). The Committee is also working on a general recommendation on migrant workers, and reviewing drafts and that has taken some time.

The mandate for the Committee to issue general recommendations is based on article 21 of Convention. The Committee has given a dynamic interpretation to this particular article. Information from NGOs and civil society organisations has become very relevant to the work of the Committee, along with that submitted by States parties. The main thrust of the work of the Committee should be to assist States in strengthening their own work in promoting and protecting human rights of women, so general recommendations and statements should be geared towards strengthening the promotion of human rights.

Drafting concluding comments is one of the most difficult and daunting tasks of a treaty body because they can make a difference in the context of how a particular State functions. They therefore should be aimed at the specific concerns within a particular country, should focus on concrete issues within particular countries and should be “implementable” by the State, providing tools the State can use to develop and strengthen their policies relating to implementation of the Convention. Over the years, the Committee has made considerable progress in how it formulates its concluding comments, but more should be done.

Adoption of concluding comments is done in a “pressure cooker” context, since States parties are reviewed each day during a session and the concluding comments need to be formulated and adopted by the following week. There is not much time for in-depth discussion on any particular issue and the whole process needs to be done quickly and

expeditiously. The procedure is different in the context of general recommendations. There is general discussion with civil society organisations, discussions within the working group, seminars and debates within the Committee.

It is tempting to use general recommendations as a way to set new standards on women's human rights. However, general recommendations can only acquire meaning if they are firmly based on the experiences of the Committee that has been built up in the examination of State party reports over a number of years. It is important that a general recommendation is well-structured and written in an accessible way. The Committee should not try to cover too much, but should limit itself to a small number of highly relevant issues. A general recommendation should contain clear guidelines for States, illustrated, if possible, with clear and relevant examples. If a recommendation fulfils these criteria, then it will be seen as authoritative.

In the 2004 discussion on a general recommendation on article 2, a large number of issues were submitted, but not all of these reflect the experience of the Committee in its consideration of State party reports. What is needed is a focus on issues relating to the Convention and the responsibility of the State in relation to them.

There are several points that need to be discussed in relation to article 2, including:

- The status of the Convention in domestic law and issues related to this topic;
- Conceptual clarity on the notions of equality vs. equity; sex vs. gender;
- The meaning of the words "without delay" in the chapeau of article 2;
- The scope of article 2: whether it relates to all rights of women and the responsibility of States for private actors; and
- The issue of reservations, though this will need to have its own general recommendation in due time.

The CEDAW Committee is developing its jurisprudence through the five decisions it has issued under the communications procedure of the Optional Protocol to CEDAW. Two cases were inadmissible, providing further interpretation of the meaning of exhaustion of domestic remedies. In two cases, the Committee found violations of the Convention, including on the issue of violence against women (about which the Convention is silent). In one case, the Committee found there was no violation of the Convention. These decisions are not binding, but they are authoritative interpretations of the Convention.

Discussion

On general recommendations as "guidance"

- Much of the language of the Committee's work is around "guidance" and "assistance", but this is often not strong enough to get the States to comply with the Convention. Instead of remaining within the nomenclature of suggestions, the Committee might consider moving "guidance" forward into something more concrete and enforceable.
- A general recommendation should not be merely about guidance. States cannot use them as optional guidelines from which they can opt out. It is important to highlight this language. Article 2 is an overarching framework and so attention should be given to interpret every clause under the provision, so that all concerned, including States and activists, gain a clear understanding of State obligation.
- The main reason for adopting a general recommendation on State obligation is that the Committee is seeing some problems with the issues of incorporation and obligation. The general recommendation will be adopted in order to provide

explanation and help States parties understand and solve those problems. “Guidance” is simply a legal term that means that the recommendation is not legally binding.

On the criteria used to draft the general recommendation

- In response to Professor Flinterman’s criteria for inclusion of issues in the general recommendation, there was concern about the limitation or boundaries that may be imposed if the general recommendation is only based on the work of the Committee thus far. The experiences of the Committee are important, but it must also have a visionary approach hand-in-hand with experience, similar to what has been achieved in the area of violence against women. In the effort to give authority to the general recommendation, the Committee must not lose sight of the importance of vision and pushing the boundaries within the framework of a realistic approach.
- A question that was raised was whether it is possible to adopt more dynamic interpretations of the Convention, based on the work of other treaty bodies and not confined only to the “experience of the Committee”.
- The content of the general recommendation should reflect not only the current practice of Committee, but the main idea of article 2 as we understand it now. The general recommendation should be based on the Committee’s work, but also different persons from academia, NGOs, etc.

On concluding comments

- Concluding comments of the Committee reflect the nature of the constructive dialogue between the State and the Committee. Though some issues are raised during the dialogue, if no consensus about how to address them is reached within the Committee, they are not included in the concluding comments.

On other issues to be included in the general recommendation

- Is a general recommendation on article 2 the best place to deal with the issue of discrimination? The Human Rights Committee has two separate general comments on discrimination and State obligation, respectively. Is it too ambitious to deal with discrimination in this recommendation?
    - In response, a CEDAW Committee member said that the Committee does need to consider discrimination. In the first sentence of article 2, it says “States parties condemn discrimination …” This is something that is very important to CEDAW, and is also a way to show the connection between articles 1 and 2.
- Should the issue of intersectionality be covered in the general recommendation?
- The issue of development and human rights guarantees and obligations should be linked to State obligation.
- The general recommendation should consider to whom the State is accountable. States parties report once in four years or whenever they choose to, and often consider reporting their only obligation. How do we know what has been done with respect to women’s rights? How do we make States responsible to civil society?

Session 3: Affirming Progressive Elements of State Obligation Identified by Other Treaty Bodies

Speakers: Elizabeth Evatt and Dianne Otto
Chair: Jane Connors

Presentation by Dianne Otto, University of Melbourne, Australia[7]

Dianne Otto focussed on the language of article 2 and how the work of other treaty bodies can help interpret and clarify that language. She began by looking at the chapeau, which expresses the general obligation broadly and uses some language that is common, or similar, to that used in other treaties. She then identified ten principles relating to State parties' obligations to implement sex non-discrimination and gender equality under the two Covenants (ICCPR and ICESCR). These relate to the more specific obligations in CEDAW that are outlined in paragraphs (a) – (f) of article 2.

Chapeau

For the chapeau, the work of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights can assist in the interpretation of CEDAW:

- ***"States parties"***: The interpretation of this should take into account all branches and levels of government, and should also incorporate the conduct of States parties as members of international organisations (which may be more related to article 3).
- ***"Condemn discrimination in all its forms"***: This notion is a unique one and requires the State to make it clear, in no uncertain terms, that discrimination is unacceptable.
- ***"Agree to pursue … a policy"***: This is similar to "take steps" under the ICESCR and "to take the necessary steps" under the ICCPR. The ESCR Committee in fact pins down what steps to take: deliberate, concrete, targeted steps must be taken. The obligation under CEDAW is closer to immediate obligation under the ICESCR. "Without delay" in the chapeau is also an indication that the obligations under CEDAW are more immediate obligations than under the ICESCR.
- ***"By all appropriate means"***: The ICESCR has assisted in spelling out what this means: administrative, social, judicial, financial, etc., remedies. While each State may decided for itself which means are most appropriate with respect to each of the rights, the Committee makes the ultimate determination as to whether all appropriate measures have been taken, and the State must justify its action/inaction.
- ***"And without delay"***: This is not in the other treaties, but indicates that even if it is not immediate, it is very close to immediate.
- ***"A policy"***: This is unique to CEDAW and is a critical component of the general recommendation. What is required under this is that all levels and branches of government identify rights bearers, and ensure that there is means for collection of data disaggregated by sex. This should be an integrated policy that the State adopts across the board.
- ***"Of eliminating discrimination against women"***: This phrase relates to the obligation of results. The question of jurisdiction of the Convention may come into the discussion, since it talks not just about application to citizens, but to all women.

Specific obligations under article 2(a) – (f)

In relation to specific obligations under article 2, some principles have been identified:

- Sex non-discrimination and equality between women and men are substantive (de facto) obligations, not merely formal (de jure) obligations. This is firmly grasped by both the HRC and CESCR in general comments.

[7] See also attached paper, "Affirming progressive elements of State obligation recognised by other treaty bodies", at Annex 6.

- Special temporary measures and differential treatment may be necessary to achieve the obligation of non-discrimination. Again, both the CESCR and HRC have taken these on board, though they are not as explicit as CEDAW.
- Sex non-discrimination and equal enjoyment of Covenant rights are immediate obligations.
- The concept of progressive implementation, where it applies to economic, social and cultural rights, still requires that available resources be distributed equally between women and men. Under the ICESCR, immediate implementation means that resources need to immediately be distributed or equalised between women and men. CEDAW envisages that social change is also necessary to realise the goal of equality. It is not a progressive obligation – there is still immediacy there – but progressive implementation is part of the concept of social change.
- Sex non-discrimination is not derogable in times of public emergency.
- Indicators and benchmarks must be identified for monitoring purposes.
- Obligations extend into the private/domestic sphere (articles 2(e) and (f)).
- State obligation includes measures to eliminate prejudices and practices based on gender hierarchies or stereotypes (article 2(f)).
- Sex discrimination can intersect with other forms of discrimination creating sometimes unique forms of discrimination against women, which must also be addressed. It is important to find a hook in the Convention that can be used to take up more complex forms of discrimination.
- Violence against women is a form of sex discrimination. With this issue, it is important to see whether CEDAW can address this issue as a direct human rights violation instead of only through the lens of discrimination.

Presentation by Elizabeth Evatt, University of New South Wales, Australia[8]

Elizabeth Evatt began her presentation by stating that since her object was to bring in the work of other treaty bodies relevant to the current issues, she has approached the task by examining the main issues in the work of those bodies that may illuminate interpretation of article 2:

- ***Relation of article 2 to other provisions****:* Article 2 provides an "overarching framework" within which the other provisions are to be implemented. In CEDAW, article 2 is linked to the provisions of articles 3, 4, 5 and 24.
- ***Reservations***: Following the opinion of the HRC on reservations, it can be argued that any reservation to article 2 is incompatible with the object and purpose of the Convention, so that reservations should not be made or should be withdrawn.
- ***States may not invoke domestic law to justify non-implementation***: It is clearly established in the work of the HRC and CESCR that a State cannot rely on its domestic laws or constitution as an excuse for non-implementation of its obligations under human rights treaties. The treaty bodies consider that the provisions of the instruments ratified by States parties must be fully implemented, regardless of their legal, political or economic system.
- ***Obligations to be performed in good faith***: Article 26 of the Vienna Convention on the Law of Treaties provides for good faith in performing treaty obligations. This should be mentioned in the general recommendation, since this principle is relevant to the full implementation of all provisions of article 2.

[8] See also attached paper "Summary of issues on State obligations" at Annex 7, which provides more details for each of the issues discussed in this presentation.

- ***"Obligation to respect and ensure rights (ICCPR art 2 (1))"***: Although CEDAW does not use this terminology, the same principles can be derived from the text of CEDAW. In effect, Article 2 requires the State party to *respect* equality rights by itself refraining from discrimination of any kind against women (para. 2(a) and (d)), and also imposes obligations on State parties to *ensure* equality and non-discrimination by prohibiting discrimination, protecting women against discrimination and adopting effective measures to that end. The Committee should therefore consider including in the general recommendation the dual nature of the obligation.
- ***Obligations are immediate***: The obligation to bring the law into line and adopt necessary legislation is immediate. However, the enactment of laws is not sufficient; a range of other measures is also necessary, e.g., affirmative action for education. Although it is not possible to achieve the goal of equality immediately, the obligation is to take steps immediately (immediate action toward the achievement of equality).
- ***Extent of State responsibility and non-State actors***: Human rights instruments bind all branches of the government though some countries have dualist legal systems requiring legislative measures in order to secure enforcement. In the area of discrimination States parties also have a general obligation to take action in regards to private acts that violate or undermine the right to equality. Other treaty bodies have applied this principle, which is expressly stated in CEDAW. A draft general recommendation needs to emphasise that the effective implementation of CEDAW requires effective measures to be taken to overcome discrimination in the private sphere, including laws and policies. The specific provisions of article 2 (and other articles) which support measures aimed at private discrimination should be elaborated in the general recommendation.
- ***Legal measures of implementation, incorporation issues***: Article 2 of CEDAW is unique in that it gives priority to incorporation via the Constitution. Examples can be found in the South African and Canadian models. Legislation is an alternative. Other treaty bodies have called for legislative incorporation as well, e.g. CESCR and HRC ask States to consider incorporation to ensure full realisation. The draft general recommendation should emphasise legislation that incorporates equality, and that this legislation should override existing laws incompatible with equality. Those laws have to be effective to prevent discrimination and where there is a breach of the obligation must provide remedies. The law must be able to be relied on to challenge discriminatory acts.
- ***All other appropriate (non-legislative) measures of implementation, paras. (a) (b) (e) (f) [also (c) and (d)]***: Virtually all the provisions of article 2 and later articles call for some kind of non-legislative measures of implementation. The CEDAW Committee, in its comments on particular articles, has indicated what means are appropriate for that article. Other treaty bodies also call for a range for non-legislative implementation particularly on non-discrimination. States should be asked to assess the effectiveness of all these measures.
- ***Remedies and reparation***: Where discrimination against women occurs in violation of the Convention or of domestic law, there should be no issue about the justiciability of the issue in domestic jurisdiction. All of the treaty bodies consider discrimination in the enjoyment of rights to be justiciable issues. Issues around remedies can be discussed later in the EGM.
- ***Obligations in dealing with international organisations / negotiations***: Some treaty bodies take the view that States must respect their obligations under human rights instruments in international dealings that affect the well-being of women in other countries, others do not.

In terms of the form and length of the general recommendation, it should be short and firm. Some of the material can be put into guidelines, instead of the general

recommendation. The Human Rights Committee's general comments are based clearly on the case law and the concluding observations of the Committee.

Discussion

On formulating the general recommendation

- While formulating a general recommendation it would be wise to think of ways of involving States parties. There has been criticism with respect to other treaty bodies on the non-inclusion of States parties. For example, for the general comment on the right to water, States expressed disappointment that they did not have an opportunity to provide input or feedback.
- Some questions and issues that need to be kept in mind while drafting the elements of the general recommendation are:
  - While examining article 2, should there be a focus on articles 3 and 24 as well?
  - Article 24, if read carefully, relates to other articles through the phrase "adopt all necessary measures". It has been overlooked in other discussions, so it might be important to bring it in here.
  - It would be impossible to write a general recommendation on article 2 without referring to these other articles, as articles 3 and 24 both fill gaps that are missing.
  - As the CERD Convention uses language similar to article 2, can interpretations from the CERD Committee be utilised for drafting the general recommendation?
- It is useful but not absolutely crucial to look at the comments of other treaty bodies.
- The general recommendation should have clear textual analysis with emphasis on comparative discussion.

On the concept of "equality" under the Convention

- The misunderstanding surrounding gender equality should be dispelled. It is important to revisit the meaning of women's equality and make it clear that equality is not all about "sameness". Often, State officials come back to women's groups with the statement that equal attention needs to be paid to men. So, the general recommendation needs to address such erroneous assumptions of States.
- The CEDAW Committee in reviewing Iraq in 2000 said that no matter what the context is, there must be equality between men and women. If there is deprivation because of sanctions, the State must make sure this deprivation is not disproportionately felt by women. The effect of the sanctions cannot deprive women more than men.

On "without delay" / "progressive realisation"

- The focus should be on the interpretation of immediate obligations, which should be made clear to all, especially States parties. Gender equality will not be achieved unless there is a process of change. There should not be an attempt to overreach and attain that which is immediate and thereby undermine social change.
- The obligation to take steps is an immediate obligation and there cannot be any arguments on this. What are progressive is not the steps, but the achievement of the goals. The ESCR says it must be unqualified and immediate, and CEDAW cannot be less than that.
- There should not be any divide on whether the equality is *de jure* or *de facto*; realisation of both kinds of equality need to be considered as immediate obligations.
- The principle of "progressive implementation" is applicable to discussions of different levels of resources and the manner of their distribution.
- The CEDAW Committee should be very assertive while examining justiciable rights under the Convention, and should deliberate on how substantive equality can be justiciable as well.

- The “minimum core obligations” that the State must immediately fulfil, as set out under the ICESCR, might be a good principle to adopt.
- The phrase “without delay” has to mean the obligation of the State to commit to take steps to remedy the discriminatory practices/acts that exist. Article 2 also mentions about the obligation of the State to adopt sanctions where appropriate for prohibiting discrimination against women. Should this be considered as a possibility?

Session 4: Evolving Understanding of Women’s Human Rights and Emerging Human Rights Standards: Non-State Actors

Speakers: Madhu Mehra and Deepika Udagama
Chair: Miho Omi

Presentation by Deepika Udagama, University of Colombo, Sri Lanka

Deepika Udagama said that the issue of non-State actors is a difficult and complex topic. The background paper (pages 29-33) discusses State responsibility as defined by the International Law Commission (ILC). This is an important reference point. But the obligation to oversee the actions of non-State actors in the context of CEDAW is a different dimension, so it is necessary to expand the sources beyond the ILC’s work.

At a practical level, there are various types of non-State actors:

- At the personal level in the home;
- Multinational companies, which are often the largest employers in many countries;
- Non-State armed groups;
- General criminals such as in cases of rape or sexual harassment;
- Communities, in terms of discriminating against women on the basis of customary practices.

Generally, there are certain principles already established. Namely, the State is under an obligation under clause 2(e) and (f) of CEDAW to positively regulate private actors. Also, there is the principle of due diligence (the State has a responsibility to prevent, investigate and punish violations, regardless of whether it was committed by a State or non-State actor). These two principles can provide the overarching framework for State obligation in respect of non-State actors.

In the background paper (page 33), a distinction is made between provisions 2(d) and (e) of CEDAW Convention, 2(d) relating to negative obligations and 2(e) to positive actions. However, direct State action or inaction entails both negative and positive obligations, and there may also be negative obligations even with regard to private actors. Further, the language of article 2 in itself cannot be conclusive and so needs to address both State action and inaction. From the four-fold obligation (respect, protect, promote, and fulfil), the obligation to protect immediately comes to mind; to protect people from the action/inaction of third parties.

Within the general recommendation, it may be important to look at this overarching framework that the obligation on part of the State is to provide substantive regulation, and due diligence and these principles should go hand in hand. The State should put into place substantive regulation along with provision for remedies.

We then need to address the various types of private actors using different frameworks and methods:

- ***Armed groups***: Humanitarian law considerations should be borne in mind.
- ***Domestic actors (in the home)***: Usually overseen through direct regulation.
- ***Commercial actors***: This is extremely complex. The model used at present expects the State to regulate multinational corporations. The norms formulated by the Working Group of the UN Sub-Commission on multi-national corporations are in the nature of soft law. MNCs commit themselves voluntarily to certain obligations but they are ultimately subjected to the laws of the State and so it is the responsibility of the State to regulate action of such MNCs.

The general recommendation should include an overarching framework (at least as a minimal approach), and then can go into specifics. Globalisation is another key issue that can be examined in the general recommendation. Overall, the issue is complex because each category of actors has its own set of issues, and the approaches used for each category cannot necessarily be used for other categories.

Presentation by Madhu Mehra, Partners for Law in Development, India

Madhu Mehra started her presentation by drawing attention to the specific relevance of article 2 sub-sections (b), (e) and (f) in relation to non-State actors. While it is clear that the State is accountable through the principle of due diligence in relation to actions of non-State actors (the 3 broad categories commonly identified, viz. the market, family and community), the exact nature of obligations for regulating non-State actors in diverse contexts may not always clear. The general recommendation might usefully elaborate the nature of State obligation in relation to non-State actors, including using the principle of due diligence, in contexts where such obligation is not clear.

Since it is not possible or desirable to map a range of contexts for such elaboration, the general recommendation would need to strategically select from the few contemporary challenging contexts. Criteria to select two contexts to be elaborated might include:

(1) Where the Committee has intervened but where no textual basis within the CEDAW Convention exists;
(2) Where the existing textual basis is not helpful or constructive.

Two contexts that correspond to the criteria relate to mass crimes against women and culture. State obligation in relation to the two contexts needs urgent attention, in terms of outlining what the obligations should include.

- ***Mass Crimes against women***: The Committee has undertaken remarkable steps in alerting States parties to accountability in such contexts, e.g., Congo, Rwanda, and Gujarat. Despite this work of the Committee, there is no textual basis clarifying State obligations in such situations, leaving it to the Committee each time to alert the State party to its responsibilities in mass crimes. General recommendation 19 on violence against women outlines State obligation in relation to violence against women in specific contexts such as the workplace, the family and so on, but not in relation to mass crimes. It is therefore assumed by States parties that their penal codes are adequate for addressing mass crimes against women, when in fact penal codes are designed for individual crimes in normal times. Relying upon such penal codes only sustains the impunity attached to mass crimes, especially since the nature of crimes [substantive offences], procedure, evidence, redress and rules of culpability [such as

command responsibility] are different from that of regular penal laws. To clearly dispel the myth that due diligence standards are fulfilled by the ordinary penal code this general recommendation must outline the distinct normative framework for justice and accountability in relation to mass crimes against women. This outline must point to the need for creation of new offences that recognise mass crimes against women, appropriate evidentiary and procedural rules, command responsibility and reparations.

- ***Culture***: Article 5 provides textual basis for State obligation in relation to culture, but general recommendation 21's expansion on this subject is not constructive. The creation of a binary between modern and traditional cultures is not constructive or real. In response, States parties make blanket reservations or indirect excuses such as India's declaration that claims non-interference in personal laws. This general recommendation must clarify the State obligation that compels some engagement with the community rather than a head-on collision or a complete stand off. This can be ensured by directing States parties to proactively take steps to initiate a debate within the community and to ensure participation of women and women's groups as part of the due diligence standards. It must be clarified that the community is a space occupied not by men and religious leaders alone, but also comprised of different views and sub-groups with differing interests. Only by initiating a democratic debate on cultural reforms within the community in this broader sense can the myth of homogenous community be fully dispelled. The State must ensure that non-State actors – regardless of their sex or other status – have the equal right to dialogue and debate on culture, so that culture does not become monopolised by one interest group. The general recommendation should provide direction on who could participate in the dialogue and direct States parties to put in place processes and mechanisms that would bring such diverse groups together in dialogue and protect them from risks and backlash. This will help elaborate State obligation under article 2 of CEDAW.

Discussion

On non-State actors generally

- The general recommendation should spell out the obligation of the State when an armed group abducts a girl child. In some such cases, the State is not in control of the territory, so an examination of extraterritorial operation is necessary and should be reflected in the general recommendation. States cannot be absolved from responsibility by taking the plea that it is an issue concerning humanitarian law.
- States are under an obligation to have in place domestic regulation for operation of companies. In the event of a human rights violation by a company, the State would be liable if no proper regulations are in place.
- An issue that needs to be considered is whether there can be parallel obligations: State-State and State-citizens. Under both obligations the Convention distinguishes between acts of States and non-State actors. In some cases, "non-State actors" may be acting as the State, or their acts may be directly attributable to the State because the State has delegated its role to the non-State actor or has authorised the non-State actor to take actions on its behalf.
- Members of the Organisation of Economic Cooperation and Development (OECD) have an obligation with regard to the action of their MNCs to check whether they are acting in conformity with CEDAW standards.
- What happens in terms of attributing State responsibility to religious institutions? Are we able to challenge these institutions in the courts?

On using other mechanisms to address State responsibility for violations by non-State actors

- In the event that the domestic legal system is unwilling to provide redress to acts committed by non-State actors, the International Criminal Court (ICC) and other international tribunals could possibly provide international remedies, as they have been sensitive to such interests in the areas of armed conflict.
- A question that needs examination is the relevance of international law of State responsibility in the context of CEDAW, namely the responsibility of State A towards State B for acts/violations committed by its citizens. Article 29 of CEDAW provides for settlement of disputes between 2 or more States by arbitration. If the parties are unable to agree on arbitration one of the parties may refer the dispute to the International Court of Justice. So, State A can refer a dispute to the ICJ against State B for its failure to regulate non-State actors in its country.

On the Beatrice Fernandez case in Malaysia

- In the Beatrice Fernandez case in Malaysia, which involved a flight attendant whose employment was terminated when she became pregnant, the judges stated that the non-discrimination clause in article 8 of the Federal Constitution of Malaysia is not applicable to non-State actors, but applies only to the State. The judiciary clearly makes a distinction between State and non-State actors, which limits the guarantees under the Constitution. Is there a remedy for the plaintiff?
- If the judiciary has not interpreted its laws in the correct manner and there is an adverse finding from the highest court of the country, the only option would be to submit it before the CEDAW Committee through its complaints procedure.
- In the Malaysian case, there is difficulty in the language of the Constitution as well as the interpretation by the judiciary.

On mass crimes

- One CEDAW Committee members said that although a general recommendation can be used as a tool for dynamic interpretation of the Convention, it should be deeply rooted in the experience of the Committee and based on the constructive dialogues with States parties. The issue of mass crimes has been examined only on an ad hoc basis in one or two countries. The advice that could be followed is that of the International Court of Justice in the case of Israel.
- A different Committee member disagreed, saying that the Committee has reviewed mass crimes against women in Rwanda, Croatia, Congo and Mexico and from these experiences it could be said that there need to be a mechanism to address these types of issues. The issues addressed should include the impunity with which mass crimes happen, since the system cannot address these crimes and therefore perpetrators continue to violate with no consequences, as well as the political connections to the crimes.
- Another Committee member said that it might be appropriate to have a separate general recommendation on mass crimes instead of including it in the general recommendation on article 2.
- The ICC should be approached in cases of crime against humanity even if the State is not a member of the ICC.

Session 5: Discussion on Guidelines (Working Groups)

The participants were divided into five working groups for development of elements that should be considered in formulating a general recommendation on article 2. The topics for the five working groups were divided as follows:

A. "External" operation of the Convention

- Extraterritorial operation
- IHL and the Convention
- Development assistance
- Participation in international organisations
- Relationship to other treaty regimes (e.g., WTO)

B. Content: Definitions, scope and nature of obligation

- Equality and non-discrimination – definition
- Rights covered (coverage *ratione materiae*)
- Intersectionality/sex/gender/sexuality
- Nature of the obligations (content of the chapeau – condemn, pursue, without delay)
- Reservations

C. Legal incorporation of the Convention

- Status of the Convention in the domestic legal system
- Remedies – judicial and quasi-judicial
- Remedies – others

D. Accountability issues

- The place of the rights holder
- Processes for implementation
- Institutions necessary
- Devolution of power and responsibility – horizontal and lateral

E. Non-State actors

- Privatisation and the withdrawal of the State
- Contracting out
- Situations of conflict
- Other private actions (violence in the family and society etc.)

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS

Session 6: General Issues of Applicability of the Convention

Speakers: Harry Roque, Celina Romany and Cees Flinterman
Chair: Dianne Otto

Presentation by H. Harry L. Roque, Jr., University of the Philippines Law Center[9]

Harry Roque presented on how CEDAW has been given applicability in Philippines, which was the first country to ratify CEDAW, and which has also ratified the Optional Protocol.

The incorporation clause in the Philippines Constitution says that "The Philippines … adopts the generally accepted principles of international law as part of the law of the land". In terms of case law, there have been several cases interpreting the incorporation clause. In *Yamashita and Kuroda*, the court ruled that international humanitarian law, including the customary norms in the Geneva Conventions, had automatic applicability. The same is true in refugee law, where three years before the 1951 Geneva Convention on Right of Refugees, the court had already said that individuals should not be deported back to their home states.

For the ICCPR, there have been two cases in which the right to liberty as stated in the UDHR (*Mejoff and Borovsky*) and freedom of expression and the right to peaceful assembly (*BAYAN v. Executive Secretary*) were determined to be self-executory. In terms of the ICESCR, the court (erroneously, in Harry's opinion) ruled that the State had a duty only to take steps toward positive rights, so the Covenant is not self-executory, and there is a need for implementing legislation.

Under CEDAW, there have been three cases, none of which can give a clear indication of how the courts view whether CEDAW is self-executory. The first case was *Marcos v. Comelec*, in which the Marcos's widow wanted to run for the House of Representatives in the district she lived in before her marriage. Under the old law, widows were required to file in the domicile of their husbands, therefore could no longer run in their home districts because they are registered in their husbands' districts. The court ruled that widows automatically regain their domicile upon death of their husbands. In a concurring opinion, a justice wrote, "In ratifying [CEDAW], the Philippines bound itself to implement its liberating spirit and letter … one such principle embodied in the CEDAW is granting to men and women the same rights with regard to the law relating to … the freedom to choose their residence and domicile".

The second case was a labour case, *PT&T* (Philippines Telegraph and Telephone) *v. NLRC*. The company had a requirement that only single women could work for the company. A woman falsified documents about her marital status, the result of which she was fired. She filed suit, and she prevailed. But her argument was based on the constitution, not on CEDAW. The decision ruled that the corrective labour and social laws on gender inequality have also emerged with more frequency in the years since the Labor Code was enacted on 1 May 1974, which was largely due to the country's commitment to CEDAW. This indicates that the principles of CEDAW are not self-executory, since CEDAW was a source of legislation allowing for gender equality.

---

[9] See presentation, "CEDAW: General Issues of Territorial Applicability in the Philippines", attached as Annex 8.

The third case was about a provision in a collective agreement that provided for different ages of retirement for flight attendants – 54 for women, 60 for men. A stewardess questioned the constitutionality of this differential in retirement ages. Her counsel argued that the courts must strike down the agreement as unconstitutional and contrary to CEDAW. The court struck it down, but pursuant to the Constitution, not CEDAW. Under these cases, there is no clear indication of whether CEDAW is self-executory.

There are a number of laws that were enacted based on CEDAW: family code; definition of rape; anti-DV law; law on gender responsiveness; trafficking in person; anti-mail order bride. There are also important laws that still need to be enacted – reproductive work in labour laws; recognition of women's non-monetary contribution to marriage; a national policy on reproductive health; and laws intended to protect differently-abled women.

There are three relevant cases pending before Supreme Court. The first is the entitlement of Filipino comfort women who were subject to rape during World War II to seek compensation against Japan. The government signed a treaty renouncing claims from Japan, so comfort women are barred from filing claims. Therefore, the government has refused to espouse the claims of comfort women. The women have cited CEDAW as a basis for asking the Philippines government to espouse the claims. The second case is the rape of a Filipino woman committed by an American soldier, together with six of his friends. The American was found guilty, but the American authorities maintain that custody should remain with Americans. There is a pending challenge in Supreme Court that invokes CEDAW in asking the executive to recover Mr. Smith so he can begin his sentence. The third case relates to "battered women syndrome", which is recognised as a defence but also requires the defendant to prove all of the elements of self-defence.

A challenge for courts is that 25 years have passed since CEDAW was ratified, but there are only three cases where it was cited. One area where CEDAW can be useful is for its definition of discrimination. The issues and concerns are those manifested by the Committee as its areas of priority. While there has been substantial compliance with treaty obligations in the Philippines, there are also very real challenges that the government will have to address.

Presentation by Celina Romany, Inter-American University School of Law, Puerto Rico

Celina Romany's presentation focused on obstacles regarding application of CEDAW related to the issue of separation of powers within a federal / state system.

She started with two general introductory reminders about CEDAW work. First, there are two generations of discrimination that are at issue. First generation discrimination is deliberate exclusion, which requires some level of intentionality, some proof, from an individual perspective. While this is still very alive in the world, CEDAW has a more encompassing approach that allows us to look at second generation discrimination, which encompasses the structural dimensions of discrimination that includes neutral laws/policies that have a discriminatory impact in terms of the real lives of women.

The second issue is the need to expose the relationship between CEDAW and the Beijing Platform for Action (BPFA). It is important to recognise the cross-fertilisation that has occurred between CEDAW and BPFA, the impact it has had in advancing anti-discrimination laws and the impact it has had in terms of compliance. It has spurred interest in compliance and allowed countries to put the issue of reputation on the table.

In terms of federalism and separation of powers, there is a resistance on the part of the State to adopt CEDAW measures within all three branches of government or to commit to things that are beyond their particular scope. States recognise that by incorporating the CEDAW Convention into their constitutional frameworks, they are trying to say that all branches are obliged by those particular provisions. For treaties such as CEDAW, all branches should be mandated to comply with its provisions.

Those executing the treaty have to recognise that many court cases refer to political questions, saying that the issue at hand is best resolved by political dynamics, so the courts can avoid entering into the matter. The CEDAW Committee can answer this question by saying that the Convention is a mandate that must be recognised by the legislature, but is not just political. It should become part of the constitution, and, as such, incorporation should be recognised by all three branches.

For federations, the fact that the central government generally controls foreign policy does not mean that state governments should not be involved in implementing CEDAW. The CEDAW Committee can ask state governments what the federal government is doing to encourage states to actually adopt policies to advance the rights that are included in CEDAW. The federal government must foster, nurture and encourage states to adopt policies in sync with CEDAW. For instance, they can provide measures, plans and monies to states to encourage them to advance programmes on health, housing, etc.

Another important question is what level of autonomy (if any) states retain to advance compliance with CEDAW. The San Francisco ordinance is one example of how executive orders and municipal ordinances at the local level can advance the principles of CEDAW.

Justiciability issues are very important. These can be found in the Human Rights Committee's general comment 1, general comment 5 of the CRC, and even the good faith aspect in connection to ICESCR, and access of justice in CERD – all of these have good language in the context of recognising that principles of CEDAW should be incorporated into all branches of government.

On the question of justiciability, the CEDAW Committee should ask whether courts are trying to shield themselves from addressing these issues by claiming they are really political issues. The Committee should ask what types of remedies the judicial branch is providing in accordance with principles of State responsibility. Remedies could include compensation for injuries, damages, use of extraordinary remedies such as injunctions, etc. The executive power could also be questioned as to what it is doing to pursue these remedies, such as asking for mandamus or extraordinary remedies in court or exploring the role of administrative agencies, arbitration, and mediation – basically expanding the possibilities of how rights can become justiciable. The use of class actions should be further explored, including how the CEDAW Committee could explore the idea of a class action under the Optional Protocol.

Finally, there is a host of literature and new compliance scholarship that CEDAW should explore. This literature is not only on the legal perspective, but is interdisciplinary, dealing with the importance that States place on their own interests and concerns for reputations.

Presentation by Cees Flinterman, CEDAW Committee member, The Netherlands

Cees Flinterman began his presentation on reservations by stating how important article 2 is, both since it contains the obligations of States parties regarding the Convention generally and obligations with respect to each to the substantive articles – articles 6-16.

For these reasons, the CEDAW Committee has taken the view that reservations to article 2 are incompatible with the object and purpose of the Convention.

The CEDAW Convention does not explicitly prohibit or allow reservations. Therefore, it implicitly allows them, with one exception in article 28, paragraph 2 that states that reservations which are incompatible with the object and purpose of the Convention are impermissible. Even if this was not included in the Convention, it still would still apply because of article 19 of the Vienna Convention on the Law of Treaties.

Who determines that a reservation is incompatible with the object and purpose of a treaty? In general international law, it is up to States to determine this by making objections to reservations by other States (even though States are reluctant to play that role). But human rights treaties not only create obligations between States, but also create obligations of States toward those people who are under their jurisdiction. All of the human rights treaties have also created treaty bodies that have taken up the integrity of the treaties in an increasingly bold way. In the process of constructive dialogues with States parties, the States parties have been held legally and politically accountable and have been asked to explain their reasons for and the meaning and validity of reservations.

The CEDAW Committee has said that reservations that are incompatible with the object and purpose of the Convention are impermissible, but has not taken the further step of declaring such reservations null and void. This is partly because it is important to have as many States on board the Convention as possible. Therefore, the Committee has always called on States to withdraw or narrow such impermissible reservations.

In the context of a recommendation on article 2, it is important to reconfirm that reservations to article 2 are incompatible with the object and purpose of CEDAW, and are therefore impermissible. Most, if not all, reservations to article 2 are very open in nature, such that it is difficult to determine the scope of the reservation. For that reason alone these reservations are impermissible.

The CEDAW Committee is waiting for the day that it can rule on reservations through the individual communications procedure. So far, there has only been one case in which reservations played an important role, and the Committee in that case avoided the question of assessing the validity of the reservation.

In a general recommendation on article 2, the Committee should reaffirm the present policies. It should also continue its close cooperation with other treaty bodies in order to develop a common policy toward reservations. The Committee should wait for the results of the International Law Commission studies, then in due time adopt a general recommendation on the issue of reservations to both determine the validity and take the step of declaring such reservations null and void. That day has not come yet, so that aspect will not be included in the framework of the general recommendation on article 2.

Discussion

On national machineries for women

- Quite often States have weak, ineffective national machineries for women that are tasked with following up on CEDAW at the national level. Other units of the executive handle other treaties, and give them a lot of attention, but give CEDAW little attention or importance. Ministries of women often have no authority to do anything about

integrating or making other branches comply. It is important to ask who initiates this process of encouraging all branches to comply.

- Usually a second tier minister is involved in implementation of CEDAW – the minister of women's affairs instead of the foreign minister – and CEDAW is ghettoised. This is why it is important that the Committee develops a common idea of applicability, so that all ministers can be concerned with and involved in CEDAW implementation.

On other human rights treaties, the Beijing Platform for Action and other "soft law"

- Perhaps the general recommendation on article 2 could give countries that have ratified multiple treaties guidance on how to view the treaties collectively and harmonise the obligations and the plans to implement these treaties.
- An advantage of having the OHCHR dealing with treaty bodies in an integrated manner is that the treaty bodies can start working together to identify ways in which discrimination against women, especially in terms of intersectionality, has intensified. They can perhaps have a project where they have joint sessions of treaty bodies working together to see how they can push boundaries.
- It is very important to recognise that CEDAW has the weight of treaty law, but the BPFA has the weight of political participation. We should remind ourselves of this distinction and learn from the political weight of Beijing, from which States have generated monitoring processes that have been more successful, more public and more widely disseminated than CEDAW.

On the structure and content of concluding comments

- CEDAW concluding comments are fairly standard in terms of structure and content, and do not seem to include anything about how actual women access the rights provided in the Convention. There are abstract recommendations about how it the treaty should be made enforceable, but not about how that really impacts on women. What do the Convention, the concluding comments, the proposed general recommendation do for the everyday woman?
- The Committee cannot be too precise in concluding comments because there are different legal situations and systems and States need flexibility to apply the Convention in their own ways. But it is not enough to just say that the Convention must be enforceable. Enforceability is interpreted differently by different States parties and groups of people. What does enforceability mean to the average woman? What difference would it make in her life?
- CEDAW has some language about the mandate of dissemination. It is important to disseminate the Convention and concluding comments so they don't just sit on the shelves of ministries of foreign affairs, but help increase political participation.

On separation of powers and centre-state relations in a federation

- Most constitutions have a provision that defines the scope of centre-state relations, and outlines where the centre can encroach upon state areas of jurisdiction. It is important to ask States parties what the provisions are, how they use them, and in what situations they use them more actively or don't use them at all.
- The Committee always works from the premise that it is having a constructive dialogue with the State party – with representatives of the State, not the Government. States are the ones that are held accountable. The executive in most countries represents States parties at the international level, but the Committee is still holding the State as a whole (not just the executive) accountable, and it is up to the State to divide the work amongst its organs. The Committee can hold the State accountable for lack of compliance at local levels, at state levels, and at the judiciary level, since it is the obligation of these bodies to legislate, implement or interpret the country's laws in conformity with international obligations.

On implementation and application of CEDAW

- It is not important that the CEDAW Convention be specifically mentioned in the implementation of its principles. In court cases like the Philippines cases, it does not matter whether the Constitution or CEDAW was cited. If the decision is in accordance with the principle of non-discrimination, then it is an application of the CEDAW Convention, even without the reference. It is nice to have the reference, because it is easier to see that courts understand the importance of the Convention. But when trying to determine the issue of implementation, what is important is that national remedies and legal regulations are compatible with CEDAW principles. We do not need to use the term “incorporate” because there are different ideas of this. What is really important is that CEDAW is applied in whatever way States choose.
- Explicit “incorporation” is not required if the State party already has similar national norms. For instance, Denmark will not incorporate the treaty explicitly, because it has compatible national laws. If this is the case, it does not need to explicitly incorporate CEDAW because it already has CEDAW-compliant laws.

On challenges to States

- It is important to track issues of devolution especially in conflict situations, where human rights and especially women’s voices are often not given a prominent position. In peace processes, constitutional arrangements often have to absorb identity politics to such an extent that in a federal arrangement, issues such as women’s rights become so devolved that different communities can still have their customary laws without any State oversight or intervention.
- Whatever the system of government, the trend of deregulation on the part of the State raises huge issues. Even in unitary States, there is often a huge division between the public, private and labour sectors, and the State argues that it is impossible to get the private sector to comply with equality and non-discrimination principles, since no one in the private sector will enforce them.
- It is also important to consider transitional countries like Cambodia, Laos, where the UNDP and other agencies bring in consultants that do everything for the country: write constitutions adopting free market principles, ratify treaties, and set up mechanisms. But this creates an artificial reality. How do you reach this type of country when there are no groups working from below for implementation and enforceability?

On the possibility of including a preamble in the general recommendation

- A participant suggested that the general recommendation have preambular statements that talk about the impediments that are often raised by States parties in trying to implement the Convention, such as deregulation, identity politics, relationships between different arms of the State (executive and courts), etc.
- Another participant agreed that a preamble is a good idea, both to respond to these impediments and come up with a common denominator about what is meant by enforceability and how to get there through different paths.

On reservations

- A participant asked a CEDAW Committee member what the Committee would do if it had to address an article 2 reservation in an Optional Protocol case.
- In response, the Committee member answered that the question of consequences for an incompatible reservation is an important one. These issues are discussed by the International Law Commission and discussed in the international law of cooperation with other States. The CEDAW Committee should participate in these discussions, but should not be more ambitious than other treaty bodies. If such an OP-CEDAW case came up, especially where there are reservations to article 2, then his approach

would be to have the Committee try as much as possible to avoid expressing itself on that particular question and find other grounds on which to base the decision.
- At the end of the Session, a CEDAW Committee member noted that there was no opposition in the meeting to his thoughts about continuing the Committee's current course of reservations, namely saying that reservations are incompatible and States are called upon to withdraw them, but not declaring them invalid.

Session 7: Findings and Lessons from the Treaty Incorporation Project

Speakers: Janet Chew, Jesus Agura Villardo, Deepika Udagama and Renée Chartres
Chair: Andrew Byrnes

Introduction by Andrew Byrnes

IWRAW Asia Pacific's Treaty Incorporation Project arose out of a need to assess how treaties have been incorporated in countries in Asia. IWRAW Asia Pacific commissioned six studies (on Laos, Pakistan, Vietnam, Philippines, Sri Lanka and Malaysia) to examine the process of ratification, the justiciability of human rights, what organs of the State were involved, what problems were encountered and strategies to overcome.

The presentations cover findings from Malaysia, Philippines and Sri Lanka. For the other countries, the researchers and writers were not able to attend the meeting, so Renée Chartres summarised those country studies.

Presentation by Nurjaanah @ Janet Chew, University of Malaya, Malaysia[10]

Janet Chew began her presentation by stating that the initial report under this project was done in 2003 and was recently updated. The focus of the paper is purely on legal research (legal structure and substance only), and not on extralegal measures, e.g. political, economic, etc. It does not cover individual domestic laws, even though these were initially addressed in the report submitted to IWRAW Asia Pacific.

Malaysia has thus far ratified only 5 out of the 25 major human rights instruments. It acceded to CEDAW in 1995 with several reservations. In 2004, Malaysia submitted its initial and second periodic reports to the CEDAW Committee.

There is no direct incorporation of treaties via an enabling statute. Rather, the process of incorporation is set out in articles 74 & 76 (1) (a) of the Federal Constitution or can be done via judicial acceptance in adopting international law to be part of domestic law.

The power to ratify lies with the executive and implementation is though the legislature. In the process of ratification / implementation, it is in the executive's discretion to invite input from various stakeholders prior to ratification, or to accept any recommendation. For example, the National Human Rights Commission of Malaysia (SUHAKAM) has been calling for withdrawal of reservations but there has been no action from the government. Generally, where the treaty is partly incorporated by local law, courts have been very restrictive in their interpretations in that they will not refer to the treaty as a whole, but restrict their interpretation merely to the specific wordings of the local law.

[10] See attached paper, "Findings of research – Incorporation of treaty into domestic legislation in Malaysia", at Annex 9.

Article 8 of the Federal Constitution guarantees equality and non-discrimination, and an amendment was introduced in 2001 to include "gender" in article 8(2). There have been no corresponding amendments to other relevant provisions such as education (article 12) or citizenship (article 15 & 23), and there is no definition of discrimination. Courts have been restrictive in interpreting article 8. In the case of *Beatrice Fernandez*, the court said article 8 applies only to State organs and not to non-State actors, and the court made no mention of international law. There were references to progressive Indian cases, which the court rejected on the grounds that we cannot rely on foreign cases (even though Malaysian courts have referred to Indian case law in other situations).

SUHAKAM was formed in 2000. One of its functions is to make recommendations to the Government on the ratification of treaties and other international instruments. It has done this to a certain extent by submitting reports and calling for the removal of reservations, but none of the reports and recommendations have been presented or debated in Parliament and there has been no follow up on the part of the Government.

The courts can adopt principles of international law or international instruments, which is another process by which incorporation can occur. Recently in respect of customary land rights, a court adopted the Australian case *Mabo (no.2)* – "international law, especially universal human rights, is a legitimate and important influence on the development of common law". However, in general there is reluctance to refer to general principles of international law, and the courts are inconsistent in their approach, especially where there are political / economic interests of the State at stake. In the Bakun Dam case, the Federal Court stated that the UDHR is merely declaratory and that Malaysia is not bound by it. The court also ignored the constitution, which states that an environmental impact assessment must be carried out, and followed a local state law that is contrary to the Federal Constitution. One question is whether judges lack knowledge in international law or are just reluctant to apply it.

There are also limitations within the Constitution itself, such as exceptions to equality with regard to personal and Islamic law. This is especially difficult since, contrary to the terms of the Constitution, the Government has stated that the supreme law is Syariah law and the Attorney General's chambers is now assessing civil law to ensure its compatibility with Syariah law. There is also a lack of political will to amend the laws to comply with international law.

Presentation by Jesus Agura Villardo III (Bong), Philippines[11]

Jesus Agura Villardo began his presentation by telling a story to illustrate the complexities of implementing international law in the Philippines. In most Christian provinces in the Philippines, there is a culture where certain female Barangay dancers are given ribbons. Men who have the financial means and who come from a "good" background can dance with the girls who have the ribbons. Human rights groups have argued that these dances are demeaning to women, as they are treated as chattel. Also, not all girls receive ribbons, and not all men could buy the ribbons. One province, Bohol, tried to end the Barangay dance by enacting a local law that prohibits "selling" girls with ribbons. The point of this illustration is that it is the local state that took steps to end this discrimination because the federal government did not do anything.

He recounted four critical findings of his research:

[11] See attached presentation, "Status of International Law in the Philippine Legal System with particular regard to the CEDAW", attached as Annex 10.

1) Cultural pressure to comply in a patriarchal society;
2) Mass media and cyber technology, e.g. sensational tabloids which portray women/girls in a biased way;
3) Syariah law, and a general disconnect between national laws and CEDAW; and
4) Sporadic application and implementation of international human rights law.

In law reform, though there has been some action, there have been no substantial changes. For example, the penal code is archaic, personal law has not been dealt with, there is feminisation of migration, and the biggest chunk of money goes to the military. Though there is legislation, there is no adequate monitoring mechanism to assess the impact of government action. The laws that exist do not really help the women enjoy their rights; there is a gap that exists between the law and women's realisation of their rights.

The Philippines follow the dualist system and there has been sporadic application of international human rights law by the judiciary. The role of the Human Rights Commission is also limited and it confines itself to fact findings and investigations. There is no State body pushing for the implementation of international law.

There are four potential ways of moving forward:

1) Dissemination and popularisation of the standards set in the Convention, Beijing Platform of Action, MDGs and international human rights law;
2) Accountability of the government to give priority on its obligations under the treaty;
3) Harmonisation of the position of international law in the domestic legal system, i.e., CEDAW and national legal regime; and
4) Addressing the sporadic application of CEDAW in jurisprudence/case laws by encouraging the judiciary to use international law.

Presentation by Deepika Udagama, University of Colombo, Sri Lanka

Deepika Udagama began her presentation by stating that Sri Lanka has a very strong ratification record with no reservations (although there are some declarations regarding the Convention on Migrant Workers). The legal system in Sri Lanka is influenced by the British system. In the constitution, there is no express provision on whether it is a dualist or monist system. It is silent on the ratification process, and therefore the position must be pieced together through interpretation and statements from Parliament.

However, a recent judgment by the Supreme Court in a case called *Singarasa* takes the position that Sri Lanka has a dualist system and so must have enabling legislation for ratified treaties to take effect at the national level. The only treaty for which there is a domestic act is the Convention against Torture, though this does not fully incorporate the treaty. There is no incorporating legislation for the other treaties. There are some provisions in the domestic law that have been amended to comply with the treaties signed. However, these are only piecemeal amendments.

The judiciary have been quite effective in using international standards as interpretative guides for domestic law. However, there have been no cases relating to sex discrimination. There was only one Supreme Court case, but it was settled out of court. It related to discrimination in immigration law where women cannot transmit nationality to their foreign spouses (the Supreme Court did say that it violated the principle of equality).

One case involved a contract between Sri Lanka and an infamous mining company. In the course of the judgment, the court referred to "soft law" (the Stockholm and Rio

declarations) in recognising the principle of sustainable development. The court ruled that the government cannot disregard the principle of sustainable development and that international standards are so important that if they are recognised by a court they become the law of the land.

However, the *Singarasa* case has rolled back these achievements. The position that must be taken is that the case should be distinguished / ignored. This type of interpretation depends on individual judges. There were two judges that had taken a positive approach, but they have since retired. Since the Chief Justice delivered the judgment in *Singarasa,* it is very difficult for other judges to go against it. (It is interesting to note that before he became Chief Justice, he used to take a different (not restrictive) approach.) Education and sensitisation of judges is therefore very important.

There are some major problems with regard to changing customary laws. The Constitution states that a community customary law can continue even if it is violative of the Constitution, especially with regard to inheritance, child marriage, etc. But women of all communities want a change. An example is from a discussion with women cadres of the LTTE, who are extremely against legislating customary laws. This is similar to how Muslim women feel about Muslim personal laws and with regard to Kandyan law as well. But with the onset of identity politics, change seems difficult.

Presentation by Renée Chartres, Research Assistant, University of New South Wales, Australia

Renée Chartres discussed two main aspects of the findings from the countries for which research was conducted in the Treaty Incorporation Project:

- Integration into domestic system;
- Obstacles and strategies suggested by authors, especially in respect of "all appropriate measures"

a) Integration into domestic system

Although it is difficult to synthesise the diverse results that emerged from the six participating countries, some commonalities can be identified. With regard to the integration of CEDAW into domestic legal systems, very few States have formal mechanisms enshrined in the domestic legal system to ensure that international treaties, upon ratification, are implemented domestically, and to ensure that existing laws are compliant with the treaty conditions. In Laos there appeared to be lack of knowledge about the need for incorporation whereas in Pakistan and Vietnam, statutes considering the issue merely acknowledge that "the relevant ministry" has the responsibility to implement international treaties. In the case of CEDAW, this generally meant that the Ministry of Women was responsible for ensuring that the Convention was incorporated into the domestic legal system. It was clear that in the opinion of the authors, however, delegation of the responsibility for incorporating CEDAW into the domestic legal system to the Ministry for Women/Family was problematic. This is largely because integration of the broad range of rights and obligations enshrined in treaty cannot be confined to one ministry and as such, is the responsibility of all ministries. Moreover, generally speaking, women's ministries have a lessened capacity to influence other areas of government, due to, *inter alia*, budgetary constraints.

b) Obstacles and strategies suggested by authors, especially in respect of "all appropriate measures"

Obstacles

With regard to obstacles to the application of CEDAW in the national legal system, all authors mentioned that the lack of education amongst lawyers and the judiciary of not only the content of CEDAW but even its existence was a major obstacle to its application in the domestic legal system. This was particularly the case in Laos, where international law is hardly ever referred to not due judicial reluctance to rely on international law but rather because those responsible for upholding the law are unaware of not only CEDAW but also other international human rights treaties to which Laos is a party. This is to be contrasted with Pakistan, where there is a general hesitance amongst the judiciary to apply international law without enabling legislation (although the author of the Pakistani report also attributes the lack of enforcement to the fact that international law is hardly utilised by the lawyers themselves in the arguing of a case). Interestingly, the country where international law was the most utilised was Sri Lanka, where those students undertaking a law degree are required to spend a significant amount of time studying international law. Thus the requirement to disseminate international law to lawyers and judges should be reflected in the general recommendation to article 2, as in all countries the knowledge gap was a fundamental obstacle to the use of the Convention in the national legal system.

A novel obstacle to the application of international law in the domestic legal system was identified in Vietnam. There appears to be a disturbing relationship between deregulation, contracting out and the preservation of international human rights law, as contracts concluded with multinationals or other States are governed solely by the terms of that contract and domestic law becomes inapplicable. It is difficult to see how conventions such as CEDAW can be incorporated into the domestic legal system when the domestic law does not even govern the activities of such corporations. Similar concerns were raised by the Sri Lankan author with regard to the Free Trade Zones in that country.

Strategies

Although discussions have centred on the importance of using formal legal strategies to further the effectiveness of the Convention, the problem seems to be not an absence of formal legal mechanisms but rather an absence of knowledge on behalf of those whose rights are to be protected. For this reason, a general recommendation on article 2 should emphasise, alongside the need for enabling legislation, the requirement for States to disseminate and educate the public on the content of the Convention and for national laws that reflect the Convention's provisions. To this extent, the authors appear to accept that there is not always a concerted effort on behalf of the judiciary/legislature to strike down or inhibit women's rights but rather a lack of understanding by women themselves, as well as lawyers and the judiciary, that their rights are protected in law and remedies are available should the rights have been breached. Finally, it is interesting to note that several authors reiterated the obligation of the State to encourage the media to undertake gender sensitisation. The media were identified by several authors as a major impediment to the eradication of traditional gender stereotypes.

Discussion

On the necessity of treaty incorporation

- One activist asked whether, why and to what extent treaty incorporation is necessary. Another person asked whether there are any concrete suggestions on how to ensure that States understand that a basic obligation under CEDAW is to incorporate the treaty into its domestic law.
- Though incorporation is not necessary, it is useful. There has been consistency in the CEDAW framework, such as in the definition of equality, so incorporating CEDAW would allow for a consistent interpretation of equality and other such standards.

- Incorporation is not for the sole purpose of ensuring that courts can cite the Convention, it is also for necessary so the Convention can be invoked in seeking and acquiring remedies.
- Taking into consideration the different systems in different countries, there must be a method of automatic incorporation of CEDAW. In fact this should be the first step towards a commitment of State obligation. Even in a dualist system there is an indirect application of the Convention through the judiciary, though this avenue has uncertainty with regard to its application.
- The status of the Convention in the domestic legal order is of crucial importance, and therefore needs to be discussed in the general recommendation. It does not matter whether the legal system is dualist or monist – it is up to the State to comply regardless of the type of system. The basic obligation of States parties is to make the Convention a living law for their people and this can be done in various ways.

On issues in Sri Lanka

- There is a coalition looking into the incorporation of treaties in Sri Lanka. But the problem is that there is no women's movement to support this issue. Although there are strong organisations, substantial gains cannot be made without a movement. For example, in the field of education women are doing very well. In the Law Faculty of the University of Colombo, 80% of the lecturers are women, but they are not empowered or willing to claim their rights and even discard the notion of feminism.
- When Sri Lanka was drafting the women's bill they incorporated the CEDAW framework. But unfortunately, the bill is still pending at the Attorney General's chambers, in part because there is a misconception that CEDAW promotes abortion.

Session 8: Legal Obligations and Remedies

Speakers: Christine Forster
Chair: Kanjapat Korsieporn

Presentation by Christine Forster, University of New South Wales, Australia[12]

Christine Forster stated that her presentation relates to a project that she and a colleague have been engaged in over the past 18 months with UNIFEM and UNDP, focusing on the legislative compliance of nine Pacific countries (Fiji, Samoa, Solomon Islands, Tuvalu, PNG, Marshall Islands, Federated States of Micronesia, Vanuatu and Kiribati) with the Convention. The project involved identifying legislative and constitutional indicators by which to measure compliance and analysing the application of the indicators to the legislation and constitutions of the nine countries. The presentation focused on the process of conducting this research, in particular the obstacles and difficulties involved in the project, rather than the substantive results.

There are several reasons for encouraging legislative compliance. It is a crucial first step to achieving de facto fulfilment of the State's obligation under CEDAW. It provides clear standards for individuals, organisations and governments, and the process of drafting and enacting legislation can involve consultation with all of these stakeholders. Legislation can provide remedies for victims of discrimination, and can provide material to assist with the judicial interpretation of human rights standards.

---

[12] See attached paper, "Legislative and Constitutional Obligations under Article 2 of CEDAW", at Annex 11.

The research project involved developing indicators to measure legislative compliance with CEDAW, which had many challenges. The language in many of the articles of CEDAW is broadly framed, with considerable overlap between articles. Some of the articles or components of articles are arguably best dealt with by policy, not legislation, which is less easily directly measured. There are questions about framing the indicators themselves, in terms of how specific they should be, whether they should be universal or context specific, and what benchmarks to use.

To identify indicators for the Pacific region, the researchers analysed the text of CEDAW and studied the general recommendations, CEDAW Committee reports, shadow reports and other reports produced throughout the region. They utilised feminist literature to identify "best practice" models, though these were often contradictory, and consulted with NGOs and government agencies in the region. Through this process, the project identified 113 legislative indicators for articles 1-16.

In terms of articles 1 and 2, these were considered together, excluding areas specifically dealt with by other articles (e.g., marriage, custom, citizenship, special measures, etc.). There were 33 legislative indicators identified for articles 1 and 2.

In terms of indicators for equality, non-discrimination and fundamental rights and freedoms, the Convention provides for the guarantee of the principles of substantive equality and freedom from discrimination. There are anti-discrimination provisions on the basis of gender/sex, and anti-discrimination provisions should encompass marital status, disability, sexual orientation, HIV status, etc. These cannot be achieved without reference to intersections of discrimination.

In terms of violence against women, general recommendation 19 states that violence against women constitutes sex discrimination. General recommendation 19 contains considerable reference to general measures required to combat gendered violence, e.g., "sanctions, penalties and compensation", but the specificity of legislative compliance is not identified. Key findings from the research included "best practice" sexual assault provisions in the criminal legislation, bail acts, criminal procedure and evidence acts and sentencing. There could be legislative provisions for the compensation for sexual assault victims, and States could have included specialist courts, camera/video facilities, criminal injuries compensation, etc.

Discussion

On the use of indicators for determining compliance with the Convention

- There was some discussion on the use of these indicators for States parties or for the CEDAW Committee:
  - Indicators like these can be helpful for governments in writing their State party reports. Governments might find it helpful to have more specific guidelines from the Committee.
  - It might also be useful for the Committee to have indicators like these for all countries. Committee members could receive lists of indicators for each country, which might make it easier to focus the review.
- The research project on legislative indicators also demonstrated that there are a number of provisions and aspects of the Convention that cannot be implemented through legislation alone, but require educational or policy measures. One such area is gender stereotypes.

On the link between rights and remedies

- The Convention is results-driven, and requires outcomes regardless of a country's legal system. Article 2 includes a whole set of interwoven obligations that need to be included in constitutions and laws. The South African and Canadian models are good examples of national systems orientated towards substantive outcomes.
- Although the word "remedy" is not used under article 2, paragraph (c) specifies that remedies are necessary. Article 2 also supports adoption of sanctions for prohibiting all forms of discrimination against women.
- The Convention is not described in terms of rights, but in terms of obligations. It covers all human rights. Whenever there is a right there must be a remedy; without the remedies, the rights become an illusion. For example, Tajikistan has a perfectly-crafted law on gender equality, with interesting and important phrases, but there is no reference to remedies and procedures by which those rights can be upheld. This means that in real terms, and for CEDAW purposes, the law does not mean anything.
- When raising the issue of remedies, it is important for women to have access to ordinary courts of law. The State has an obligation to fulfil rights, which includes procedures, access to courts, appropriate legal aid schemes, with women, women's organisations and the legal profession having knowledge of these procedures.
- The Optional Protocol is relevant to the discussion of rights and remedies. State parties to the OP-CEDAW implicitly accept the substance of the rights enumerated in the CEDAW Convention itself. It is important that the rights can be claimed in courts of law, therefore this implies that States that have accepted the OP-CEDAW have implicitly accepted the self-executing character of the provisions. Otherwise, it is difficult to raise the substance of the Convention at the international level.
- There is a need to engage national human rights institutions in pursuing remedies, as they can bring an end to ongoing violations.

Session 9: Obligations Relating to the Adoption, Enforcement and Implementation of Laws, Policies and Programmes

Speakers: Shanthi Dairiam and Andy Lynch
Chair: Dubravka Šimonović

Presentation by Shanthi Dairiam, CEDAW Committee member, Malaysia

Shanthi Dairiam began her presentation by stating that she would not make a comprehensive assessment of obligations relating to the enforcement and implementation of treaties but would only briefly discuss a few critical issues.

Human rights treaties establish universal human rights standards that have to be applied at the national level. While treaty ratification is optional, once ratified, the obligations of States to implement the treaty and make its standards available to the people is no longer optional. These obligations are legally binding. Article 2 of the CEDAW Convention clearly states that State parties should condemn discrimination, eliminate discrimination in law and practice and pursue all appropriate means to ensure the practical realisation of the principles of equality. The preamble of article 2 of the Convention enjoins States parties to pursue the goal of eliminating discrimination against women without delay. As a final measure of the fulfilment of State obligation, women must be able to enjoy and exercise their right to equality in practical terms. This is what the enforcement and implementation of the Convention must achieve. The question therefore is, in concrete terms, what would the measures or steps by which the obligation to fully implement and or enforce treaty obligations entail?

Secondly, who will then become responsible in the State to do this? When Government delegations appear before the Committee, they are representing the State and not just a particular ministry or department. They have to take collective responsibility for the implementation and enforcement of the treaty. This realisation is not evident, and needs to be made clear in the general recommendation. For example, in the Maldives in 2001 the Ministry for Women had lead responsibility for implementing the Convention, while the Law Reform Commission was the agency that was able to plan and implement law reform. But the Minister stated that the Law Reform Commission could not tackle issues of women's equality because it had other priorities, such as broadening the legal system to include laws for the market economy. The Attorney General whose office would have responsibility for drafting laws or amendments to the law was of the view that the Attorney General was only a technician and it was up to the "Government" to decide to bring in reforms that would help eliminate discrimination. Therefore, he would not initiate any action to implement the Convention but rather said that the Minister for Women should take the lead in this matter. This is an example of how some States do not accept collective responsibility for fulfilling their obligations under the Convention as a matter of priority. In this case, it was clear that the central authority within the Government did not see it as its responsibility to take all appropriate measures to implement the Convention.

Thirdly, the authority of the treaty and the Committee must be emphasised. In terms of enforcement, we see retrogressive behaviour on the part of some States. Recently the Sri Lankan Supreme Court ruled that the Sri Lankan government had no obligation to implement a decision of the Human Rights Committee pursuant to a case brought before it under the Optional Protocol to the ICCPR. If the State is of the view that the decisions of a treaty body are not legally binding, then the Committee needs to ensure that the rights given under the treaty are binding. Under these circumstances, the State has to show how the standards of the treaty are available to the people. This could be called upholding the authority of the treaty. At the same time it is critical that the authority of the Committee is also upheld. The Committee is a body of experts, duly elected into these positions by States parties. Through this process, the Committee is given the authority to interpret the treaty, monitor the implementation of the treaty by States parties and make an assessment as to when the State has allowed violations of the rights under the treaty to occur. It is unacceptable if this authority is not respected.

There is also need to take into consideration the issue of reservations to a treaty. Reservations prevent the full implementation of the treaty. Under human rights treaty law, there is recognition that some States may have impediments to achieving the full implementation of the treaty, so reservations to the relevant articles are allowed. However there must be an intention on the part of the State to fully implement the treaty concerned. This means there must be plans and timeframes in place to remove the impediments so that people, and in this case women, can eventually exercise all the rights provided for through human rights treaty law. Hence having such plans will form part of the measures to implement the treaty.

Presentation by Andonia (Andy) Piau Lynch, Disability Promotion & Advocacy Association, Vanuatu

Andy Lynch started her presentation by reflecting that one of the purposes of a large number of these treaties is to bring about peace. She said the general recommendation should bring out our ultimate aim of achieving peace through justice and recognition of equality between men and women.

In order for State obligation to be truly effective, all three branches of the government must work in tandem. The reforms taking place in the United Nations are a significant step in the right direction as they are attempting to harmonise and bring about coherence in the various agencies, funds and programmes of the UN. The general recommendation on article 2 should be a guiding light for governments and civil society as it speaks to all sectors of the community.

Finally, while the churches speak about the spiritual side of life, this aspect is often forgotten in our quest for material wealth. We must not forget that we need to balance both the spiritual as well as the material side of development.

Discussion

On implementation of CEDAW generally

- It is clear that implementation of laws must be strongly addressed in the general recommendation. The requirements of the Convention have been articulated, but the implementation side is often weak.
- It is also important to recognise the role of all the bodies involved in implementing the Convention: NGOs, Government, the media, religious communities, etc. These are all significant actors, without whom there would be no accountability.

On using CEDAW to create social change

- There should be consideration about how treaty law can bring about social change and enjoyment of equality in practical terms. Social change does not come exclusively from the top down or from pieces of legislation, pronouncements, declarations or recommendations. Consideration should be given to craft international language so as to bring about social change. Legislation is important, but we also need to think about alternatives to the traditional avenues, like the use of media, advocates, education, etc. “Naming and shaming” can be used to bring about some changes.
- When there is consideration about the vision of CEDAW, there are many limitations at the legislative level. Therefore, there must be methods to keep pushing the agenda of CEDAW advancement in alternative ways, such as providing legal aid, legal education, dissemination of information, and other creative ways in which to make the State responsible and to achieve social change through law.
- Public pressure/shame often brings about change. A strategy needs to be adopted whereby the States are convinced that they would be supported if they do particular things for the advancement of women’s rights, including CEDAW. Sometimes you can have all the political structures in place, but if you do not have advocacy, media, NHRIs, etc., you will not get anywhere. So many reforms only come about because of media pressure, public pressure, shame, or because it is part of a political game.
- How do we enforce political will? The expression “all appropriate measures” in article 2 is not just proposing legal measures; nor does it de-emphasise the law. It requires that the State use the law and other mechanisms. Looking at summary records of constructive dialogues, it is clear that the Committee interprets State obligations to include creating public space for women, building capacity for civil society and women to be able to exercise their rights, ensuring provision of legal aid, literacy, education – all of that is there. This is one of the reasons that sometimes civil and political rights activists and lawyers dismiss the Convention – they don’t see it as legal enough.

Session 10: General Discussion on Guidelines

The working groups continued their discussions to formulate elements under each of the five topics.

Combined Sessions 11 and 12:
(a) Judicial, Quasi-judicial and Related Use of the Convention
(b) Institutional Mechanisms and Processes for Implementing the Convention and Recommendations of the CEDAW Committee

Speakers: Jane Connors, Deepika Udagama, Tulika Srivastava, Ivy Josiah, Andy Lynch
Chair: Celina Romany

Presentation by Jane Connors, Office of the High Commissioner for Human Rights

Jane Connors started her presentation by stating that her task would be to summarise some of the important issues that had already been made in the previous two days.

The role of courts and tribunals in bringing CEDAW to bear at the national level
The issue at hand is not as much about incorporation, but about practical application and enforceability by women, which is not guaranteed in either monist or dualist systems. Pages 347 to 395 of the supplementary materials contain information that testifies to the fact that judges and judiciary officers have invoked human rights treaties as strategies to advance the rights of women in jurisdictions that both are monist and dualist, or where international law is not directly incorporated.

Most judgements are drawn from the common law world, possibly because researchers and activists come from this context. The Bangalore Principles (supplementary materials, page 347) were the first to state that international human rights instruments provide important guidance in cases concerning human rights and freedoms. All of the principles after Bangalore – Bloemfontein, Zimbabwe, etc. – more or less say same thing. There is an impressive body of jurisprudence, both international and national, concerning implementation of rights and freedoms. In most common law systems, international conventions are not directly enforceable, but there is a growing tendency for national courts to have regard to international norms, especially where national law or the common law is incomplete. The Principles welcome this tendency because it reflects the universality of fundamental human rights and freedoms and the vital role of judiciary in recognising human rights. There is an indication in the Principles that if the national law does not reflect human rights, then it is the duty of the judge to follow national law, but the judge must also at least draw attention to fact that the national and international laws are inconsistent. The Bangalore Principles provide comments on legal training, availability of materials, dissemination of principles to law enforcement, judiciary, etc. It would be nice to see these ideas reflected in a general comment relating to article 2.

The Bangalore meeting was the first of nine judicial colloquia. This series inspired a series of colloquia directly related to the human rights of women, starting with Victoria Falls in 1994. The latest declaration concerning the rights of women was the Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level. This declaration notes that the domestic justice system is an arm of State, and as such has an obligation to observe

States' international legal obligations, for which States can be held accountable at the international level.

The results of these colloquia in terms of the effect on judicial decision-making are remarkable. In his article (supplementary materials, page 395), Andrew Byrnes discusses 13 cases in which the Convention has been invoked. There is also a collection of cases compiled by Andrew Byrnes, Robyn Emerton, Kirstine Adams, and Jane Connors (*International Women's Rights Cases* (Commonwealth Secretariat and Cavendish, 2005)) over 10 years – it provides examples of usage of treaties, other outputs, general interpretive guides, explanations of discrimination, rights regarding marriage, family life, reproductive rights, employment, etc. The RRRT Law Digest contains similar cases in the Pacific region. Africa Human Rights Reports has similar cases in Africa. The African cases go quite a long way in using international treaties and output. There is also an International Law Association report on the impact of findings of treaty bodies.

What does this mean for a general comment on article 2? In the article, Andrew identifies six ways in which courts have used unincorporated treaties:

- As an aid to constitutional interpretation, either generally or to resolve an ambiguity;
- As a relevant consideration in the exercise of administrative discretion by a decision-maker;
- As giving rise to legitimate expectation that provisions of treaties will be applied by a decision-maker;
- As a relevant factor in the exercise of discretion by judges;
- As a factor to be taken into consideration in the development of common law, where the common law is unclear;
- As a factor to be taken into account in identifying the demands of public policy.

This leaves much to discretion and knowledge of judges. There was a judicial colloquium in Kenya about a year ago for judges in southern Africa, and the judges were concerned that they did not know about international human rights law. They are not keen to do things that have not been done before, so were happy to see that other judges are looking at international law as well.

Structure and content of CEDAW concluding comments

CEDAW concluding comments generally have a set structure, with principal areas of concern, the failure to incorporate, the need for full applicability, the lack of a definition of discrimination in line with article 1. The concern is that these concluding observations do not pay enough attention to the practical realisation of equality by individual women or to effective protection against discrimination – accessibility, affordability, etc. Few sets of concluding observations refer to the judiciary or cases relating to treaties. The questions may be raised in the dialogues with States parties, but do not feature in concluding observations. The revised harmonised guidelines developed in the treaty body reform process do include these, and it is interesting to think about how far to include these in the elements for a general comment on article 2.

National Human Rights Institutions (NHRIs)

There are different levels of involvement of NHRIs with treaty bodies, which could possibly be raised in a general comment as well. Generally, NHRIs have competence to promote and protect human rights, a promotional role, sometimes a quasi-judicial role, a number of advisory powers, powers to intervene in administrative matters, and some have mediation or judicial mandates. To be involved in the International Co-ordinating

Committee of National Human Rights Institutions, NHRIs must fulfil the requirements of the Paris Principles on NHRIs.

The background paper (page 46) states that the new disability treaty provides a specific role for national institutions. The Subcommittee on Torture under the CAT Optional Protocol will have a specific role for national institutions in terms of visiting rights.

There are a number of general comments on national institutions, of which the Committee on the Rights of the Child's general comment is best. General comments tend to be written because a member of the treaty body is or was a member of an NHRI. The CRC general comment says that the NHRI falls within the commitment made by States parties on ratification of the treaty to ensure implementation of the treaty and advance children's rights. This means that it is not just something nice to do, but falls within the general obligation of the State.

A few national institutions have discovered CEDAW. The best example is the Irish national institution which has produced papers for the CEDAW Committee. The Mexico national institution became involved in the Ciudad Juarez inquiry because Rosario Manalo, the former chair of the CEDAW Committee, met someone from the national institution at an inter-committee meeting and asked why it had not done much, so it reacted a bit and became involved.

Presentation by Deepika Udagama, University of Colombo, Sri Lanka

Deepika Udagama presented based on her role as a human rights commissioner in Sri Lanka. The Sri Lankan Human Rights Commission has an array of powers and mandates not only to investigate, but to reply to complaints, try to mediate them, and eventually to make recommendations. The advisory powers are quite extensive, advising the Government on policy making, legislation, bringing policies in line with international human rights standards. There is also an educational function and a research function. An interesting dimension in the statute is that the inquiry powers are limited to fundamental rights in the Constitution, and human rights more broadly could only come in where advisory and promotional activities were concerned.

When Deepika served, there were three women out of the five commissioners, which made a difference. When the commission started, women's organisations had to make demands for more inclusiveness, going from no commissioners eventually to three. If there is just one woman, and she is not conscious of CEDAW, CEDAW wouldn't play a role. A lot depends on the composition of the commission. In the current composition, there isn't single member who is familiar with international human rights law. There is also now a crisis over its independence and the appointment process.

Where the Commission used CEDAW extensively during Deepika's tenure was in documenting human rights violations, especially in the north and east, when they looked at the plight of women in war-torn areas and relating to post-tsunami efforts. They lobbied hard to get a unit specifically for women set up after the tsunami. CEDAW was also useful in training programmes and protection work. In educational activities, CEDAW and the CRC were given a lot of emphasis.

A general recommendation of the CRC calls for a specialised body to look at children's rights. Deepika personally feels it is necessary to have a specialised institution look at women's rights. If it is a general institution, then it might happen by chance that someone is sensitive to women's issues, but a lot of haphazard, ad hoc approaches could be avoided by having specialised institutions. The women's rights bill proposed in Sri Lanka

includes a national women's commission that would have the power to implement the national women's rights law if it comes to pass.

In the reporting process, under article 2(c), States are required to report on national institutions other than courts that exist. The Committee might want to adopt guidelines along the lines of the CRC, calling for national institutions to implement CEDAW.

Presentation by Tulika Srivastava, Executive Director, IWRAW Asia Pacific

In her presentation, which relied mostly on her experience from India, and a bit from Cambodia and Afghanistan, Tulika Srivastava raised issues around two institutions that are forwarded as being national machineries for women, and most often have the potential to contribute to the effective implementation of CEDAW: (1) administrative/ executive institutions, and (2) oversight institutions

Administrative/executive institutions are the arrangements that are made by States in relation to programmes and policies for women. They are largely either ministries or, more often, departments for women, with children, veteran affairs, family or community affairs included. It is often these institutions that bear the main burden of reporting to CEDAW or piecing together information to demonstrate compliance with CEDAW.

However, in actual fact, they have very little capacity to ensure compliance at the domestic level. In this one can identify two key issues: their functional role and (lack of) access to resources. On one hand the women's departments/ministries, to ensure integration of women's issues across the board, must take on an extremely proactive advocacy role within the government. On the other hand, they are overloaded with implementation of policies and programmes – mostly cast in welfare and relief mode.

The material resources for their existence come from these very programmes, which are the antithesis of steps required to ensure women's human rights. Their access to resources from sources other than these programmes, which range from nutrition, health benefits and widowhood pensions to running shelter homes, etc., is almost nil. In most cases, they have no power to influence any other ministry or department, simply because the others are not mandated to heed them, nor do they have any other access to power or influence. Also, given their own workloads in terms of programmatic work, they have other priorities.

These dilemmas in relation to an advocate's role as compared to that of implementer's role or a combination have in many ways affected the competency of these executive institutions. In India the relevant department is located within the human resources ministry, and is mandated to be an advocate within the government for women. In Afghanistan and Cambodia, there have been discussions that the ministry should not get into the execution of programmes, but be an advocate within government to ensure that women's rights are streamlined within all ministries. This, however, is more aspirational than practical. If they only take on the advocate role, they don't have the necessary resources or enough power to be taken seriously by the government. But ministries that get involved in executing the programmes often lose sight of the fact that they are mandated to ensure that every department is addressing these issues. In fact, they become possessive of what they see as "their" issues, as result of which women's issues get more ghettoised, and are not linked, to mainstream programmes or interventions. The one advantage that ministries do have over departments is that if the ministry is headed by a powerful and aware minister, s/he can influence the cabinet and gain political will and backing on integrating women's issues.

Women's commissions are the other institutions that are entrusted with ensuring women's access to their human rights. However, the discrimination they experience nationally as compared to other commissions should be examined very seriously. In India, the National Commission for Women was instituted in 1992 through a parliamentary act and the National Human Rights Commission instituted in 1993. The difference between the two in terms of powers, mandates and financial resources is stunning. The women's commission simply does not have the mandate to protect and promote women's human rights. It is at best able to offer recommendations, or take its recommendations in relation to specific violations to the media.

In addition, the process for determining composition of the commission is ad hoc and political, even though composition is key to ensuring that women's issues are examined from a proper perspective. While this is also true even for the "human rights" institution, somehow the people who traditionally step into these roles come from very different worlds. In India, the trend has been to bring in retired judges from at least the Supreme Court to head human rights commissions, whereas just about anybody can become the head of the women's commission. For example, in the state women's commissions, a woman who runs a beauty parlour was appointed as chairperson.

The resourcing of such institutions is also critical and is mostly not institutionalised. While donors provide assistance in countries like Afghanistan and Cambodia, this comes at a price. There are requirements in terms of what they do, their outreach, their network, etc., and the funding also compromises their independence especially in relation to the way they are seen by the government. In India, the women's commission in fact depends on the women's ministry to provide resources.

The other issue is the relationship of these commissions to each other. The National Women's Commission in India bears no relation to the state commissions, other than forwarding the complaints back to the state where they come from if there is a state commission in existence. This does not provide for any linkage or understanding being built exchanged or institutionalised locally or nationally.

The final institutions to be highlighted are various independent commissions that are either created from time to time, in the case of sudden/egregious violations, or are standing commissions. For most part these are one member commissions, with absolutely no mandate to look at gender issues in the matter at hand. An example is the mass crimes committed against minorities during the Mumbai Riots in 1993. While the Sri Krishna report took much into consideration, the Commissioner simply did not look at the gender aspect of such violations. This was also true during the Gujarat mass crimes, where the women have been fighting for acknowledgement of the crimes committed against them, since even the recommendations of the NHRC do not take into account the issues faced by women who are trying to piece their lives together after suffering gross violations, displacement and much loss.

This lack of mandate extends to even Ombudsperson's offices where they exist. For the most part, they look into corrupt practices committed by people in public offices. However, their understanding of corrupt is limited to fiscal, and does not include the manner in which women are used and abused for various purposes by people in public offices.

The absence of a mandate to look at the gendered aspects of violations as a matter of practice and to ensure that the framework for all bodies looking into violations of human rights includes women indicates the very superficial level at which States are looking to serve women's human rights.

Presentation by Ivy Josiah, Women's Aid Organisation, Malaysia

Ivy Josiah used Malaysia as an example for how institutional mechanisms are designed to implement the Convention. In Malaysia, the structures appear to be in place. There is a Ministry of Women, Family and Community Development with a Women's Development Department and an International Affairs department. The ministry has close links with the Attorney General's chambers to discuss law, legislation, etc. The ministry realised that it needed to have senior government personnel as Gender Focal points, so there are now appointed personnel who can bring policy input into the respective ministries. Curiously, only the Ministry of Transport does not have gender focal point. While the gender focal points are senior staff they also have other duties aside from being focal points.

Through strategic meetings, women's groups have worked with the Prime Minister's Department and advocated for a Cabinet Committee on Gender Equality. Women's groups prior to the meeting with the PM had even worked out the objectives of this Cabinet Committee, incorporating CEDAW in terms of fulfilling the promises of CEDAW and the BPFA. A recent development is the formation of a Parliamentary Gender Caucus.

Women's groups have engaged with all of these structures at varying levels. Furthermore, the media is strong on women's issues and have good relationships with women's groups. There is also a national human rights commission (SUHAKAM) that has organised roundtable discussions on CEDAW.

Though all of these structures are in place and it looks good on paper, there isn't full impact on the lives of women. The Government was quick to put structures in place so it looks good and appears to be delivering. But a lot of policy changes are not taking place because the women's ministry is the youngest ministry and doesn't have the status to command its line ministries to incorporate gender sensitive policies. The Ministry has also lost its initial focus on women as it began as the Ministry of Women, and then went on to add "Family" and finally "Community Development". Its full name now is the Ministry of Women, Family and Community Development.

In terms of checks and balances, there are hardly any. The Government report to CEDAW is not debated in Parliament, the Ministry is not reporting to the Cabinet Committee on a regular basis and it has not reported on its constructive dialogue with the Committee and what was recommended in the concluding comments. For the judiciary, there is not much training and judges are not fully aware of international treaties and the State's obligations under them.

On the part of the CEDAW Committee, its general recommendation should emphasise the duty and obligation of the State and thoroughly discuss what is meant by discrimination and temporary special measures. There is a poor understanding of discrimination, especially past discrimination, and of how temporary special measures can be used to address discrimination.

Presentation by Andonia Piau Lynch, Disability Promotion & Advocacy Association, Vanuatu

Andy Lynch focused her presentation on government capacity to implement the Convention. In Vanuatu, the government ratified CEDAW, but did not even have the internal capacity to write the CEDAW report – they advertised to find someone to write

the report. Vanuatu has ratified a large number of treaties but still has little capacity in the executive or legislative branches to implement the treaties.

One way to move CEDAW is by going outside the box and working with other conventions. The Disability Convention, for example, has adopted the definition of non-discrimination on the grounds of disability from article 1 of CEDAW. Similarly, the reporting procedures of the Optional Protocol to the Disability Convention have been adopted from other treaties including the OP-CEDAW. When these links are made to decision makers, it become more easily understood, thus NGOs like Disability Promotion & Advocacy Association are calling on the Government to enact an anti-discrimination act that incorporates the non-discrimination provisions of CEDAW and the Disability Convention. The CEDAW Committee should work with other treaty bodies as well, and encourage States parties to make connections between them.

In Vanuatu, there are national committees on children and on disability, but not on women. One reason for not having a committee could be the internal capacity of the national government to implement its commitments.

Discussion

On understanding and internalising State obligations

- A participant told a story about being in Cambodia to help a large governmental inter-ministerial team review the CEDAW concluding comments. On the final day, a woman from the rural ministry said that the discussion was very interesting, but that focusing on CEDAW implementation will interfere with her core functions. She is in charge of agricultural matters, and has to make sure that enough crops are produced – she feels she does not have the time to worry about women's issues.
- Unless there is a clear understanding and internalising of obligations at every level, where people see the relevance of equality and non-discrimination to the harvesting of crops and other core functions, then the resources and institutions that are being used are wasted. The general comment needs to raise awareness that equality and non-discrimination are not luxury items that you take on after your core business is done, but are integral to the prosperity of the country, whatever happens within the country. This might be included in the conceptual part of the comment.

On specific versus general commissions

- There was a question of whether and to what extent a State party should be creating gender specific focal points, having gender specific commissions, etc. and how these relate to the general institutions:
    - A participant suggested that a general commission with dedicated positions for women or people with expertise on women's human rights might work as well as or better than a specific women's commission.
    - Another participant said it is difficult to recommend one model for all countries – we have to look at country experiences and the ethos that is there. In some countries, it is difficult to push policies for women. Women's issues and experience become secondary to the conflict, displacement, emergencies, etc. But the government and aid agencies do not have the capacity to integrate these women's needs into what they are doing. In a generic human rights commission, a women's unit may work well if civil society has already done the groundwork for pushing these things, but in other circumstances it might be better to have a dedicated women's commission.
    - There is merit in having a separate women's commission because no matter how good the human rights institutions are, they can only look at so many issues, and

women's issues will not always be picked up. The danger of having a separate women's commission is that it may have less power, a weaker mandate, and fewer resources than the generic commission, as in India

- Regardless of the system, it is important to have accountability, checks and balances, and scrutiny within the system. It is essential to have an oversight mechanism.

On capacity building of judges and lawyers

- Judicial training is very important, but will remain somewhat limited since there is a perception that only judges can train judges. One problem is that judges are exposed to gender issues, but not to human rights law.
- It is important to train the subordinate judiciary as much as the senior judiciary. Although the Supreme Court of India produced the *Visaka* judgment, judiciaries across the board have refused to institute a sexual harassment body, even though women are seriously affected. There has been no institutional response.
- It is also important to look at the role that women lawyers/advocates in bar associations play both in terms of capacity building and promotion of women's rights.

Session 13: Working Groups

The five working groups met for discussion and finalisation of their contributions to the draft elements document, then submitted these contributions for compilation into one document to be examined in the plenary session.

Session 14: Plenary – Review of Draft Elements Document

Chair: Shireen Huq

Andrew began by thanking the working groups for their contributions to the draft elements paper on article 2 of the CEDAW Convention. Andrew then explained that we would go through the draft elements paper section by section, with one person from each working group presenting that section. After each section was presented, comments and input on that section from the group would be welcome.

PREAMBULAR PARAGRAPHS

Proposed Text

GENERAL

1. A general recommendation on article 2:

   (a) should underline the binding nature of the legal obligation accepted by States when they become parties to the Convention, and provide specific guidance to States parties as to the types of steps which they should take into order to give effect to their obligations under the Convention;

   (b) should be pithy, concise and focused;

(c) should be formulated with the goal of making it a useful and practical juridical tool for government officials, activists, advocates, courts and tribunals, and other institutions; and

(d) should be firmly based in the practice of the CEDAW Committee (and other relevant practice under the Convention), take into account the progressive developments in the practice of other human rights bodies (including the other UN human rights treaty bodies and regional human rights bodies), and seek to develop the practice of the Convention in a dynamic way to reflect the fact that the convention is a living instrument.

SCOPE OF APPLICATION OF THE CONVENTION

2. A general recommendation on the nature and extent of State obligation under the Convention:

(a) should consider not only article 2 of the Convention, but also articles 3 and 24 in defining the scope and content of State parties' obligations, and the relevance of the Preamble to the Convention to the content of obligations under the Convention; and

(b) should also refer to the differing formulations of obligation that appear in the various provisions of the Convention (for example, the obligations under article 15 that States "shall accord" legal equality).

Discussion

- ***On para. 1 (b)***: There was a question whether we should include the word "concise" in this section, since article 2 is as an extremely important and integral article of the CEDAW Convention. There were opinions on both sides but it was finally agreed to delete section (b) and put the word "focused" into section (c) below.
  - ***Decision***: Delete section 1(b) entirely and put the word "focused" into section (c).

WORKING GROUP A: "EXTERNAL" OPERATION OF THE CONVENTION

Proposed Text

3. Extraterritorial operation

(a) While the jurisdiction of State is primarily territorial, it may sometimes be exercised outside the national territory.

For example:

- The obligations of States parties apply where a State party is in effective control over a territory outside its borders.
- Similarly, the obligations of States parties under article 2 of CEDAW (2(c) and (e) also extend to acts of national corporations operating extraterritorially.

- o The obligations of States parties extend to its nationals when they are outside the territory of the State party (for example, in situations where nationals are perpetrators of trafficking).
- o [Question: What about obligations vis-à-vis victims?]

(b) In considering their extraterritorial obligations, States parties should bear in mind the general recommendation of the CEDAW Committee relating to migrant workers.

4. IHL and the Convention

(a) States parties are reminded that their obligations under CEDAW do not cease in periods of armed conflict. The Committee recognises the complementarity between CEDAW and international humanitarian law.

5. Development assistance

(a) State parties must ensure that gender impact is taken into account when designing and delivering overseas development assistance policies and programmes.

(b) Similarly, a State party should refrain from accepting development assistance that would manifestly have a negative impact on the enjoyment by women of their human rights.

(c) All development assistance a State party receives should be utilised in a manner that is non-discriminatory against women.

6. Participation in international organisations / Relationship to other treaty regimes

(a) A State party is under an obligation:

i. To take into account the rights guaranteed under the Convention when it negotiates with international financial institutions in relation to loans and other forms of financing for national projects.

ii. To ensure that when entering into international agreements relating to trade liberalisation or other subjects, that these agreements do not have an adverse impact on protected rights;

iii. To take steps in its capacity as a member of international organisations: including the various international financial institutions: to ensure that due account is taken of protected rights in the activities of those institutions.

(b) States parties participating in international organisations, including international financial institutions, must apply the standard of due diligence to assess, foresee and prevent any adverse consequences for the enjoyment of women of their human rights.

Discussion

- ***Para. 3 (a) iv***: The group debated whether to include a reference to the obligation to victims. One participant felt that there was no need, since a State party's obligation to a victim is already a well-established principle of international law. Another, however, felt that despite it being implicit, she felt it needed to be explicit for emphasis. Another person felt there was no problem leaving the reference to victim in the text. Andrew reminded the group that we are not actually drafting the general recommendation but

simply writing down possible elements, so we can just include that the Committee should consider obligations to victims. All agreed.
- ***Decision***: Leave reference to "victims", but rephrase stating that "we urge the Committee to consider obligations to victims".

- ***Para. 4***: A participant wondered if we need to refer to IHL, since its complementarity with international human rights law is implied. Another person wondered if we refer to IHL whether we should also refer to refugee law, and someone else wondered if we should include states of emergencies. All agreed with this suggestion to add "states of emergency" to para. 4(a), but there was no consensus on whether to add other forms of law. Someone suggested that we do not need to find the answer but that can once again urge the Committee to consider complementarity with other laws. All agreed.
  - ***Decision***: Take out reference to IHL specifically and instead put in a statement urging the Committee to consider complementarity with other laws – e.g. IHL, refugee law, etc.
  - ***Decision***: Add "states of emergency" to para. 4(a).

- ***Para. 6(b)***: It was suggested that the term "due diligence" be taken out of this paragraph and replaced with the phrase "must take all reasonable measures", in order to make it stronger. All agreed.
  - ***Decision***: Replace phrase "due diligence" with "must take all reasonable measures".

WORKING GROUP B: CONTENT: DEFINITIONS, SCOPE AND NATURE OF OBLIGATIONS

Proposed Text

I. Definitions
- Equality and non-discrimination
- Intersectionality/sex/gender/sexuality

II. Scope
- Rights covered (*ratione materiae*)
- Reference to articles 3 and 24

III. Nature of Obligations – content of chapeau
- Condemn
- Agree to pursue
- By all appropriate means
- Without delay
- A policy of eliminating discrimination against women

IV. Reservations
- Generally
- With reference to article 2 in particular

I. DEFINITIONS

7. The GR on article 2 should provide clear/specific guidance on the form of a constitutional or other legal guarantee of equality. [as specified in (a) 'to embody the principle of the substantive equality']. The guidance should include a statement:

(a) That the convention embodies the concept of substantive equality
(b) That substantive equality includes equality of opportunity, equality of access and equality of results
(c) That guarantees of 'equality before the law', which require the equal handed application of the law, while necessary are insufficient to fully meet the obligations imposed by article 2

8. The GR should provide clear and specific guidance on the form that constitutional and legislative guarantee of equality and non-discrimination,

(a) Definition of discrimination should include a definition of discrimination which embodies the definition of discrimination in article 1 which encompasses indirect as well as direct discrimination
(b) Should extend to the content and administration of law,
(c) Should extend to the actions of public authorities and institutions as in (d)
(d) Should extend to the actions of any persons, enterprise, and organisation including private and non-State actors as in (e).
(e) The guarantee should provide for effective sanctions including appropriate remedies as in (b).
(f) That special measures will be required to achieve substantive equality and eliminate discrimination in many instances as elaborated by the CEDAW general recommendation 25 to achieve substantive equality

9. The GR on article 2 should clarify that the Convention covers intersectional discrimination where women experience discrimination on the basis of their sex combined with other grounds of discrimination, for example ethnicity, sexual orientation, HIV/AIDS etc. The text of the Convention and the practice of the Committee that the Convention covers intersections of discrimination.

10. The Convention refers to intersections of discrimination in:

(a) The Preamble which states that 'everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex', which emphasises that 'in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs' and which emphasis that the 'eradication of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women.'
(b) Article 1 which expressly includes marital status
(c) Article 2 which condemns discrimination in <u>all</u> its forms, (b) refers to prohibiting <u>all</u> discrimination, (c) refers to <u>any</u> act of discrimination.
(d) Article 14 requires States parties to take into account the particular problems faced by rural women

11. The Committee has previously recognised the need to consider intersections of discrimination in:

(a) GR 15 which recommends that States parties adopt measures to prevent specific discrimination against women in relation to HIV/AIDS.

(b) GR 18 which states that women with disabilities suffer from a 'double discrimination linked to their special living conditions'
(c) GR 21(13) which states that the form and concept of the family can vary and recommends recognition of de facto relationships.

II. SCOPE

Rights covered by the Convention

12. The general recommendation should include a clear statement that the Convention not only guarantees women's equal enjoyment of the rights explicitly dealt with in the fields covered in articles 6-16 of the Convention, but also extends to the equal enjoyment of all internationally recognised human rights and fundamental freedoms. This is clear from the Preamble, the definition of discrimination in article 1, and the terms of articles 2, 3 and 24, and the practice of CEDAW (for example, *general recommendation 19*).[13] This broad coverage has been articulated most clearly by the Committee in relation to violence against women, but also applies more generally. The rights covered would include those rights recognised in the Universal Declaration of Human Rights, the International Covenants on Human Rights, other UN and regional human rights treaties, and other human rights instruments.

III. NATURE OF OBLIGATIONS

(a) Nature of Obligations – Article 2 chapeau:

13. The chapeau of article 2 expresses the general legal obligation of States parties to implement the Convention. Its substantive requirements provide the framework for the implementation of the specific legal obligations identified in paragraphs (a) – (f).

(b) 'States parties condemn discrimination against women in all its forms,'

14. The first substantive commitment undertaken by States parties in the chapeau is to 'condemn' discrimination against women in all its forms. The language of condemnation is the strongest wording used by the international community in this context, expressing abhorrence of the highest level and acknowledging that discrimination against women is as intolerable as racial discrimination. It is an undertaking by each State Party to immediately, and continuously, make it very clear to all levels and arms of government, to their domestic population and to the international community that they are totally opposed to discrimination against women, in all its forms and determined to bring about its elimination.

(c) 'agree to pursue … [a policy of eliminating discrimination against women]'

15. States parties also agree to 'pursue … a policy of eliminating discrimination against women'. The obligation to 'pursue' such a policy is both immediate and continuing. The State party must immediately take concrete steps to formulate and implement a policy

---

[13] See also CERD *general recommendation XX on article 5 of the Convention* (1996), para. 1 (noting that the list of rights in article 5 of the Racial Discrimination Convention is not exhaustive but extends to human rights and fundamental freedoms recognised in the UN Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights).

that is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men. The emphasis is on forward movement, from the initial adoption of a comprehensive range of measures to continuously building on them, in light of their effectiveness and new or emerging issues, towards the Convention's goals.

(d) 'by all appropriate means'

16. States parties undertake to pursue the policy of eliminating discrimination against women 'by all appropriate means'. This gives the State Party a great deal of flexibility in devising a policy that will be appropriate to its particular legal, administrative and political framework, and which can respond to its particular history of obstacles and resistances to the elimination of discrimination against women. However, each State Party must be able to justify the appropriateness of the particular means it has chosen and ultimately it is for the CEDAW Committee to determine whether all appropriate means have been adopted.

17. The types of means that might be considered appropriate are not limited to constitutional or legislative measures, although the Convention emphasises the importance of such means and gives them some priority. In addition, the Committee would expect the State Party to have adopted measures that ensure the practical realisation of the elimination of discrimination against women and women's equality with men. These would be likely to include measures that ensure women are able to make complaints about violations of the Convention and have access to effective remedies, that enable women to be actively involved in the formulation and implementation of measures, that ensure governmental accountability domestically, that promote education and support for the goals of the Convention throughout the education system and in the community, that encourage the work of women's rights NGOs, establish the necessary national human rights institutions and/or other machineries and that provide adequate administrative and financial support to make the measures adopted make a real difference in women's lives in practice.

18. In order to satisfy the requirement of 'appropriateness', the means adopted by a State Party must also address all aspects of its legal obligation under the Convention to respect, protect, promote and fulfil women's right to non-discrimination and to the enjoyment of equality with men. Thus 'appropriate means' will include measures that ensure the State party abstains from performing, sponsoring or tolerating any practice, policy or measure that violates CEDAW (respect); takes steps to prevent, prohibit address violations of CEDAW by third parties, including in the home and in the community (protect); fosters wide knowledge about and support for its CEDAW obligations (promote); and adopts positive measures that achieve sex non-discrimination and gender equality in practice (fulfil). (*See CEDAW general recommendation 25, para 4*)

(e) 'and without delay'

19. The words 'without delay' make it clear that the State Party's obligation to pursue its policy, by all appropriate means, is immediate. This language is unqualified, and does not allow for any delay in the implementation of the legal obligations that State Parties assume on ratification of CEDAW. It follows that delay cannot be justified on any grounds, including by reference to political, social, religious, cultural, economic, resource or other considerations within the State [is there an obligation to seek international assistance where State resources are inadequate?].

(f) 'a policy of eliminating discrimination against women'

20. The requirement to adopt a policy is an essential and critical component of a State Party's general legal obligation. Such a policy must comprise a resolute, detailed and comprehensive action plan that provides a framework for designing, coordinating and integrating the more specific undertakings that follow the chapeau in paragraphs (a)-(f). The policy must ensure that the State Party's obligations under CEDAW are given effect. To this end, all elements of the policy must be scrupulously directed towards achieving the goals of the Convention, which are to eliminate discrimination against women and ensure that women enjoy equality with men in all spheres of life.

21. The policy should incorporate *clear definitions* of discrimination against women and gender equality, that are consistent with the spirit and substance of CEDAW, including the definition in article 1, as outlined elsewhere in this general recommendation.

22. The policy should be *comprehensive* in that it should apply to all fields of life, including the political, economic, social, cultural and civil fields. It should apply to both public and private spheres of life, including the domestic sphere. It should also ensure that all arms and levels of government assume their respective responsibilities for implementation. It should incorporate the entire range of measures that are appropriate in the particular circumstances of the State Party.

23. The policy should *identify women as the rights bearers*, with particular emphasis on those groups of women who are most marginalised. It should ensure that women, as individuals and groups, have access to information about their rights under CEDAW and are able to effectively promote and claim those rights. The policy should also ensure that women are able to actively participate in its development and implementation. To this end, resources must be devoted to ensuring that women's NGOs are well-informed, adequately consulted and generally able to play an active role in the initial and subsequent development of the policy. Women must also be empowered to present their views, in the form of shadow reports, to the CEDAW Committee when it considers the State Party's periodic report, and be actively involved in the domestic dissemination of the Committee's Concluding Observations.

24. The policy should be *action oriented* in that it should establish benchmarks and time-lines, and ensure that all relevant actors are adequately resourced and otherwise enabled to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to budgetary processes in order to ensure that all aspects of the policy are adequately funded. The policy should provide for mechanisms, that collect relevant sex-disaggregated data, that enable progress and effectiveness of measures to be monitored, that facilitate continuing evaluation, and allow for revision, supplementation and the identification of any new measures that may be appropriate.

25. The policy should ensure the *establishment of national institutions* by legislation that will coordinate its implementation and development, arbitrate or conciliate complaints, and ensure adequate means of political and administrative accountability. Such institutions may include national women's rights machineries. These institutions should be empowered to provide advice and analysis directly to the highest levels of government, such as the Cabinet and Attorney-General. (autonomy?)

26. The policy must *engage the private sector*, including business enterprises, organisations, community groups and individuals, and engage their partnership in adopting measures that will fulfil the goals of CEDAW in the private sphere. The policy should also provide a focal point for government regulation of private actors, to ensure that they act consistently with its obligations under CEDAW, in the marketplace and elsewhere in the private sphere.

27. The policy should be *result-driven* in that it should be targeted as clearly as possible towards the goal – the obligation of result - aimed at eliminating all forms of discrimination against women and providing for women's equal enjoyment of all human rights and fundamental freedoms.

IV. RESERVATIONS

28. Article 2 is the "very essence of obligations under the Convention" and reservation to article 2 will "impede full implementation of the Convention" *(see Committee's Concluding Comments for Singapore report, 25th session, July 2001)*

29. Therefore, a reservation to article 2 is incompatible with the object and purpose of the Convention, as the Committee has previously stated.

30. Even a reservation which is valid under CEDAW does not obviate the need for the State to comply with its obligations under international law relating to the elimination of discrimination against women, including its obligation under other treaties and under customary international law.

Discussion

- ***Para. 23***: It was suggested that when referring to "women who are most marginalised", we add reference to women who are non-citizens by adding the language "to all women within the jurisdiction of the State party who are rights bearers" and all agreed. Another suggestion was to put the statement of which women are protected by there rights earlier, perhaps in the preamble, and all agreed.
  - ***Decision***: Add phrase to para. 23, "and to all women within the jurisdiction of the State party who are rights bearers".
  - ***Decision***: Add at beginning of elements paper, as part of the preamble, which women are protected by these rights including above statement of "all women within the jurisdiction of the State party who are rights bearers".

- ***General***: A participant commented that something should also be added at the beginning, in the preamble section, as to the universality of the obligation of equality but recognising that the process by which it is applied varies from State to State. It was suggested that it could be added in paragraph 7 above, when defining "discrimination". All agreed.
  - ***Decision***: Add to paragraph 7 that definition and applicability of "equality and non-discrimination" is universal, even though process of implementation may vary from State to State.

- ***Para. 25***: A participant raised the point that there should be more emphasis given in this paragraph on the need for increased coordination among the various national mechanisms for women's rights within a country.

- ***Para. 22***: It was suggested that when referring to all "arms and levels of government", each of the three branches of government should be specifically stated. All agreed.
  - ***Decision***: Spell out all three braches of government (i.e., executive, legislature and judiciary)

- ***Para. 29***: It was suggested we mention here that States parties are also encouraged to lift reservations, and that we can also mention here that many States parties have made objections to reservations on article 2.

- ***Para. 30***: A participant suggested taking out the word "valid" from this statement, as it may be misleading and give the wrong impression that some reservations are acceptable. Another person responded that this was not at all the intention. All agreed to take out word "valid" from this phrase. Someone suggested adding this phrase to para. 30: "where there is discrepancy, a State party should review its reservations with a view to withdrawing them". Agreed.
  - ***Decision***: Remove word "valid" from para. 30.
  - ***Decision***: Add phrase, "where there is discrepancy, a State party should review its reservations with a view to withdrawing them".

WORKING GROUP C: LEGAL INCORPORATION OF THE CONVENTION

Proposed Text

31. Prohibit discrimination contrary to the Convention

32. Ensure, through Constitutional amendments or by other legislative means that the principle of equality of men and women and of non discrimination is incorporated into domestic law with overriding and enforceable status. [HRC Gen. Comment 31, paras. 13, 15; CESCR 3 para. 3; CESCR 9 paras. 2, 4]

33. Undertake a continuing review of all existing and planned legislation, laws, regulations, public policies and programmes with the view to removing, repealing, revoking, or abolishing all the discriminatory elements and of ensuring harmonisation with international human rights obligations. Involve all branches of governments in this process, the executive, the judiciary (to draw attention to discriminatory laws) and the legislature (e.g., Parliamentary Committee could be established to continue the review process) [HRC 4 para. 4; CESCR 16 para. 16 and 24; CERD 31; CRC 5, para. 15]

34. Ensure that legislation provides appropriate remedies for women who are subjected to discrimination contrary to the Convention, including compensation, restitution, rehabilitation, reinstatement [HRC 31, paras. 15-17; CESCR 9 para. 2, 3 paras. 4, 5, 16 & 33; CERD 26, para. 2; 25, para. 2; CRC 4 para. 25]

35. Ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, determined in a fair hearing by a competent and independent court or tribunal with access to a mediation process. [HRC 31 para. 15]

36. Ensure that women can invoke the principle of equality in the courts in support of complaints of discrimination contrary to the Convention by public official/s or in the private sphere and that the courts are bound to apply that principle to interpret law, where possible, compatibly with Convention obligations. [*see Arusha Principles & Bangalore Principles*]

37. Support women's legal resource centres with the function of educating women about equality rights and assisting in pursuing remedies for discrimination.

38. Where discrimination constitutes a serious abuse of human rights (e.g., in cases of violence) penal sanctions should be applied and there should be no impunity. [HRC 28 para. 11, 12 & 15]

39. Ensure that those who discriminate contrary to the principles of the Convention should be liable to appropriate sanctions, fines, compensation, and other remedial measures. [HRC 31 para. 18; CESCR 3 para. 5]

40. Where not already in existence, establish independent national machinery/institutions (in accordance with the Paris Principles) with adequate resources to oversee the implementation of the Convention, investigate complaints of discrimination, provide mediation or pursue remedies behalf of women, to promote equality, undertake education programmes and to coordinate with other agencies responsible for women's affairs. [CEDAW 6; CESCR 10 para. 23, CESCR 16 para. 21, 38; CERD 31 para. 5 (j); CRC 2 para. 1, CRC 4 para. 27, CRC 5 para. 65]

41. Promote equality of women through the formulation of and implementation of National Plans of Action and other relevant policies and programmes.

42. Establish codes of conduct for Public Officials to ensure respect for the principles of equality and non-discrimination.

43. Ensure reports of courts' decisions are widely distributed. (Bangalore Principles)

44. Undertake specific education programmes about the principles of the Convention and of women's human rights directed to all government agencies to public officials and in particular to the education and training of the legal profession and the judiciary. [HRC 3 para. 1 & 2; CESCR 16 para. 21; CERD 13]

45. Enlist all media in public education programs about the equality of men and women and to ensure in particular that women are aware of their right to equality without discrimination and of the measures taken by the government to implement the Convention including reports of the Committee. [HRC 3 para. 1; CESCR 16 para. 21; CRC 5 para. 67; CEDAW 3]

46. Establish valid indicators of the status and progress of women for inclusion in data disaggregated by sex and relevant to the specific provisions of the Convention. [CESCR 16 para. 39; CESCR 31 para. 1] Undertake specific education programmes about the principles of the Convention, directed to public officials, the legal profession and the judiciary.

Discussion

- ***Para. 34 & 35***: It was suggested that we add the word "reparations" when mentioning "remedies", and that we have specific mention of "affirmative action" and "temporary special measures" in these examples.

- ***Para. 46***: A participant suggested that when mentioning indicators, we add that these indicators should be disaggregated by other "intersectionality" categories such as sex and race, sex and ethnic group, etc. The language, "and other categories necessary to identify forms of discrimination including intersectional discrimination", was suggested and agreed upon. A participant said we can add a reference to para. 9 of the elements paper which defines "intersectionality". All agreed.

- ***Decision***: Add to section on indicators, “and other categories necessary to identify forms of discrimination including intersectional discrimination”.
- ***Decision***: Refer to definition of “intersectionality” in para. 9 of elements paper.

- ***Paras. 35 and 36***: It was suggested we say remedies for discrimination by either public or private actors. A further suggestion was to mention in the beginning that the acts refer to both private and public actors, unless otherwise specified. Agreed.
  - ***Decision***: In preamble, mention that we mean prohibition of discrimination by public and private actors, unless otherwise specified.

- ***Para. 36***: A participant proposed dropping the phrase “where possible” from this paragraph. It was suggested adding instead the phrase that the courts “should/shall apply that principle to interpret law, compatible with Convention obligations”. Agreed.
  - ***Decision***: Drop phrase “where possible” and replace with “should/shall apply that principle to interpret law, compatible with Convention obligations”.

WORKING GROUP D: ACCOUNTABILITY

Proposed Text

PART I:

47. The Committee believes that effective implementation of the convention requires a State Party to be accountable at the international and national level to its citizens.

48. In order for this accountability function to work smoothly appropriate mechanisms and institutions have to be put in place.

49. The Committee has found it necessary to emphasise that the treaty obligation falls on all three organs of the State and as such the responsibility to put in effect obligations under CEDAW lie equally with the executive, legislature and the judiciary.

50. The Committee has found it necessary to emphasise that decentralisation of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party’s Government to fulfil its obligations to all women within its jurisdiction, regardless of the State structure.

51. The Committee reiterates that in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. In any process of devolution, States parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention. The Governments of States parties must retain powers to require full compliance with the Convention by devolved administrations or local authorities and must establish permanent monitoring mechanisms to ensure that the Convention is respected and applied for all women and men within its jurisdiction without discrimination. Further, there must be safeguards to ensure that decentralisation or devolution does not lead to discrimination in the enjoyment of rights by all people in different regions.

PART II:

52. The Committee therefore recommends that State Parties put in place a national institution, a specialised statutory body, with powers and independence to have an oversight function with regard to compliance and implementation of the Convention.

53. Such a body should be adequately resourced; have operational independence; and be mandated to cover both complaints and inquiries; as well as an advisory function vis-à-vis government with regard to policy formulation and programme; commission independent reviews of progress in CEDAW implementation under different ministries and agencies; and have the authority to coordinate with other human rights bodies as well as national machinery on women's advancement.

54. Such an institution should be composed of members who have demonstrated knowledge and expertise in women's human rights at the national and international level. These members shall be appointed in a transparent manner.

55. The Committee considers the establishment of such bodies to fall within the commitments of a State Party upon ratification to ensure the implementation of the Convention and advance the practical realisation of women's rights.

56. Independent human rights institutions are complementary to national machineries for women. The role of such institutions is to independently monitor the State's compliance and progress towards implementation and to do all it can to respect, protect, and fulfil women's rights.

57. When designating or establishing such a mechanism, State Parties shall take into account the principles relating to the status and functioning or national institutions for protection and promotion of human rights.

58. Knowledge of the workings of this institution and how to engage with it must be made widely known using all available means.

PART III:

59. Implementation is an obligation for the State party, but needs to engage all sectors of society, including women themselves.

60. The State needs to work closely with NGOs in the widest sense, while respecting their autonomy; these include, for example, human rights NGOs, women's organisations, academic institutions and professional associations. NGOs played a crucial part in the drafting of the Convention and their involvement in the process of implementation is vital.

61. The Committee welcomes the development of NGO coalitions and alliances committed to promoting, protecting and monitoring women's human rights and urges Governments to give them non-directive support and to develop positive formal as well as informal relationships with them. The engagement of NGOs in the reporting process under the Convention, coming within the definition of "competent bodies" under article 45 (a), has in many cases given a real impetus to the process of implementation as well as reporting. The media can be valuable partners in this process.

62. The beneficiaries of the rights recognised by the Covenant are individuals. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals do not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own right

Discussion

- ***Para. 47***: Remove the word "citizens" and refer to previous conversations when we decided that we would add in the preamble that these rights extend to all rights bearers within the jurisdiction of the State party. It was also suggested that we rephrase that States parties are accountable at the "international and national level" to read "not only at the international level, but at the national level".
  - ***Decision***: Remove "citizens" and say that rights extend to all rights bearers within jurisdiction. Rewrite phrase to read, "not only at the international level but at the national level".

- ***Para. 54***: It will be difficult to find individuals with such requirements of expertise at the international and national levels. It was agreed that this will need rewording. Shireen also suggested we replace the word "expertise" with "experience". Agreed.
  - ***Decision***: Reword criteria, to not be so exclusionary. Replace "expertise" with "experience".

- ***Para. 61***: We should cross out reference to para. 45(a) in this section as it was a mistake caused by cut and paste from another general recommendation.
  - ***Decision***: Cross out reference to para. 45(a) in this section.

- ***Para. 62***: Someone questioned purpose of 62 and whether it was necessary, and it was explained that it was there to express that individuals are rights bearers. Someone thought it was not necessary and suggested taking it out. All agreed.
  - ***Decision***: Delete para. 62 entirely.

- ***Section III***: Add a statement which says that the State party also has an obligation to create an enabling environment for NGOs. Agreed.
  - ***Decision***: Add phrase stating obligation of States parties to create an enabling environment for NGOs.

WORKING GROUP E: NON-STATE ACTORS

Proposed Text

Deregulation

63. Noting with concern that the absence of mechanisms to ensure accountability of private entities leads to the feminisation of poverty, destitution and increased vulnerability to risks and violence,

64. The State is under an obligation to ensure that private actors comply with the Convention. Appropriate steps include regulating the activities of private actors in regard to employment policies, working conditions and the provision of State services *inter alia*.

Cultural Practices

65. The State has an obligation to take steps to modify discriminatory cultural practices. This obligation includes the requirement to take appropriate measures to proactively

initiate debate on cultural change within the relevant communities, specifically ensuring the participation of women and women's groups in such discussions.

Mass Violence

66. Noting with concern that existing penal codes do not address the commission of mass crimes of a sexual and gender based nature, in addition to adopting the principles of general recommendation 19, the State must institute effective measures to prevent, punish, eradicate and provide reparation for such crimes. States are therefore obliged to:

(a) Report to the Committee on the occurrence of mass crimes in all contexts,

(b) Enact appropriate legislations to address offences of mass crimes and to provide appropriate redress mechanisms,

(c) Enact a remedial system, including reparations, for victims of mass crimes,

(d) Develop appropriate procedural and evidentiary rules for the prosecution of and reparation for mass crimes, and

(e) Prosecute State officials for inaction or complicity in mass crimes.

Discussion

- ***Para. 64***: Someone suggested we replace "working conditions" with "working standards", but another participant thought that both should be left in, since they refer to different but related situations. Agreed.
  - ***Decision:*** Expand phrase to read, "working conditions and standards".

- ***Para. 65***: A participant raised the concern that this paragraph seemed to imply that discriminatory cultural practices existed only within communities and was therefore too limiting. Another participant saw the benefit of having it as a means to address a specific situation. It was suggested the following language be added instead, "State has an obligation to modify gender based stereotypes and existing laws, regulations, customs and practices which constitute discrimination against women". Agreed. Someone thought the language was too mild and should include language like "prohibiting" discrimination, so the language "modify or abolish" discrimination was suggested. Agreed. Another person also thought language was too limiting and should include religion as well as culture, to which one participant agreed, but there was no decision.
  - ***Decision***: Take out reference to "discriminatory cultural practices" and add instead phrase, "State has an obligation to modify gender based stereotypes and existing laws, regulations, customs and practices which constitute discrimination against women".
  - ***Decision***: Change phrase to read States parties' obligation to "modify or abolish" discrimination.

- ***Para. 66(c)***: It was suggested we add remedies "for victims and family members left behind". Another person said that family members are also victims, so perhaps there is no need for this language. She also stated that we should address victims as

groups. The following language was suggested: “individual and group victims and family members left behind”. All agreed.

- ***Decision***: Include phrase that remedies should be available to “individual and group victims and family members left behind”.

- ***General***: Andrew, in closing, thought we should mention “dissemination” more throughout. He also warned that we will need to harmonise language like “remedies and reparations” that we have also used throughout. He asked whether we should organise this elements paper according to paragraph in article 2, and there was wide consensus against this.
    - ***Decision***: The elements paper should not be organised according to paragraphs and sub-paragraphs of article 2 of the CEDAW Convention.

Session 14: Final Comments and Closing

As head of the working group on a general recommendation for article 2, Professor Cees Flinterman thanked everyone for their participation and contribution. He assured the group that these elements would play a very important role in the formulation of the final general comment, and joked that he only hoped the CEDAW Committee had as much time to devote to this discussion as we had over the past few days!

Dubravka Šimonović also thanked everyone present for the participation and input into the elements paper. She said she truly hoped that this general recommendation would be completed sometime soon. She encouraged the participants to continue to follow up with the Committee and pressure them to complete it.

Andrew Byrnes thanked IWRAW Asia Pacific for their collaboration on this meeting. He thanked his colleagues Renée and Maria for their support, and thanked the three CEDAW Committee members who were present in particular for making time in their very busy schedules to attend this meeting.

Anuradha Rao thanked Andrew and his team for their excellent preparatory work. She also thanked the programme officers of IWRAW Asia Pacific for their hard work, as well as the administrative team of IWRAW Asia Pacific for all their logistical support.

List of Annexes

Annex 1: List of Participants

Annex 2: Expert Group Meeting Agenda

Annex 3: Final Elements Paper

Annex 4: Background Discussion Paper Table of Contents

Annex 5: Supplementary Materials Table of Contents

Annex 6: Paper distributed by Dianne Otto

Annex 7: Paper distributed by Elizabeth Evatt

Annex 8: Slides presented by Harry L. Roque Jr.

Annex 9: Paper distributed by Nurjaanah @ Janet Chew

Annex 10: Slides presented by Jesus Agura Villardo III

Annex 11: Paper distributed by Christine Forster

Annex 1: List of Participants

Andrew Byrnes, *Associate Dean, University of New South Wales, Australia*

Renée Chartres*, Research Assistant, Australian Centre for Human Rights*

Janet Chew Li Hua @ Nurjaanah Abdullah, *Senior Lecturer, University of Malaya*

Jane Connors, *Senior Human Rights Officer, Office of the High Commissioner for Human Rights*

Shanthi Dairiam, *CEDAW Committee member, Malaysia*

Elizabeth Evatt, *Honorary Visiting Professor, University of New South Wales Law School; Commissioner, International Commission of Jurists*

Cees Flinterman, *Director, Netherlands Institute of Human Rights, Utrecht University and CEDAW Committee member*

Christine Forster, *Senior Lecturer, University of New South Wales, Australia*

Shireen Huq, *Activist, Naripokkho, Bangladesh*

Ivy Josiah, *Executive Director, Women's Aid Organisation, Malaysia*

Kanjapat Korsieporn, *Senior Researcher, Social Research Institute of Chulalongkorn University, Thailand*

Andonia (Andy) Piau Lynch, *Disability Promotion and Advocacy, Vanuatu*

Madhu Mehra, *Executive Director, Partners for Law and Development*

Miho Omi, *Japanese Association of International Women's Rights (JAIWR), Japan*

Dianne Otto, *Associate Professor of Law and Director of the International Human Rights Law Program, University of Melbourne Law School*

Celina Romany, *Inter-American University School of Law, Puerto Rico*

H. Harry L. Roque, Jr., *Director, International Institute of Legal Studies (IILS), University of the Philippines Law Center*

Dubravka Šimonović, *Chair, CEDAW Committee*

Deepika Udagama, *Head of Department of Law, University of Colombo, Sri Lanka*

Jesus Agura Villardo III, *Researcher, Treaty Incorporation Project*

Anuradha Rao, *Outgoing Executive Director, IWRAW Asia Pacific*

Tulika Srivastava, *Incoming Executive Director, IWRAW Asia Pacific*

Yew Bee Yee, *Deputy Executive Director, IWRAW Asia Pacific*

Lee Wei San, *Programme Officer, IWRAW Asia Pacific*

Janine Moussa, *Programme Officer, IWRAW Asia Pacific*

Selvi Palani, *Programme Officer, IWRAW Asia Pacific*

Jana Rumminger, *Programme Officer, IWRAW Asia Pacific*

Rachael Hopkins, *Intern, IWRAW Asia Pacific*

Annex 2: Expert Group Meeting Agenda

Expert Group Meeting on CEDAW Article 2
National and International Dimensions of State Obligation
14-16 February 2007
Kuala Lumpur, Malaysia

AGENDA

DAY 1: 14 FEBRUARY 2007

09:00-10:00 **Welcome and Introductions**

Welcome and introduction of experts and a brief overview of the programme and background paper.

TOPIC A: UNDERSTANDING CONCEPTS AND STANDARDS THAT RELATE TO STATE OBLIGATION IN INTERNATIONAL LAW

10:00-11:15 **Session 1: Locating the Discussion: "State Obligation" and the International and National Law of State Responsibility**
Speakers: Shanthi Dairiam and Andrew Byrnes
Chair: Anuradha Rao

In this session we will explore the concept of "State obligation" under the CEDAW Convention as developed by women's rights activists and scholars, a notion which includes formal notions of legal obligation but goes beyond these to include broader notions of accountability. We will examine the relationship of this concept to the traditional international law analyses of human rights obligations carried out from the perspective of the law of treaties (issues such as how we interpret what a particular treaty provision means, the relationship between a State's international obligations and its domestic law, what reservations to treaties are permissible) and the law of State responsibility (such as whether a State has an obligation of means or an obligation of ends, which bodies can engage the State's responsibility, the responsibility of the State in relation to private parties, the consequences of a State's failure to fulfil its obligations). In this session we will also examine how doctrines of State action and accountability under domestic constitutional law relate to the corresponding international conceptions.

11:30- 12:45 **Session 2: The CEDAW Committee's Approach to Clarifying and Defining the Principle of State Obligation**
Speakers: Cees Flinterman and Dubravka Šimonović
Chair: Shanthi Dairiam

At the beginning of this session, participants will have an opportunity to revisit the nature of State obligation (respect, protect, fulfil, promote) as it relates to the language of obligation in the CEDAW Convention. In addition, the intent and spirit of articles 2 and 3 will be referred to and concrete examples of relevant State action will be shared. CEDAW Committee members will have an opportunity to sketch the importance/relevance of interpretations of UN human rights treaties generally, and then move to the particular case of CEDAW and how CEDAW has approached this issue in the past and might in the future. This session will provide space for analysing and discussing CEDAW's concluding comments, general recommendations and jurisprudence under the OP-CEDAW. Participants will have an opportunity to begin to discuss the structure and content of the general recommendation. For example, is "new" language of State obligation necessary? Does it need to be combined with or explained in terms of the more traditional international law categories?

14:00-15:15 **Session 3: Affirming Progressive Elements of State Obligation Identified by Other Treaty Bodies**
Speakers: Elizabeth Evatt and Dianne Otto
Chair: Jane Connors

In this session, experts will undertake a comparative analysis of progressive elements of State Obligation as defined under other international treaties such as the ICCPR, and the ICESCR. The main objective of this session will be to canvass expanded/progressive interpretations of the principle of State Obligation that also relate to CEDAW article 2.

15:30-16:45 **Session 4: Evolving Understanding of Women's Human Rights and Emerging Human Rights Standards: Non-State Actors**
Speakers: Madhu Mehra and Deepika Udagama
Chaired by: Miho Omi

This session will start with a presentation on emerging human rights standards that relate to State Obligation and non-State actors. In this session, recent issues and concerns raised by women's human rights activist at the international level will be shared and discussed.

16:45-17:45 **Session 5: Discussion on Guidelines (Working Groups)**

At this stage, participants will have the opportunity to break into working groups to discuss various areas that should be included in a GR on State obligation. .

DAY 2: FEBRUARY 15, 2007

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS

09:00-10:30 **Session 6: General Issues of Applicability of the Convention**
Speakers: Harry Roque, Celina Romany and Cees Flinterman
Chair: Dianne Otto

This session will address the territorial scope of the Convention –including Federal/State issues- as well as the role of the executive, legislature and judiciary. General questions about reservations to article 2; legal and political accountability for reservations; application of the convention to situations of emergency as well as the relationship between IHL and CEDAW will be discussed.

10:45- 12:15 **Session 7: Findings and Lessons from the Treaty Incorporation Project**
Speakers: Janet Chew, Jesus Agura Villardo, Deepika Udagama and Renée Chartres
Chair: Andrew Byrnes

The researchers who took part in the Treaty Incorporation Project will present an overview of the most critical country-specific findings, focusing on the barriers to the reception of the Convention in their country and highlighting the ways the removal of these barriers could be addressed in the General Recommendation on article 2. The editor, Professor Andrew Byrnes, will also have an opportunity to present an overview of the common themes, lessons and strategies. At the end of the session, we will also have an opportunity to consider selected jurisprudence from countries and regions not included in the research study.

13:45- 15:00 **Session 8: Legal Obligations and Remedies**
Speakers: Christine Forster
Chair: Kanjapat Korsieporn

This session will explore the obligations of the State to amend its constitution or legislation to ensure that the Convention is fully implemented as a matter of law and legal regulation. The importance of amending procedural laws and establishing appropriate domestic remedies to address violations of women's human rights will also be discussed.

15:15-16:30 **Session 9: Obligations Relating to the Adoption, Enforcement and Implementation of Laws, Policies and Programmes**
Speakers: Shanthi Dairiam and Andy Lynch
Chair: Dubravka Šimonović

In this session we will discuss the "de facto" implementation of the CEDAW Convention. The session will explore the meaning and scope of "enforcement" and "implementation" of the Convention as defined by the public policy framework at the domestic level.

16:30-17:30 **Session 10: Discussions on Guidelines (Working Groups)**

DAY 3: FEBRUARY 16, 2007

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS, PART 2

09:30- 11:00 **Combined Sessions 11 and 12:**
(a) Judicial, Quasi-judicial and Related Use of the Convention
(b) Institutional Mechanisms and Processes for Implementing the Convention and Recommendations of the CEDAW Committee
Speakers: Jane Connors, Deepika Udagama, Tulika Srivastava, Ivy Josiah, Andy Lynch
Chair: Celina Romany

11:15-12:45 **Session 13: Discussion on Guidelines (Working Groups)**

Each group will have the opportunity to finalise its list of suggested issues for inclusion in the elements paper. They should prepare a brief statement of how the Working Group considers the CEDAW Committee might address the issue (ideally a sentence or two – no more than a brief paragraph on each issue – see, for example, the Montreal Principles).

14:00-1700 **Session 14: Plenary – Review of Draft Elements Document**
Chair: Shireen Huq

This session will review in plenary the whole of the draft elements document.

17:00-18:00 **Final Comments and Closing**

Annex 3: Final Elements Paper

Possible Elements for Inclusion in a General Recommendation on Article 2 of the CEDAW Convention

A. GENERAL

1. The *General recommendation* on Article 2:

(a) should underline the binding nature of the legal obligation accepted by States when they become parties to the Convention, and provide specific guidance to States parties as to the types of steps which they should take into order to give effect to their obligations under the Convention;

(b) should be formulated with the goal of making it a useful, focused, and practical juridical tool for government officials, activists, advocates, courts and tribunals, and other institutions; and

(c) should be firmly based in the practice of the CEDAW Committee (and other relevant practice under the Convention), take into account the progressive developments in the practice of other human rights bodies (including the other UN human rights treaty bodies and regional human rights bodies), and seek to develop the practice of the Convention in a dynamic way to reflect the fact that the convention is a living instrument.

B. SCOPE OF APPLICATION OF THE CONVENTION

2. A *General recommendation* on the nature and extent of State obligation under the Convention:

(a) should consider not only article 2 of the Convention, but also articles 3 and 24 in defining the scope and content of State parties' obligations, and the relevance of the Preamble to the Convention to the content of obligations under the Convention; and

(b) should refer to the differing formulations of obligation that appear in the various provisions of the Convention (for example, the obligations under article 15 that States "shall accord" legal equality and the obligations under various articles to take all "necessary" or "appropriate" measures).

3. The Convention should be seen not only as an international legal instrument but should also be understood as a setting out a framework for development. The Convention is one of a family of human rights instruments; many States are parties to more than one of the UN human rights treaties and their obligations under this Convention need to be understood in the light of other conventional and customary international law obligations.

Territorial and personal scope of the Convention

4. Under international law the jurisdiction of States is primarily territorial, but the State may exercise its jurisdiction outside its national territory in certain cases, and in some cases the State will be obliged to fulfil its obligations under the Convention in relation to territory outside because of the nature of its control over that territory or the persons affected. For example, the obligations of States parties under the Convention apply where a State party is in effective control of a territory outside its borders. Similarly, the obligations of States parties under article 2 (c) and (e) of the Convention also extend to acts of national corporations operating extraterritorially. The obligations of States parties may also extend to regulating the acts of its nationals when they are outside the territory of the State party (for example, in situations where nationals are perpetrators of trafficking). A *General recommendation* should also include consideration of the obligations of a State party in relation to its nationals abroad who may have been subject to violations of their rights (for example, in relation to migrant workers or women who have been subjected to forced marriages and wish to return to their home country), and should take into account in particular the practice of the Committee and States parties in relation to migrant workers.

5. The obligations of the State party under the Convention apply both to its citizens and to non-citizens in its territory or under its jurisdiction. Aliens should in general receive the benefit of the rights guaranteed by the Convention without discrimination, although there are a number of rights in the sphere of political life that may be limited in the case of non-citizens, provided that there is no discrimination between male and female non-citizens in these areas.

Private actors

6. The coverage of the Convention is not limited to the prohibition of discrimination against women directly by the State, but also imposes obligations on the State in relation to the acts of private actors. In some cases (in particular where a public function has been privatized and its performance contracted to a private actor), these acts may be viewed as the acts of the State under international law. In other cases, the obligations of the State party under article 2(e) and (f) make it clear that the State party must take all appropriate measures to eliminate discrimination against women by private actors. This obligation has been elaborated by the Committee under the concept of the obligation of due diligence in the context of violence against women it is not limited to that area. States parties are required to take appropriate preventive, investigative, punitive and remedial measures in relation to discriminatory acts or practices of private persons.

7. States parties are thus under an obligation to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures a State part is obliged to take include regulating the activities of private actors in regard to employment policies, working conditions and work standards, and other areas where private actors provide services or facilities.

8. A State party has an obligation to take steps to modify gender-based stereotypes and to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women discriminatory cultural practices which may exist in mainstream social relations or in specific communities. This obligation includes the requirement to take appropriate measures to initiate debate on cultural change generally and within relevant communities, specifically ensuring the participation of women and women's groups in these discussions.

The Convention and other bodies of international law

9. The obligations of States parties under the Convention do not cease in periods of armed conflict, or in states of emergency (in which derogations from the enjoyment of other rights be permitted under article 4 of the ICCPR). The Convention and other human rights treaties are complementary to and operate alongside other bodies of international law, including international humanitarian law, international criminal law and refugee law.

Development assistance

10. States parties must ensure that they and their development partners take gender impact into account in the design and delivery of overseas development assistance policies and programmes. Similarly, a State party should refrain from accepting development assistance that would manifestly have a negative impact on the enjoyment by women of their human rights. All development assistance a State party receives should be utilised in a manner that is non-discriminatory against women.

Participation of States parties in international organisations

11. A State party is under an obligation:

(a) to take into account the rights guaranteed under the Convention when it negotiates with international financial institutions in relation to loans and other forms of financing for national projects.

(b) to ensure that when entering into international agreements relating to trade liberalisation or other subjects, that these agreements do not have an adverse impact on protected rights protected under the Convention;

(c) to take steps in its capacity as a member of international organisations: including the various international financial institutions: to ensure that due account is taken of rights protected under the Convention in the activities of those institutions and must take all reasonable measures to assess, foresee and prevent any adverse consequences for the enjoyment of women of their human rights.

C. DEFINITIONS, SCOPE AND NATURE OF OBLIGATIONS

Definitions

13. The *General recommendation* on Article 2 should make it clear that the concept of equality and non-discrimination is a universal one. The guidance should state that:

(a) the Convention embodies the concept of substantive equality;

(b) substantive equality includes equality of opportunity, equality of access and equality of outcome/results; and

(c) guarantees of “equality before the law” (which require the equal and even-handed application of the law without regard to its substantive content), while necessary, are insufficient to fully meet the obligations imposed by Article 2.

14. The *General recommendation* should provide clear and specific guidance on the form that constitutional and legislative guarantees of equality and non-discrimination as specified in article 2 (a) should take. These guarantees should:

(a) contain a definition of discrimination which embodies the definition of discrimination in article 1 (which encompasses indirect as well as direct discrimination);

(b) extend both to the substantive content of laws and to their administration;

(c) extend to the actions of public authorities and institutions as stipulated in article 2(d);

(d) extend to the actions of any persons, enterprise, organisation including private and non-state actors as stipulated in article 2(e); and

(e) provide for effective sanctions, including appropriate remedies as provided for in article 2(b).

15. The *General recommendation* should also recall the views of the Committee – in particular as elaborated in its *General recommendation 25* -- that temporary special measures will be required to achieve substantive equality and eliminate discrimination in many instances

Intersectionality

16. The *General recommendation* should clarify that the Convention covers intersectional discrimination against women (where women experience discrimination on the basis of their sex combined with other grounds of discrimination, for example ethnicity, sexual orientation, HIV/AIDS etc).

17. The text of the Convention and the practice of the Committee show that the Convention covers intersectional discrimination. The Convention refers to intersections of different bases of discrimination in various places, for example:

(a) the Preamble, which states that “everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex”, emphasizes that “in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs” and notes that the ”eradication of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women”;

(b) article 1, which expressly includes marital status;

(c) article 2, which condemns discrimination in *all* its forms, refers to prohibiting *all* discrimination, and refers to *any* act of discrimination; and

(d) article 14, which requires States Parties to take into account the particular problems faced by *rural* women.

18. The Committee has previously recognised the need to consider intersections of discrimination in:

(a) *General recommendation 15*, which recommends that States Parties adopt measures to prevent specific discrimination against women in relation to HIV/AIDS;

(b) *General recommendation 18*, which states that women with disabilities suffer from a "double discrimination linked to their special living conditions"; and

(c) *General recommendation 21,* which states that the form and concept of the family can vary and recommends recognition of de facto relationships.

Rights covered by the Convention

19. The *General recommendation* should include a clear statement that the Convention guarantees women's equal enjoyment not only of the rights explicitly dealt with in the fields covered in articles 6-16 of the Convention, but also extends to the equal enjoyment of all internationally recognized human rights and fundamental freedoms. This is clear from the Preamble, the definition of discrimination in article 1, the terms of articles 2, 3 and 24, and the practice of the Committee (for example, *General recommendation 19*).[14] This broad coverage has been articulated most clearly by the Committee in relation to violence against women, but also applies more generally. The rights covered would include those rights recognised in the Universal Declaration of Human Rights, the International Covenants on Human Rights, other UN and regional human rights treaties, and other human rights instruments.

D. NATURE OF THE OBLIGATIONS UNDER THE CONVENTION

(a) Nature of obligations – Article 2 chapeau:

20. The chapeau of article 2 expresses the general legal obligation of States parties to implement the Convention. Its substantive requirements provide the framework for the implementation of the specific legal obligations identified in paragraphs 2 (a)–(f).

(b) "States Parties condemn discrimination against women in all its forms"

21. The first substantive commitment undertaken by States parties in the chapeau is to "condemn" discrimination against women in all its forms. The language of condemnation is the strongest wording used by the international community in this context (this language is based on the similar language in the Racial Discrimination Convention), expressing deep abhorrence of discrimination against women and acknowledging it is as intolerable as racial discrimination. It is an undertaking by each State Party to make it very clear -- immediately, and continuously -- to all levels and arms of government, to their domestic population and to the international community that they are totally opposed to discrimination against women in all its forms, and determined to bring about its elimination.

(c) "agree to pursue … [a policy of eliminating discrimination against women]"

[14] See also CERD *General recommendation XX on article 5 of the Convention* (1996), para 1 (noting that the list of rights in article 5 of the Racial Discrimination Convention is not exhaustive but extends to human rights and fundamental freedoms recognized in the UN Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights.

22. States parties also agree to "pursue … a policy of eliminating discrimination against women". The obligation to "pursue" such a policy is both immediate and continuing. The State party must immediately take concrete steps to formulate and implement a policy that is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men. The emphasis is on forward movement, from the initial adoption of a comprehensive range of measures to building on them continuously, in light of their effectiveness and new or emerging issues, towards the Convention's goals.

(d) "by all appropriate means"

23. States parties undertake to pursue the policy of eliminating discrimination against women "by all appropriate means". This gives the State party a great deal of flexibility in devising a policy that will be appropriate to its particular legal, administrative and political framework, and which can respond to its particular history of obstacles and resistances to the elimination of discrimination against women. However, each State Party must be able to justify the appropriateness of the particular means it has chosen and ultimately it is for the Committee to determine whether all appropriate means have been adopted.

24. The types of means that might be considered appropriate are not limited to constitutional or legislative measures, although the Convention emphasizes the importance of such means and gives them some priority. In addition, the Committee expects States parties to have adopted measures that ensure the practical realization of the elimination of discrimination against women and women's equality with men. These will include measures which ensure women are able to make complaints about violations of the Convention and have access to effective remedies, which enable women to be actively involved in the formulation and implementation of measures, which ensure governmental accountability domestically, which promote education and support for the goals of the Convention throughout the education system and in the community, which encourage the work of women's rights NGOs, establish the necessary national human rights institutions and/or other machineries and that provide adequate administrative and financial support to make the measures adopted make a real difference in women's lives in practice.

25. In order to satisfy the requirement of "appropriateness", the means adopted by a State Party must also address all aspects of its legal obligations under the Convention to respect, protect, promote and fulfil women's right to non-discrimination and to the enjoyment of equality with men. Thus "appropriate means" will include measures which ensure that the State party:

(a) abstains from performing, sponsoring or tolerating any practice, policy or measure that violates the Convention (*respect*);
(b) takes steps to prevent, prohibit address violations of the Convention by third parties, including in the home and in the community (protect);
(c) fosters wide knowledge about and support for its Convention obligations (*promote*); and
(d) adopts positive measures that achieve sex non-discrimination and gender equality in practice (*fulfil*).[15]

(e) "and without delay"

[15] See CEDAW General Recommendation 25, para 4.

26. The words “without delay” make it clear that the State party’s obligation to pursue its policy, by all appropriate means, is immediate. This language is unqualified, and does not allow for any delay in the implementation of the legal obligations that State Parties assume on ratification of the Convention. It follows that delay cannot be justified on any grounds, including by reference to political, social, religious, cultural, economic, resource or other considerations within the State. Where a State party is facing resource constraints or needs technical or other expertise to facilitate its implementation of its obligations, it may be incumbent on it to seek international cooperation in order to overcome these difficulties.

(f) “a policy of eliminating discrimination against women”

27. The requirement to adopt a policy is an essential and critical component of a State party’s general legal obligation. Such a policy must comprise a resolute, detailed and comprehensive action plan that provides a framework for designing, coordinating and integrating the more specific undertakings that follow the chapeau in paragraphs 2 (a)-(f). The policy must ensure that the State party’s obligations under the Convention are given effect to. To this end, all elements of the policy must be scrupulously directed towards achieving the Convention’s goals of eliminating discrimination against women and ensuring that women enjoy equality with men in all spheres of life.

28. The policy should incorporate *clear definitions* of discrimination against women and gender equality, that are consistent with the spirit and substance of the Convention, including the definition in article 1, as outlined above.

29. The policy should be *comprehensive* in that it should apply to all fields of life, including the political, economic, social, cultural and civil fields. It should apply to both public and private spheres of life, including the domestic sphere. It should also ensure that all arms of the State (executive, legislative and judicial) and all levels of government assume their respective responsibilities for implementation. It should incorporate the entire range of measures that are appropriate in the particular circumstances of the State Party.

30. The policy should identify women within the jurisdiction of the State party (including non-citizens) *as the rights-bearers*, with particular emphasis on those groups of women who are most marginalised. It should ensure that women, as individuals and groups, have access to information about their rights under the Convention and are able to effectively promote and claim those rights. The State party should also ensure that women are able to participate actively in the development and implementation of the policy. To this end, resources must be devoted to ensuring that women’s NGOs are well-informed, adequately consulted and generally able to play an active role in the initial and subsequent development of the policy. Women must also be empowered to present their views, in the form of shadow reports, to the Committee when it considers the State party’s periodic report, and be actively involved in the domestic dissemination of the Committee’s Concluding comments.

31. The policy should be *action-oriented* in that it should establish benchmarks and time-lines, and ensure that all relevant actors are adequately resourced and otherwise enabled to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to budgetary processes in order to ensure that all aspects of the policy are adequately funded. The policy should provide for mechanisms, that collect relevant sex-disaggregated data, that enable progress and effectiveness of measures to be monitored, that facilitate continuing evaluation, and allow for revision, supplementation and the identification of any new measures that may be appropriate.

32. The policy should ensure that there are strong and focused bodies within the executive government (national women's machineries) to coordinate and oversee the development of legislation, policies and programmes necessary to implement the Convention. These institutions should be empowered to provide advice and analysis directly to the highest levels of government, such as the Cabinet and Attorney-General. The policy should also ensure that there are independent monitoring institutions such as national human rights commissions or independent women's commissions established, or that existing national institutions have conferred on them a mandate with respect to the rights guaranteed in the Convention.

33. The policy must *engage the private sector*, including business enterprises, organisations, community groups and individuals, and enlist their partnership in adopting measures that will fulfil the goals of the Convention in the private sphere. The policy should also provide a focal point for government regulation of private actors, to ensure that they act consistently with its obligations under the Convention, in the marketplace and elsewhere in the private sphere.

34. The policy should be *result-driven* in that it should be targeted as clearly as possible towards the goal of eliminating all forms of discrimination against women and providing for women's equal enjoyment of all human rights and fundamental freedoms.

E. LEGAL INCORPORATION OF THE CONVENTION

Legal protection

35. States parties should ensure that through constitutional amendments or by other legislative means the principle of equality of men and women and of non-discrimination is incorporated into domestic law with overriding and enforceable status. They should also enact legislation which prohibits discrimination contrary to the Convention.[16]

36. States parties should undertake a continuing review of all existing and planned legislation, laws, regulations, public policies and programmes with the view to removing, repealing, revoking, or abolishing all the discriminatory elements and of ensuring harmonization with international human rights obligations. States parties should involve all branches of governments in this process, the executive, the judiciary (to draw attention to discriminatory laws) and the legislature (for example, a Parliamentary Committee could be established to continue the review process).[17]

37. States parties should ensure that the courts are bound to apply the principle of equality as embodied in the Convention and to interpret law, to the maximum extent possible, compatibly with Convention obligations. However, where it is not possible to do so, courts should draw the inconsistency between national law and the State party's international obligation to the attention of the appropriate authorities since the supremacy

[16] See Human Rights Committee (HRC), *General comment 31*, paras 13, 15; Committee on Economic, Social and Cultural Rights (CESCR), *General comment 3*, para 3, and *General comment 9*, paras 2 and 4.
[17] See HRC, *General comment 4*, para 4; CESCR, *General comment 16*, paras 16 and 24; CERD, *General recommendation 31*; Committee on the Rights of the Child (CRC), *General comment 5*, para 15.

of domestic law under the national legal system does not justify a failure to carry out an international obligation.[18]

38. States parties should ensure that women can invoke the principle of equality in the courts in support of complaints of discrimination contrary to the Convention by public officials or by private actors, and that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, determined in a fair hearing by a competent and independent court or tribunal with access to a mediation process.[19] Where discrimination constitutes a serious abuse of human rights (for example, in cases of violence), penal sanctions should be applied and there should be no impunity.[20]

39. States parties should ensure that legislation prohibiting discrimination and promoting equality legislation provides for appropriate remedies for women who are subjected to discrimination contrary to the Convention, including reparation, compensation, restitution, rehabilitation, and reinstatement.[21] The power to order temporary special measures or other systemic remedies should be included.[22]

40. States parties should support women's legal resource centres in their work to educate women about equality rights and to assist them in pursuing remedies for discrimination.

Mass violence

41. Many existing penal codes do not address the commission of mass crimes of a sexual and gender-based nature and the particular difficulties of evidence and procedure to which efforts to identify and bring to justice perpetrators are subject. In addition to adopting the principles of *General recommendation 19*, States parties should institute effective measures to prevent, punish, eradicate and provide reparation for such crimes. States are therefore obliged to:

(a) report to the Committee on the occurrence of mass crimes in all contexts;

(b) enact appropriate legislation to address offences of mass crimes and to provide appropriate redress mechanisms;

(c) enact a remedial system, including the provision of reparation, for individual and group victims of mass crimes and their family members left behind;

(d) develop appropriate procedural and evidentiary rules for the prosecution of and reparation for mass crimes; and

(e) prosecute state officials for inaction or complicity in mass crimes.

F. OTHER MEASURES OF IMPLEMENTATION

---

[18] See *The Bangalore Principles on The Domestic Application of International Human Rights Norms*, adopted by a Judicial Colloquium held in Bangalore, India from 24-26 February 1988, para 8.

[19] HRC, *General comment 31*, para 15.

[20] HRC, *General comment* 28, para 11, 12 and 5

[21] HRC, *General comment 31*, paras 15-17; CESCR, *General comment 9*, para 2; *General comment 4*, paras 4, 5, 16 and 33; CERD, *General recommendation* 26, para 2; *General recommendation 25*, para 2; CRC 4 para 25.

[22] HRC, *General comment 31*, para 18; CESCR, *General comment 3,* para 5

42. States parties should also adopt other appropriate measures of implementation such as:

(a) promoting equality of women through the formulation of and implementation of National Plans of Action and other relevant policies and programmes, and allocating to them adequate human and financial resources;

(b) establishing codes of conduct for public officials to ensure respect for the principles of equality and non-discrimination;

(c) ensuring reports of court decisions applying the equality principle are widely distributed;

(d) undertaking specific education programmes about the principles of the Convention and women's human rights directed to all government agencies, to public officials, and in particular to the education and training of the legal profession and the judiciary;[23]

(e) enlisting all media in public education programs about the equality of men and women and to ensure in particular that women are aware of their right to equality without discrimination and of the measures taken by the government to implement the Convention including reports of the Committee;[24] and

(f) establishing valid indicators of the status and progress of women for inclusion in data disaggregated by sex and relevant to the specific provisions of the Convention (including the other categories necessary to identify forms of intersectional discrimination).[25]

G. ACCOUNTABILITY ISSUES

The State

43. Effective implementation of the Convention requires a State party to be accountable not only at the international level, but also at the national level to its citizens and other members of its community. In order for this accountability function to work effectively, appropriate mechanisms and institutions have to be put in place.

44. The obligations under the Convention fall on all three branches of government; accordingly, the responsibility to give effect to a State party's obligations under the Convention lies equally with the executive, legislature and the judiciary.

45. The decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party to fulfil its obligations to all women within its jurisdiction, regardless of the State structure.In all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. In any process of devolution, States parties must ensure that the devolved authorities have the necessary financial, human and other resources effectively to

[23] HRC, *General comment 3*, paras 1 and 2; CESCR, *General comment 16*, para 21; CERD *General recommendation 13*

[24] HRC, *General comment 3*, para 1; CESCR, *General comment 16*, para 21; CRC, *General comment 5*,para 67; CEDAW, *General recommendation 3*

[25] CESCR, *General comment 16*, para 39; CESCR, *General comment 31*, para 1

discharge responsibilities for the implementation of the Convention. The governments of States parties must retain powers to require full compliance with the Convention by devolved administrations or local authorities and must establish permanent monitoring mechanisms to ensure that the Convention is respected and applied for all women and men within its jurisdiction without discrimination. Further, there must be safeguards to ensure that decentralization or devolution does not lead to discrimination in the enjoyment of rights by all people in different regions.

Institutions

46. If they have not already established such a body, States parties should set up national institution (and or equivalent provincial or state-level institutions in the case of a federal system), which will be an independent specialised statutory body with powers to oversee compliance with and implementation of the Convention. Where such a body already exists, the Convention and the rights it guarantees should fall within the mandate of the institution. When designating or establishing such a mechanism, State Parties should comply with the *Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights.*[26] Independent human rights institutions are complementary to national machineries for women.

47. The establishment of such institutions flows from the commitments undertaken by the State party upon ratification to ensure the implementation of the Convention and advance the practical realization of women's rights. The role of such institutions is to independently monitor the state's compliance and progress towards implementation and to do all it can to respect, protect, and fulfil women's rights.

48. These institutions should be empowered and have adequate resources to oversee the implementation of the Convention, investigate complaints of discrimination, provide mediation or pursue remedies behalf of women, to promote equality, undertake education programmes and to coordinate with other agencies responsible for women's affairs.[27]

49. These institutions should be composed of members who have demonstrated knowledge and expertise in women's human rights. These members shall be appointed in a transparent manner. Where these functions with respect ot the Convention are conferred on a national institutions with a broader mandate, it s important that a significant proportion of members should be women and have expertise in women's human rights and the fields covered by the Convention. Knowledge of the workings of this institution and how to engage with it must be made widely known using all available means.

The community

50. The obligation to implement the Convention lies primarily on States parties, but States parties need to engage all sectors of society, including women themselves. The State needs to work closely with NGOs in the widest sense, while respecting their autonomy; these include, for example, human rights NGOs, women's organizations, academic institutions and professional associations. NGOs played a crucial part in the drafting of the Convention and their involvement in the process of implementation is vital.

[26] Adopted by General Assembly resolution 48/134 of 20 December 1993

[27] CEDAW, *General recommendation 6*; CESCR, *General comment 10*, para 23, *General comment 16*, paras 21 and 38; CERD, *General recommendation 31*, para 5 (j); CRC, *General comment 2*, para 1, *General comment 4*, para 27, and *General comment* 5, para 65

The development of NGO coalitions and alliances committed to promoting, protecting and monitoring women's human rights is important to the implementation of the Convention. Government should provide them with non-directive support and should develop positive formal as well as informal relationships with them. The engagement of NGOs in the reporting process under the Convention is also important to to the process of implementation as well as to the process of reporting. The media can also be valuable partners in this process.

H. RESERVATIONS

51. Article 2 is the "very essence of obligations under the Convention" and reservation to Article 2 will "impede full implementation of the Convention".[28] Therefore, as the Committee has previously stated, a reservation to Article 2 is in principle incompatible with the object and purpose of the Convention – a view with which a number of States parties have expressed their clear agreement by stating that in their view certain reservations to article 2 are incompatible with the objection and purpose of the Convention. States parties which have entered reservations to article 2 should be pressed to explain their detailed effect and to keep them under review with the goal of withdrawing them as soon as possible.

52. The fact that a State party has entered a reservation to the Convention does not obviate the need for that State party to comply with its other obligations under international law, including its obligations under other treaties and under customary international law relating to the elimination of discrimination against women. Where there is a discrepancy between reservations under the Convention and similar obligations under other conventions, the State party should review its reservations under to the Convention with a view to removing them.

[28] CEDAW, *Concluding Comments (Singapore)*, 25th session, July 2001

Annex 4: Background Discussion Paper Table of Contents

State Obligation and the Convention on the Elimination of All Forms of Discrimination against Women

Background discussion paper
Prepared by
Andrew Byrnes and Maria Herminia Graterol
(with the collaboration of Renée Chartres)
February 2007

TABLE OF CONTENTS

A.	Introduction	3
B.	The CEDAW Convention as an international treaty within the broader international law context	6
C.	The practice of other UN Human Rights treaty bodies on the question of State obligation	7
D.	The CEDAW Convention as an international treaty – fundamentals of international law of treaties and relationship with domestic law	10
E.	Nature of obligations under human rights conventions	20
F.	State obligations under human rights treaties in relation to the acts of non-State actors	29
G.	State obligations under the CEDAW Convention	33
H.	General obligations under the CEDAW Convention	35
I.	The content of the general obligations in the light of CEDAW's practice and the practice of other human rights treaty bodies	38
J.	Obligations related to procedures contained in the Convention	58
K.	Annexes to Background discussion paper	

Annex 5: Supplementary Materials Table of Contents

Expert Group Meeting on CEDAW Article 2: National and International Dimensions of State Obligation

SUPPLEMENTARY MATERIALS TABLE OF CONTENTS

TOPIC A: UNDERSTANDING CONCEPTS AND STANDARDS THAT RELATE TO STATE OBLIGATION IN INTERNATIONAL LAW

Session 1: Locating the Discussion: "State Obligation" and the International and National Law of State Responsibility

1. International Law Commission, Draft Articles on Responsibilities of States for Internationally Wrongful Acts.

2. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986. Available at: <http://www.unimass.nl/bestand.asp>.

3. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 1997. Available at: <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_htm>.

4. Montreal Principles on Women's Economic, Social and Cultural Rights. Available at: <http://muse.jhu.edu/journals/human_rights_quarterly/v026/26.3intro.pdf>.

5. The Siracusa Principles on the Limitation and Derogation of Provisions of the International Covenant on Civil and Political Rights. U.N. Doc.E/CN.4/1985/4, Annex (1985).

Session 2: The CEDAW Committee's Approach to Clarifying and Defining the Principle of State Obligation

1. Background paper presented by International Women's Rights Action Watch Asia Pacific on the day of General Discussion on the Proposed General Recommendation on Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, July 2004. Available at: <http://www.iwraw-ap.org/news/archives.

2. Madhu Mehra, "A Case for Inclusion and Elaboration of State Obligations in the Context of Internal Conflict and Sectarian Violence"; paper presented on the day of General Discussion on the Proposed General Recommendation on Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, July 2004. Available at: <http://www.iwraw-ap.org/news/archives.htm>.

3. Deepika Udagama, "State Obligations During Periods of Armed Conflict"; paper presented on the day of General Discussion on the Proposed General Recommendation on Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, July 2004. Available at: <http://www.iwraw-ap.org/news/archives.htm>.

4. IWRAW Asia Pacific Occasional Papers Series No.6 "The Right to Decide If, When and Whom to Marry: Obligations of the State under CEDAW and other international human rights instruments". [Included in Main Folder]

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

6. Report of the Secretary-General, "In-depth study on all forms of violence against women". UN

Document A/61/122/Add1, 6 July 2006, pp. 70-81.

Session 3: Affirming Progressive Elements of State Obligation Identified by Other Treaty Bodies

1. General Comment No. 31 of ICCPR, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/5/2004. Available at: <http://www.unhchr.ch/tbas/doc>.

2. General Comment No. 3 of ICESCR, Nature of States Parties Obligations, 14/12/1990. Available at: <http://www.unhchr.ch/tbas/doc>.

3. Magadalena Sepulveda, "Chapter 7: Analysis of Article 2(1) of the ICESCR", in the Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights", Intersentia (2002).

Session 4: Evolving Understanding of Women's Human Rights and Emerging Human Rights Standards: Non-State Actors

1. Celina Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law". In *Human Rights of Women: National and International Perspectives*, Rebecca J. Cook (ed.), Philadelphia: University of Pennsylvania (1994).

2. Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights". 5 *Melbourne Journal of International Law* 1-36 (2004).

3. Adam McBeth, "Privatising Human Rights: What happens to the State's Human Rights Duties When Services Are Privatised?" In *Melbourne Journal of International Law*, Volume 5 (2004), 133-154.

4. Andrew Clapham, "Chapter 1: Old Objections and New Approaches", in *Human Rights Obligation of Non-State Actors*, Academy of European Law, European University Institute, Oxford University Press (2006).

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS

Session 6: General Issues of Applicability of the Convention

1. Katherine Young, "The Implementation of International Law in the Domestic Laws of Germany and Australia: Federal and Parliamentary Comparisons", 21 *Adel LR* 177-208 (1999).

2. IWRAW Asia Pacific Occasional Papers Series No.5, "The Validity of Reservations and Declarations to CEDAW: The Indian Experience". [Included in Main Folder]

3. Jessica Neuwirth, "Inequality before the Law: Holding States Accountable for Sex Discriminatory Laws under the Convention on the Elimination of All Forms of Discrimination against Women and through the Beijing Platform for Action", 18 *Harvard Human Rights Journal* 19-54 (2005).

Session 7: Findings and Lessons from the Treaty Incorporation Project

Session 8: Legal obligations and Remedies

1. Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *The American Journal of International Law*, Vol. 96:833 (2002), 833-856.

2. Resolution adopted by the General Assembly: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". UN Document A/RES/60/147, 21 March

2006.

Session 9: Obligations Relating to the Enforcement and Implementation of Law, and the Adoption and Implementation of Policy and Programmes

1. Ward Ferdinandusse, “Out of the Black-Box? The International Obligation of State Organs”, 29 *Brooklyn J. International Law* 45 (2003).

2. International Council on Human Rights Policy, “Human Rights Standards: Learning from Experience” (2006).

3. International Council on Human Rights Policy, “Enhancing Access to Human Rights”. Available at: <http://www.ichrp.org/paper_files/123_p_01.pdf>.

TOPIC B: THE FULFILMENT OF STATE OBLIGATION UNDER CEDAW: NATIONAL DIMENSIONS. PART 2.

Session 11: Judicial, Quasi-judicial and Related Use of the Convention

1. The Bangalore Principles: Concluding Statement of the Judicial Colloquium held in Bangalore, India from 24-26 February 1988. Available at: <http://www.chr.up.ac.za/hr_docs/african/docs/other/cwn1.doc>.

2. The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women (1994). Available at: <http://www.thecommonwealth.org/document/34293/35468/36768/the_victoria_falls_declaration_of_principles_for_t.htm>.

3. The Hong Kong Conclusions (1996).

4. Hon. Justice Michael Kirby, “The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms”.

5. Yuval Shany, “How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts”, 31 *Brooklyn J. International Law* 341 (2006).

6. Andrew Byrnes, “Using Gender-Specific Human Rights Instruments in Domestic Litigation: The Convention on the Elimination of All Forms of Discrimination Against Women”. In *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level*, Kirstine Adams and Andrew Byrnes (eds.), Commonwealth Secretariat (1999).

Session 12: Institutional Mechanisms and Processes for Implementing the Convention and Recommendations of the CEDAW Committee

1. Principles Relating to the Status of National Institutions (The Paris Principles).

2. The Eighth Annual Meeting of the Asia Pacific Forum of National Human rights Institutions, Concluding Statement, 2004.

3. IWRAW Asia Pacific Occasional Papers Series No.8, “Addressing Intersectional Discrimination with Temporary Special Measures”. [Included in Main Folder]

Annex 6: Paper Distributed by Dianne Otto

Affirming Progressive Elements of State Obligation recognised by other Treaty Bodies

The work of other treaty committees in interpreting and clarifying the general obligations of States parties may be useful to consider and, where appropriate, build on in the interpretation of the general legal obligation undertaken by States parties pursuant to CEDAW article 2.

First, I focus on the chapeau of article 2 which expresses the general legal obligation broadly and uses some language that is common, or similar, to that used in other treaties. Second, I identify, 10 principles relating to State Parties' obligations to implement sex non-discrimination and gender equality under the two Covenants, which relate to the more specific obligations, outlined in paragraphs (a) – (f)

(a) Article 2: Chapeau

CEDAW art 2	ICESCR art 2(1)[29]	ICCPR art 2 (2)[30]
'State Parties'	**'Each State Party to the present Covenant'** **HRC**	**'Each State party to the present Covenant'** 'every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the "rules concerning the basic rights of the human person" are *erga omnes* obligations' (GC31 para 2) 'States parties are required to give effect to the obligations under the Covenant in good faith (GC31 para 3) 'All branches of government (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local) are in a position to engage the responsibility of the State party. '(GC31, para 4). Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its general comment No 24 that reservations to article 2 would be incompatible with the Covenant when considered in the light of its objects and purposes. (HRC 31, para 5)
condemn		

[29] ICESCR, art 2 (1), 'Each State Party to the present Covenant undertakes to take steps, individuals and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[30] ICCPR, art 2 (2) 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'

discrimination against women in all its forms,		
agree to pursue	**undertakes ' to take steps'** 'Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant' (CG3, para 2)	**'undertakes to take the necessary steps'** The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States parties. (GC31, para 5) unless the Covenant's rights are already protected by their domestic laws or practices, States parties are required on ratification to make such changes to domestic laws and practices are necessary to ensure their conformity with the Covenant. (GC 31, para 13) 'The requirement…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.' (GC31, para 14)
by all appropriate means	**'by all appropriate means,'** '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 … the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.' (GC 3 para 4). Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies… (GC3 para 5) Other measures which may also be considered "appropriate"… include, but are not limited to, administrative, financial, educational and social measures (GC 3 para 7) "the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State… to be taken into account. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant… Convenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or groups, and appropriate means of ensuring governmental accountability must be put in place. (GC 9 para 1-2) '…one such means, through which important steps can be taken, is the	**'to adopt such laws or other measures as may be necessary'** 'The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.' (GC 31 para 6) Article 2 requires that States parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligation. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large. (GC 31, para 7)

	work of national institutions for the promotion and protection of human rights' (GC 10, para 1	
and without delay		See above **'take the necessary steps'**
a policy		
of eliminating discrimination against women	**'with a view to achieving progressively the full realization of the rights recognized in the present Covenant'** The principal obligation of result… the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content… It thus imposed an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. (GC 3 para 9) The central obligation in relation to the Covenant is for States parties to five effects to the rights recognized therein. (GC 9 para 1)	**'to give effect to the rights recognized in the present Covenant'** States parties are required… to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction… to anyone within the power or effective control of the State party, even if not situated within the territory of the State party… the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace enforcement operation. (GC31, para 10) "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules or international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.' (GC 3, para 11)

(b) Paragraphs (a) – (g): Specific obligations

The first 6 principles related to paras (a), (b), (c) and (d); the 7th and 8th principles to (e) and (f) respectively; and the last two principles are more broadly based, perhaps relying on articles 3 and 24 for their foundation.

1. Sex non-discrimination and equality between women and men are substantive (de facto) obligations, not merely formal (de jure) obligations.

2. Special temporary measures and differential treatment may be necessary may be necessary to achieve the obligation of non-discrimination.

3. Sex non-discrimination and equal enjoyment of Covenant rights are immediate obligations

4. The concepts of progressive implementation, where it applies to economic, social and cultural rights, still requires that available resources be distributed equally between women and men

5. Sex non-discrimination is not derogable in times of public emergency

6. Indicators and benchmarks must be identified for monitoring purposes.

7. Obligations extend into the private/domestic sphere (articles 2(e) and (f))

8. State obligation includes measures to eliminate prejudices and practices based on gender hierarchies or stereotypes (article 2(f))

9. Sex discrimination can intersect with other forms of discrimination creating sometimes unique forms of discrimination against women, which must also be addressed

10. Violence against women is a form of sex discrimination.

Annex 7: Paper Distributed by Elizabeth Evatt

Summary of issues on State obligations

Because my object is to bring in the work of other treaty bodies so far as relevant to the current issues, I have approached article 2 from the point of view of the main issues to which the text gives rise, rather than examining each of the paragraphs.

Relation of article 2 to other provisions

Reservations

States may not invoke domestic law to justify non-implementation

Obligations to be performed in good faith

The obligation to respect and ensure rights

Immediacy of obligations

Extent of State responsibility, non-State actors

Legal measures of implementation, incorporation issues

All other appropriate (non-legislative) measures of implementation, paras (a) (b) (e) (f) [also (c) and (d)]

Remedies and reparation

Some related issues

Compliance by other State parties

Obligations in regard to enjoyment of rights beyond territory

Obligations in dealing with international organizations and negotiations

Relation of article 2 to other provisions
The general obligations to which article 2 gives rise, provide an "overarching framework' within which the other provisions are to be implemented. They overlap and are matched in their aims with the provisions of articles 3, 4, 5 and 24

Reservations
Following the opinion of the HRC it can be argued that any reservation to article 2 is incompatible with the object and purpose of the Convention.

The undertakings set out in article 2 are the chief means of achieving the elimination of discrimination and they apply both generally and, as appropriate, to the implementation of the specific provisions of the Convention. It is important to emphasise in the Draft GR that the obligations and undertaking of State parties set out in article 2 should not be subject to any reservation, and that any reservations which have been made should be withdrawn.

States may not invoke domestic law to justify non-implementation
It is clearly established in the work of the HRC and CESCR that a State cannot rely on its domestic laws or constitution as an excuse for non-implementation of its obligations under human rights treaties. The treaty bodies consider that the provisions of the instruments ratified by States parties must be fully implemented, regardless of their legal, political or economic system. [The validity of reservations based on constitutional or domestic law is not finally established, but doubtful]

As Austria observed, in entering its objection to Pakistan's reservations: "It is in the common interests of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties"

The Draft GR should contain a reference to the Vienna Convention, article 27, and to the provision that the constitution and other domestic law of a State party cannot be invoked to justify any failure to take steps to realise the obligations under the Convention. The Comments of the HRC (GC No 31, paras 4 and 14) and CESCR (GC No 3, para 8 and GC no 9, para 3) provide models for such statements.

Obligations to be performed in good faith
The Vienna Convention on the Law of Treaties, article 26 providing for good faith in performing treaty obligations should be mentioned in the Draft GR. This principle is relevant to the full implementation of all provisions of article 2.

Obligation to respect and ensure rights
CEDAW does not expressly call on States to respect and ensure rights, as under article 2(1) of the ICCPR, but the same principles apply to the fulfilment of State obligations.

Article 2 requires the State party to *respect* equality rights by itself refraining from discrimination of any kind against women (para 2(a) and (d)).

Article 2 also imposes obligations on State parties to *ensure* equality and non-discrimination by prohibiting discrimination, protecting women against discrimination and adopting effective measures to that end.

The measures adopted by the State should aim to bring about the elimination of all discrimination against women by any person or organization and to realise fully the principle of equality.

This positive obligation is fulfilled by enacting laws, providing remedies and by a range of other means, discussed below.

As the HRC said: Article 2 [also] requires that States Parties adopt legislative judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. They should also raise the level of awareness among public officials and State agents and among the general population as part of this (para 7)

The Draft GR should emphasise the dual nature of the obligations as explained by the HRC (GC 31, paras 6 & 7)

[Preference is expressed here for the dual approach of respect and ensure, rather than the tripartite approach of BP p23, though there is little difference in result, preventive measures are part of ensuring rights.]

Obligations are immediate
Under human rights instruments, the obligation to bring law into line with the rights protected is unqualified and of immediate effect. This view is supported fully by the General Comments of the HRC and CESCR, who make particular reference to overcoming discrimination.

To achieve the desired end of eliminating discrimination ("to that end") States parties to CEDAW undertake the specific actions, set out in sub-paras (a) to (f) of article 2. Several paragraphs of CEDAW article 2 calls for legislation or legal measures. There is no basis for delaying their implementation.

Because of the nature of the issues arising in overcoming discrimination, the enactment of laws, including the provision of legal remedies, will not of itself achieve all the objectives of CEDAW. States also undertake a range of other appropriate measures, including such action as education and affirmative action. The effects of these other measures may be achieved only over time.

However, even if outcomes will occur later, there is no basis for delaying in any way to implementation of the undertakings. They are not qualified in any way. The obligation to take the steps necessary to achieve equality and to overcome discrimination, in accordance with article 2 and other provisions of the Convention is immediate and binding.

The Draft GR should stress that virtually all the provisions of article 2 (and other provisions of CEDAW) require immediate action, legislative or otherwise towards the goal of equality.

Extent of State responsibility and non-State actors
Both the HRC and CESCR take the view that, at least in the area of discrimination, State parties have n obligation to take action in respect of private acts which undermine the right to equality.

CEDAW is quite explicit in making it a responsibility of State parties to eliminate discrimination against women by any person, organization or enterprise. Any Draft GR needs to emphasise that the effective implementation of CEDAW requires effective

measures to be taken to overcome discrimination in the private sphere, including laws and policies. The specific provisions of article 2 (and other articles) which support measures aimed at private discrimination should be elaborated in the GR.

Extension to the private sphere is a distinctive feature of CEDAW, and probably contributes to the large number of States which have made substantive reservations to the basic articles which seek to eliminate discrimination in the "private sphere of work, home and family". Nevertheless, the application to ALL discrimination is significant and essential to the objectives of the Convention.

Legal measures of implementation, incorporation issues
Article 2 of CEDAW gives priority to constitutional incorporation of the equality principle. [The South African and Canadian models are examples] The Draft GR should emphasise this point.

Short of constitutional incorporation, CEDAE article 2 (a) calls for the principle of equality to be incorporated into domestic law.

Other treaty bodies support incorporation of their instrument or its main principles into domestic law. CESCR encourages this as desirable. The HRC asks States to consider incorporation, and its views give further weight to the need for incorporation of the equality principle into domestic law in order to ensure its full realisation.

The Draft GR should emphasise that legislation incorporating the principle of equality should be given a status in domestic law sufficient to override laws inconsistent with the principle of equality.

The detailed provisions of article 2 and the later specific provisions of the Convention indicate the kind of legislation which is required to fulfil the positive legislative obligations imposed by article 2. Each one needs careful elaboration.

A point stressed by some of the treaty bodies is that the laws should be effective to prevent or provide remedies for discrimination. They emphasise the means by which the principle of equality can be made effective. Does the law override inconsistent laws, does it address the real problems of discrimination, can it be relied on to challenge discriminatory acts or decisions of authorities or private persons, and is reparation or compensation provided for? Is the law effective to prevent discrimination or are other administrative measures required?

In order to implement their human rights treaty obligations, State should undertake a full review of legislation and laws. In the case of CEDAW this is needed in order to identify and eradicate laws which are incompatible with equality. The treaty bodies stress that this review should be a continuous process, not a one off exercise. [BP54, para (f)]

Issues for the Draft GR are the status of the Convention and the equality principle n domestic law, and the measures which need to be taken to make it effective.

All other appropriate (non-legislative) measures of implementation, paras (a) (b) (e) (f) [also (c) and (d)]
Virtually all the provisions of article 2 and later articles call for some kind of non-legislative measures of implementation. The CEDAW Committee, in its comments on particular articles, has indicated what means are appropriate for that article.

Other treaty bodies have called for a range of general non-legal measures of implementation, especially in the area of non-discrimination. Some of these more general measures could be included in the Draft GR as examples.

> National plans of action, to develop appropriate strategies to ensure the equal enjoyment of all rights by women.
>
> Community education about rights as a means of implementing those rights and of combating discriminatory attitudes and actions.
>
> Educating public officials, administrative and judicial authorities about equality rights.
>
> Establishing national institutions with appropriate mandates in respect of human rights and women's equality rights. Such institutions could monitor the situation of women, help to formulate policies, disseminate the Convention and State reports, and deal with complaints.
>
> Affirmative action programs or temporary special measures. Generally considered under article 4.
>
> Data collection, disaggregated by gender, to assess the situation and progress of women.
>
> Programs to address violence against women, preventive and protective measures (sanctions fall under legal measures).
>
> International co-operation.

States should be asked to ensure that the effectiveness of particular programs is adequately assessed.

Remedies and reparation

Where discrimination against women occurs in violation of the Convention or of domestic law, there should be no issue about the justiciability of the issue.

All the treaty bodies consider discrimination in the enjoyment of rights to be a justiciable issue.

The provision of remedial action should have regard to these factors:

> The need to amend or repeal discriminatory law and the need to give the principle of equality and non-discrimination overriding status so that it is directly applicable by the courts
>
> The availability and accessibility of judicial remedies, to provide reparation and prevent further violation.
>
> Timeliness of remedies
>
> The need to provide for conciliation and mediation

The need for competent tribunals, to provide readily accessible remedies for women (para (c) calls for competent national tribunals and other public institutions to ensure the effective protection of women against discrimination)

Remedies should be effective (reinforced by art 4 (1) of the OP) and prompt. "Effective protection" implies effective remedy.

Remedies should include compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, (HRC para 16):

The need for national institutions for women's rights with power to investigate violations, to conduct conciliation or to pursue remedies

The need for effective public education programs, or targeted programs to change attitudes, and the possible role of national institutions for women's rights in this, also the media (article 5)

The need for remedies to be effective to bring to an end an on-going violation and to prevent further violation, e.g., by changing the State Party's laws or practices (HRC para 17)

The need for temporary special measures as a means to overcome specific areas of discrimination (article 4(1))

Bringing to justice the perpetrators of violations which need to be dealt with as penal offences.

Remedies should be enforceable

Other related issues

Compliance by other State parties
Following the recent views expressed by the HRC, the Draft GR could encourage States parties to be concerned about the violation of the Convention by other States parties, and should consider the procedure under article 29, and other means of calling on other States to comply with their obligations.

Obligations in regard to enjoyment of rights beyond territory
Following its own practice and that of other treaty bodies, CEDAW should emphasise in the Draft GR that a State party's obligations extend to individuals within its territory, or under its effective control (such as occupied territories)

Another opinion of CESCR encourages State parties to refrain from actions interfering with the enjoyment of rights in other countries.

Obligations in dealing with international organizations and negotiations
Following its own practice, CEDAW should call on States in the Draft GR to respect their obligations under CEDAW in international dealings with affect the well-being of women in other countries.

Annex 8: Slides Presented by Harry L. Roque Jr.

CEDAW: General Issues of Territorial Applicability in the Philippines
Professor H. Harry L. Roque Jr.
Director
Institute of International Legal Studies
University of the Philippines Law Center

Slide 2:
The Philippines is the first country to ratify CEDAW on August 5, 1981.
Philippines' Further Commitment to CEDAW:
Ratified the Optional Protocol to the Convention in November 2003 and accepted the amendment to Art. 20, Par. 1.
A Filipino, Rosario Manalo, chaired the CEDAW Committee until December 2006

Slide 3:
CEDAW as Law of the Land
Constitutional Basis

Article 2, Section 2, 1987 Constitution
The Philippines xxx adopts the generally accepted principles of international law as part of the law of the land.

Slide 4:
Judicial Interpretation of the Incorporation Clause
1. International Humanitarian Law
   Yamashita and Kuroda: automatic incorporation
2. Refugee Law
   Kookooritchkin vs Commission of Immigration and Deportation: rights of refugees were recognized three years prior to the 1951 Geneva Convention on the Rights of Refugees

Slide 5:
Judicial Interpretation of the Incorporation Clause
3. ICCPR
   Mejoff and Borovsky: right to liberty as stated in the UDHR is self-executory
   BAYAN vs Executive Secretary: Freedom of Expression and right to peaceful assembly are self executory
4. ICECSR
   Simon vs CHR: erroneously ruled that ICECSR are not self-executory & need implementing legislation

Slide 6:
Judicial Interpretation of the Incorporation Clause
3. CEDAW
   a. *Marcos vs Comelec (1995)*: widows regain their original domicile automatically upon the death of their spouse

   Concurring opinion of Justice Flerida Ruth Romero:
   "*In ratifying the instrument, the Philippines bound itself to implement its liberating spirit and letter xxx one such principle embodied in the CEDAW is granting to*

men and women the same rights with regard to the law relating to xxx the freedom to choose their residence and domicile.

Slide 7:
Judicial Interpretation of the Incorporation Clause
3. CEDAW

b. PT&T vs NLRC (1997): the corrective labor and social laws on gender inequality have also emerged with more frequency in the years since the Labor Code was enacted on May 1, 1974. This was largely due to the country's commitment to CEDAW.

Slide 8:
Judicial Interpretation of the Incorporation Clause
3. CEDAW

c. Halaguena vs PAL (2004): the government, through the courts, must strike down as unconstitutional and contrary to CEDAW all policies, contracts and laws that discriminate against women each time they rear their ugly heads.

Slide 9:
Laws Enacted Pursuant to CEDAW

1. Family Code
2. Amendment to the Definition of Rape as a crime against persons
3. Anti Domestic Violence Law
4. Gender Responsiveness (R.A. 7192 and E.O. No. 77)
5. Anti-trafficking in Persons Law
6. Anti-Mail Order Bride Law

Slide 10:
Legislative Agenda in Compliance with CEDAW

Slide 11:
1. Labor and Employment
- No recognition of women's reproductive work
- No express recognition of a woman's non-material contribution to marriage
- Only unmarried pregnant women from the private sector enjoy maternity leave benefits

Slide 12:
2. Population and Reproductive Health
- The Philippines does not have a national policy on reproductive health
- The limited legislations on reproductive health rights are not fully implemented because of the people's limited access to supplies, information and services.

Slide 13:
3. Differently-abled Women
- Women who suffer from physical disabilities are usually victims of double discrimination, especially in the workplace as employers are not likely to extend employment to physically handicapped individuals more so if they are women.

Slide 14:
<u>Common Challenges</u>

1. Violence against Women
   - The issue of Filipino comfort women hasn't been resolved as the Philippine government has so far refused to espouse the claim. A case in support of this claim is now pending in the Philippine Supreme Court (Vinuya vs Executive Secretary).
   - A legal challenge has been filed before the Philippine Supreme Court following the Executive Department's decision to return to American custody an American soldier convicted of rape (*Nicolas vs Executive Secretary)*.
   - "Battered woman syndrome" is not yet deeply appreciated in Philippine Jurisprudence (*People vs Genosa)*

Slide 15:
2. Rural and Indigenous Women
   - Gender inequality is more prevalent in the rural areas
   - There are a growing number of women from the rural areas who migrate and seek employment in the Metropolis or abroad.
   - Of the reported number of Filipino migrant workers who are being abused abroad, majority of them are women.

Slide 16:
3. Women in Armed Conflict
   - From 1980-1999, more than 100 cases of violence against women in armed conflicts were recorded in Regions 2, 6 and 9.
   - From January- November 2001, majority of the 135,000 to 150,000 internally displaced persons (IDP's) were women

Slide 17:
Challenges in Utilizing CEDAW in Judicial Practice
- The Supreme Court rarely cites CEDAW.
- One area in which CEDAW can be useful to domestic courts is the definition of discrimination.

Slide18:
Issues and Concerns
- Adoption of a policy creating safe and protected jobs for women;
- Information and support services to women overseas workers;
- Sex disaggregation of data and measuring the effects of government policies and program;
- Gender discrimination of laws on prostitution and alternative job opportunities for women;
- Violence against women; reproductive and sexual health services for all women in all regions; and
- The need to increase the participation of women in political and public life.

Annex 9: Paper Distributed by Nurjaanah @ Janet Chew

FINDINGS OF RESEARCH – INCORPORATION OF TREATY INTO DOMESTIC LEGISLATION IN MALAYSIA

Nurjaanah @ Janet Chew
Faculty of Law
University of Malaya
Kuala Lumpur

Note:

- Research commissioned by IWRAW Asia Pacific. Initial report completed in April 2003, recently updated.

- For the purpose of today's meeting, domestic legislation will not be highlighted although these were individually addressed in the country report submitted to IWRAW. It would be more appropriate to look at these statutes in an audit for State's compliance of CEDAW.

- Other measures, steps and actions taken by the government of Malaysia will not be discussed here. These can be found in Malaysia's report to the CEDAW Committee. However, the measures, steps and action taken by Malaysia prove the point that such measures, steps and actions can be undertaken despite the absence of an enabling statute to incorporate CEDAW. The question that may be raised is the extent of its efficacy and the effective implementation of CEDAW in the absence of the very first basic step of incorporating CEDAW into domestic legislation via an enabling Act. Is there such a specific requirement imposed on the States Parties? Would the absence of an enabling statute violate Article 2?

Findings:

1. Malaysia has thus far ratified only 5 out of the 25 major Human Rights instruments. CEDAW was acceded to on 5.7.1995 with several reservations. A combined first and second report was submitted to the CEDAW Committee on 22.3.2004. There is no direct incorporation via an enabling statute.

2. Process of incorporation:
    - Articles 74 & 76 (1)(a) of the Federal Constitution or
    - Via judicial acceptance in adopting international law to be part of domestic law.

   The power to ratify treaties lie with the Executive but the implementation of the said treaties is by the Legislature enacting and passing an enabling statute to incorporate the treaties into domestic legislation. It is entirely up to the Executive to invite inputs from other interested parties prior to the ratification.

3. Constitutional guarantee of equality & non-discrimination – Article 8. Amendment in 2001 to include 'gender' in Article 8(2). No corresponding amendment to other relevant provisions such as education [article 12] and citizenship [article 15 & 23]. No definition of 'discrimination'. Article 8 has been given a restrictive interpretation by the Court of Appeal in the case of ***Beatrice Fernandez***, excluding non-State actors, contrary to the provisions in CEDAW. The CA made no reference to CEDAW, any other international instruments or customary international law.

4. Role of the National Human Rights Commission of Malaysia [SUHAKAM] – formed on 4.4.2000. One of its functions is to make recommendations to the government on the ratification of treaties and other international instruments. To date, it has faithfully submitted its Annual Reports and recommendations of the Treaties and International Instruments Working Group to the Legislature. However, none of the reports and recommendations has been presented or debated in Parliament.

5. Role of the judiciary:
   - Courts can adopt international law or international instruments
   - Customary international law is part of 'law' as defined under Article 160 of the Federal Constitution. Application of ***Mabo (no.2)*** in ***Adong bin Kuwau*** – 'international law, especially universal human rights is a legitimate and important influence on the development of common law'
   - General reluctance to refer to general principles of international law. The courts' approach however, has not been consistent – liberal to strict to liberal. Refer to decided cases.
   - Judges may lack knowledge and awareness of international law and international instruments
   - Bangalore Principles 1988, Bangalore Principles of Judicial Conduct 2002, Balliol Statement, Bloemfontein Statement
   - Judges can and should play a crucial role in the rapprochement between domestic law and international law.

Barriers / Obstacles:

1. Limitation within the Federal Constitution itself:
   - Article 8(5)(a) – personal law
   - Article 76(2) – Islamic law or custom of the Malays and matters of native law or custom

   The government's assertion that Malaysia is an Islamic State further complicates the issues.

2. No definition of 'discrimination' even though Article 8(2) was amended to include 'gender'. There were no corresponding amendments on other provisions in the Federal Constitution and statutes.

3. Lack of political will and no sense of urgency to enact domestic law to incorporate CEDAW.

4. Lack of knowledge and awareness on the part of judiciary vis-à-vis CEDAW, customary international law and international law. Tendency to adopt the restrictive approach.

Annex 10: Slides Presented by Jesus Agura Villardo III

Philippine Experience
[Status of International Law in the Philippine
Legal System with particular regard to the CEDAW]
Perfecto Caparas, Jr.
Jesus Agura Villardo III

Slide 2:
Some Context:

- Dance (in Barangays) –

+ socially accepted ("harmless IGPs")
+"value" given to women (with special ribbon)
- treating women as chattel
- discriminate against other women
- equivalent to GROs in the city

- Bohol Children's Code
    - prohibit "selling" girls (with ribbons)
    - no prohibition in national laws

Slide 3:
"Usual suspects"

[Image of two advertisements for "Dealer" and "2 [Travel Agent] Reservation Officers". They specify age ("18-26"), sex ("Female only"), marital status ("single"), and attributes ("pleasing personality")]

Slide 4:
Some Context Continued:

- Bill of Rights, 1987 Constitution
- Strong civil society advocates
- Receptive judiciary (SC – 5:10 are women)
- Recent meaningful legislations/policies

Slide 5:
Critical Findings: Barriers

- Cultural
- Government's lack of commitment/inaction
- Disconnect of national laws and CEDAW
- Sporadic application of CEDAW/Covenant provisions in jurisprudence

Slide 6:
Critical Findings: Way forward

- Comprehensive, culturally-acceptable dissemination/popularization of the standards set in the Convention, Beijing Platform, MDG, & the IHL

✓ *in re* General Recommendations: Element B will in more ways than one will cover this

Slide 7:
Critical Findings: Way forward

- Accountability of the Government to give priority on its obligations under the treaty

- ✓ *in re* General Recommendations: Element D

Slide 8:
Critical Findings: Way forward

- Harmonize the place of international law in domestic legal system (i.e. CEDAW and national legal regime)

- ✓ *in re* General Recommendations: Element C

Slide 9:
Critical Findings: Way forward

- Sporadic application of CEDAW/Covenant provisions in jurisprudence/case laws

- ✓ *in re* General Recommendations: Elements C & D

Annex 11: Paper Distributed by Christine Forster

Legislative and Constitutional Obligations under Article 2 of CEDAW

Background

This presentation is made with reference to a project that I have been engaged in over the past 18 months with a colleague from UTS (Sydney) and with UNIFEM Pacific and the UNDP Pacific Centre in which we undertook to assess the legislative compliance of nine Pacific countries (Fiji, Samoa, Solomon Islands, Tuvalu, PNG, Marshall Islands, Federated States of Micronesia, Vanuatu and Kiribati). The project involved initially identifying legislative / constitutional indicators by which to measure compliance and secondly the application of the indicators to the legislation / constitutions of the nines countries.

My presentation is not primarily focused on the substantive results of the research (the resulting Report will be launched on March 8 by the UNDP Pacific Centre) but on the process and in particular the obstacles and difficulties involved in the project.

Importance of Encouraging Legislative Compliance

- Crucial first step to achieving de facto compliance / fulfilment of obligation
- Provides clear standards for individuals, organisations and governments to work towards.
- Provides the opportunity for judicial interpretation of CEDAW (indirectly)
- Provides the opportunity for remedies for victims of (sex) discrimination
- Process of drafting and enacting legislation involves consultation with various stakeholders (which makes CEDAW more relevant etc)

Challenges of Measuring Legislative Compliance with CEDAW / Developing Indicators

- The language in many of the articles is broadly framed
- Considerable overlap between articles
- Some articles or components of articles (arguably) best dealt with by policy not legislation
- No judicial interpretation or articles
- Knowledge of the de facto situation required e.g. Is there a need for special measures in a particular area or for a prohibition of a particular customary practice in the region?
- How specific should legislative indicators be?
- Universal or regional?
- How high should the benchmark be?

Process of Identifying Indicators for Pacific Project

- Analysed text of CEDAW
- Extensive reference to General Recommendations
- Extensive use of CEDAW Committee reports, Shadow Reports and other reports produced throughout the region

- Extensive use of feminist literature to identify 'best practice' models (often contradictory)
- Consulted with NGOs and government agencies in the region
- 113 legislative indicators identified for articles 1-16

Article 1 / Article 2

- Considered Articles 1 and 2 together
- Excluded areas specifically dealt with by other articles e.g. marriage and breakdowns, custom, citizenship, special measures etc
- Identified 33 legislative indicators

Equality / Anti – Discrimination / Fundamental Rights and Freedoms

- Fundamental rights and freedoms free from discrimination [As specified in Article 1/3]
- Guarantee of the principle of substantive equality [as specified in (a) 'to embody the principle of the equality of men and women'. Convention makes clear substantive not formal equality is required]
- Anti-discrimination provisions on the basis of gender/sex
    - Definition of discrimination should embody the meaning of discrimination in Article 1 and include indirect as well as direct discrimination
    - Should extend to law, public authorities and institutions as in (d) and to any person, organisation as in (e)
    - Adequate sanctions should be provided (b)
- Anti-discrimination provisions should encompass marital status, disability, sexual orientation, HIV status etc
    - Article 1 expressly includes marital status
    - GR 15 recommends that States Parties adopt measures to prevent specific discrimination against women in relation to HIV/AIDS
    - Article 2 condemns discrimination in all its forms, (b) refers to prohibiting all discrimination, (c) refers to any act of discrimination.
    - Convention clearly advocates substantive equality
    - Cannot achieve above without reference to intersections of discrimination

Violence against Women

- GR 19 states that violence against women constitutes sex discrimination and Article 2(b) States undertake 'to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.
- GR 19 contains considerable reference to general measures required to combat gendered violence e.g. 'Sanctions, penalties and compensation' but the specificity of legislative compliance is not identified.
- 'Best practice' sexual assault provisions in the criminal legislation e.g.
    - Range of offences encompassing different ways women are violated e.g. not limited to penile penetration, including the violation of trust etc
    - Serious penalties
    - Consent not available as a defence for girls under 18
    - Consent comprehensively defined to include threat, coercion etc
    - No defence of honest and reasonable belief victim of legal age
    - Absence of terms such as 'outraging the modesty'
    - No exemption of marital rape

- Bail Act – specific provisions in instances of sexual assault if risk of recurrence
- Criminal Procedure Act / Evidence Act – prohibition of requirements for corroboration, proof of resistance, prior sexual conduct etc
- Sentencing – minimum sentences, no use of 'forgiveness' etc
- Legislative provision for the compensation for sexual assault victims
- Could have included specialist courts, camera/video facilities, criminal injuries compensation etc

Other Areas Covered

- Domestic/Family violence
- Article 2 / Article 3. Legislative establishment of a funded body to promote the advancement of women. E.g., Ministry of Women's Affairs.

Obstacles to Legislative Compliance in Pacific Region

- Lack of political will and political instability in the region
- Lack of resources
- Effects of colonisation (e.g. old non-compliant English Statutes)
- Custom
- Limited (non-feminist) interpretations of CEDAW e.g. banning women from night work presented in government reports as compliance with CEDAW
- Lack of specific guidance on translating CEDAW into legislation
- Weakness of CEDAW's reports system (only 3 countries in the region have reported)