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THE OPTIONAL PROTOCOL TO THE WOMEN'S CONVENTION:

Enabling women to claim their rights at the international level

1. Introduction

At the Fourth World Conference on Women held in Beijing in September 1995 governments clearly affirmed that “*women’s rights are human rights*” and they committed themselves to the full implementation of those rights. For too long women have suffered from many forms of gender discrimination, affecting their enjoyment of civil, cultural, economic, political, and social rights.¹ The time has come to take practical measures to end this discrimination. Governments agreed in Beijing to take many such measures.² Among these, they committed themselves to supporting “the elaboration (of) a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the Women’s Convention) that could enter into force as soon as possible.”³

The proposed Optional Protocol will create a mechanism whereby the Committee on the Elimination of Discrimination against Women (CEDAW) will be empowered, in relation to countries that ratify the Protocol to: 1) receive complaints regarding specific violations of the Convention and 2) carry out inquiries into systematic or serious violations of the Women’s Convention. Thus, the Protocol would create a mechanism for redress of individual grievances and add a new, very practical application of the Convention for victims of discrimination. It would also enable CEDAW to more effectively address mass violations.

Amnesty International supports the drafting of a strong Optional Protocol creating both a complaints procedure and an inquiry procedure. The Women’s Convention provides more specific guarantees with regard to women’s human rights than any other human rights treaty and

¹Amnesty International has been working to increase its documentation of such violations. See *i.e.* Amnesty International, “Rape and Sexual Abuse: Torture and Ill-Treatment of Women in Detention” AI Index: ACT 77/11/91, February 1991 ; “Women in the Front Line: Human rights violations against women”, AI Index: ACT 77/01/91, March 1991; “Human Rights are Women’s Right”, AI Index: ACT 77/01/95, March 1995.

²See Amnesty International, “Women’s Rights are Human Rights: Commitments made by Governments in the Beijing Declaration and the Platform for Action”, AI Index: IOR 41/05/96, March 1996.

³Beijing Declaration and Platform for Action, UN. Doc. No. A/CONF.177/20, 17 October 1995, at page 97, para. 230(k).

CEDAW has the most experience with gender issues of any United Nations (UN) expert body. An Optional Protocol would provide a remedy for victims who have nowhere else to turn and would support the development of gender sensitive approaches by other UN human rights treaty bodies.

Amnesty International calls on governments to make a firm commitment to the adoption of a strong Optional Protocol, fulfilling their commitment made in Beijing and as a measure to enable women to claim their rights at the international level. What better way to celebrate the 50th anniversary of the Universal Declaration of Human Rights, than to adopt a Protocol which will help to make a reality of the UDHR's proclamation that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*...or other status." (Art. 2 - emphasis added)

A strong Protocol can only be built by a commitment to strong elements of the mechanism. Amnesty International's views on these elements will be outlined below.

2. Background

2.1 The Women's Convention

The Women's Convention was drafted between 1973 and 1979, adopted in December of 1979 and entered into force in 1981, following ratification by 20 countries. Today it has 161 States Parties. The Convention defines discrimination against women and then outlines measures which States Parties are required to take in both the public and private spheres to end such discrimination. It covers a range of topics, including employment, education, voting rights, nationality laws, rights in marriage and divorce, health care and equality before the law. States Parties are required to undertake "all appropriate means" to eliminate discrimination in these and other fields. While the Convention does not, on its face, address the issue of violence against women, CEDAW has in its General Recommendation No. 19 made clear that "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."⁴ This means that the Convention's protections extend to such violence and CEDAW has specifically asked States Parties to include information on this issue in their reports.⁵

The Convention also established CEDAW, a committee composed of 23 experts of high moral standing who represent the range of fields of competence covered by the Convention, as well as equitable geographical distribution and the principle legal systems. Under article 18, States must submit reports to be considered by CEDAW indicating the measures they have

⁴General Recommendation No. 19 (11th session, 1992), "Violence against women", at paragraph 1.

⁵See General Recommendation No. 12 (8th session, 1989), "Violence against women".

taken in all fields - legislative, judicial, administrative and others - to give effect to the Convention, as well as any obstacles encountered in implementation. These reports must be submitted one year after entry into force of the Convention and then at least every four years thereafter. CEDAW now meets twice a year at the UN in New York to consider these State Party reports. This is currently the only way in which CEDAW can monitor State Party compliance and, together with General Recommendations, develop its jurisprudence.⁶

2.2 The Idea of an Implementation Mechanism

During the process of drafting the Convention, some states had suggested including an individual complaints mechanism.⁷ However, such a mechanism was not included in the treaty. Since the Convention's entry into force, the relative weakness of the implementation mechanism available to CEDAW has been noted, particularly in comparison with other human rights treaties. Unlike the Women's Convention, many UN treaties created individual complaints procedures. These include Article 22 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (Convention on Racial Discrimination), the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not yet in force). Furthermore, the Committee against Torture which monitors implementation of the Convention against Torture also has the ability to undertake investigations of systematic violations of the Convention under Article 20.

In 1993, CEDAW requested the Commission on the Status of Women to convene an expert group meeting to discuss this issue.⁸ The World Conference on Human Rights in Vienna

⁶CEDAW has adopted more than 20 General Recommendations which are statements on the meanings of Convention provisions, on what kind of information should be included in State Party reports and on Convention-related issues, such as the impact of reservations.

⁷For more information on this issue, as well as detailed discussion of the Protocol as a whole, see Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?", *Brooklyn Journal of International Law*, Vol. XXI, No. 3, 1996, 679-797, at 684.

⁸ While the official drafting group was not established until 1996, an independent expert group was convened by the Women in the Law Project of the International Human Rights Law Group with the Maastricht Centre for Human Rights at the University of Limburg. This group was comprised of experts from all regions and included members of several human rights treaty bodies. The meeting adopted a draft text. See the Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Adopted by the Expert Group Meeting on the Adoption of

endorsed the call for a Protocol as did the NGO Forum at the World Conference. The Vienna Declaration and Programme of Action declared that: "New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women."⁹

One of the members of CEDAW, Justice Silvia Cartwright of New Zealand, prepared a study on the subject.¹⁰ The Committee also adopted Suggestion 7 setting out its views on the essential elements of a Protocol.¹¹ The UN Secretary-General began collecting views on an Optional Protocol. The outcome of all this activity was the convening of an intra-sessional drafting group of the Commission on the Status of Women (the Commission) which has met annually since 1996 to formally draft the Protocol text. At its first session in March 1996 the Working Group held a general exchange of views on the subject of the Protocol and possible elements of such a text.

In March 1997, at the Working Group's second meeting, the chairperson, Aloisia Wörgetter of Austria, introduced as a "Non-Paper" a draft text of the Protocol, having been authorized informally by the Commission to do so.¹² The Working Group completed a first reading of this entire draft text which was a considerable achievement. However, although the basic outlines of the Protocol may be agreed, most of the text which is the outcome of the first

an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, organised by the Women in the Law Project of the International Human Rights Law Group and the Maastricht Centre for Human Rights, University of Limburg, Maastricht, Netherlands, 29 Sept. - 1 Oct. 1994.

⁹See Vienna Declaration and Programme of Action at paragraph 40, in Report of the World Conference on Human Rights, UN Doc. A/CONF. 157/24.

¹⁰An Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Note prepared by Silvia Rose Cartwright, CEDAW/C/1995/WG.1/WP.1 of 8 November 1994. (Cartwright note)

¹¹See Suggestion 7, "Elements for an optional protocol to the Convention", in Report of the Committee on Elimination of Discrimination against Women, U.N. Doc. No. A/50/38 of 1995 at pages 8-11. (Suggestion 7)

¹²See Annex to E/CN.6/1997/WG/L.1 of 10 March 1997. A "non-paper" is simply a text which does not have the status of an official document.

reading (revised text) is in square brackets, indicating that consensus has not yet been achieved on these aspects.¹³

As noted above, the Beijing Declaration and Platform for Action endorsed the *speedy* drafting of an Optional Protocol as a means to “promote and protect the human rights of women, through the full implementation of all human rights instruments, especially the Convention on the Elimination of All Forms of Discrimination against Women.”¹⁴ It is this underlying goal which must be kept firmly in mind throughout the drafting exercise. A Protocol which truly fulfills this purpose is a requirement of living up to the promise of the Beijing conference at the international level. Amnesty International and many other NGOs will be watching closely to ensure that this occurs.

2.3 Why is the Protocol so important?

The Protocol is part of a larger strategy to ensure the full integration of women’s human rights concerns in the international human rights framework.¹⁵ As has been noted by the UN Secretary-General, mainstreaming of women’s human rights requires that the Women’s Convention “becomes a mainstream concern within the human rights programme” and that steps must be taken “to ensure that the Convention and its Committee are at least as well known as other human rights treaties and treaty bodies and that the work of the Committee is routinely incorporated into the work of the other human rights treaty bodies and mechanisms.”¹⁶ The Protocol will assist in this practice by allowing CEDAW to elaborate how the rights in the Women’s Convention should be guaranteed in real life situations.

When Rajsoomer Lallah, a member of the Human Rights Committee, addressed the first session of the Working Group on the Protocol in 1996, he explained how a Protocol would be

¹³See Revised Draft Optional Protocol Submitted by the Chairperson On The Basis of the Compilation Text Contained in Document E/CN.6/1997/WG/L.1 and Proposals Made at the Forty-First Session of the Commission on the Status of Women, Report on the forty-first session (10-21 March 1997), E/1997/27, E/CN.6/1997/9 at Appendix I, page 87 (Revised text of 1997).

¹⁴This is strategic objective I.1 in the Beijing Declaration and Platform for Action.

¹⁵For more information on these broader issues, see Amnesty International, “1998: A Wonderful Year for Women’s Human Rights?: The United Nations, Governments and the human rights of women”, AI Index: IOR 40/12/97, January 1998.

¹⁶Follow-Up to the Fourth World Conference on Women: Review of Mainstreaming in Organizations of the United Nations System: Extent to which violations of women’s human rights have been addressed by human rights mechanisms, Report of the Secretary-General; E/CN.6/1996/9, 28 February 1996 at pages 9 and 10, paras. 23 and 24 (Report of the Secretary-General).

helpful in the mainstreaming of women's human rights in the UN system. In his view, it would allow CEDAW to develop a fuller jurisprudence which would be looked to by other treaty bodies as they sought to understand and effectively address violations of women's rights within their respective mandates.¹⁷

Just as torture is prohibited by general standards like the ICCPR but a specific expert body, the Committee against Torture, develops an in-depth approach to this serious human rights problem, so too would the complementarity of the Optional Protocol to the Women's Convention with other mechanisms under other treaties enhance and develop the protection and understanding of women's human rights. This would enable the development of a mutually reinforcing jurisprudence.

Most importantly however, the Protocol will offer a real remedy for women at the international level. This will give victims of trafficking, victims of violence and victims of other forms of discrimination somewhere to turn, giving them practical access to a body which will understand the implications of their experience.

Justice Cartwright in her note on the Protocol explained its significance as follows: "It is important to have a complaints mechanism devoted solely to the needs of women. There is no other international human rights instrument or procedure which has this as its sole objective. Women face particular obstacles in achieving and retaining equality in both public and private life. An Optional Protocol administered by experts in human rights issues for women will go some way to help achieve the objectives of the Convention."¹⁸

3. Strong Elements for a Strong Protocol for Women¹⁹

¹⁷See Commission on the Status of Women, Report on the fortieth session (11-22 March 1996), Economic and Social Council Official Records, 1996, Supplement No. 6, E/1996/26, E/CN.6/1996/15 at Annex III, Appendix, paras. 1 and 2. The need for such cross-fertilization was also noted by the Secretary-General who suggested that the treaty bodies develop a gender analysis of each article of their respective treaties, cross-referenced to the Women's Convention and that the various treaty bodies engage in information-sharing and develop a common strategy so that the format of state reports asked for and any general comments made reflect gender-sensitive perspectives. See Report of the Secretary General at para. 29.

¹⁸Cartwright note at page 4.

¹⁹Further information on the elements of the Protocol can be found in Donna Sullivan, "The Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", Center for Women's Global Leadership, 1997.

To be most effective, the Protocol has to, where relevant, both make use of precedents in human rights law and mechanisms, in terms of text and practice, and also take into account women's experience of discrimination. The purpose of the Protocol, as emphasized from Vienna to Beijing - strengthening implementation of commitments to full equality for women and to women's human rights - must be constantly borne in mind during the drafting process. The spirit of drafting should reflect how best to achieve these goals rather than a lowest common denominator approach. This section outlines Amnesty International's views on key elements of the text.

3.1 Article 2 - Standing: Who May Make a Complaint?²⁰

The issue of who has standing to make a complaint to CEDAW under the Optional Protocol is perhaps the most important issue at stake in the drafting process. The decision on this issue will determine who has access to a remedy for violations of their rights and whether or not the Protocol text is relevant to women's experience of discrimination. A number of issues have to be resolved in this regard. The first is whether groups - either groups of individuals or organizations - have standing just like individual complainants when their rights are violated. The second question is whether or not other parties - individuals, groups or organizations - may make a complaint when not directly victims of violations of the Convention if they have a "sufficient interest in the matter."

There is precedent in international and regional human rights law for extending standing to individuals, groups of individuals and organizations. Article 14(1) of the Convention on Racial Discrimination extends standing to groups of individuals as well as to individuals. Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) entitles the European Commission of Human Rights (European Commission) to receive applications "from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation..." Article 44 of the American Convention on Human Rights (American Convention) also allows petitions to be lodged by "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organisation." Under the African Charter on Human and Peoples' Rights, no limitation is placed on the identity of the author(s) of complaints to the African Commission on Human and Peoples' Rights (African Commission) as long as they meet the other criteria of the Charter. In practice the African Commission has dealt with communications from individuals, groups and organizations. Furthermore, while the First Optional Protocol to the ICCPR only speaks explicitly of individual complaints, in practice, the Human Rights Committee has allowed individuals to file claims on behalf of groups of known individuals when these claims reflect the violations and rights common to all individuals within the group.

²⁰The numbering used in the titles in this section reflects the numbering of articles in the revised text of 1997 cited above in note 13.

In the revised Protocol text, this issue is dealt with in Article 2, - offering one main version of the Article and four alternative formulations. The main version of the text states that:

“Communications may be submitted: a) By an individual, group or organization claiming to have suffered from a violation of any of the rights in the Convention or claiming to be directly affected by the failure of a State Party to comply with its obligations under the Convention; or b) By an individual, group or organization claiming that a State Party has violated any of the rights set forth in the Convention or has failed to comply with its obligations under the Convention, if in the opinion of the Committee this person, group or organization has sufficient interest in the matter.”

This is very similar to the version suggested by CEDAW itself.²¹ Amnesty International considers that the Optional Protocol should follow the precedents listed above and extend standing to groups and organizations as well as to individuals.

3.1.2 - Sufficient Interest as a Basis of Standing

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

The concept of sufficient interest will also take into account the often systemic nature of gender discrimination and the particular obstacles women may face in seeking remedies, including danger of reprisals, low levels of literacy and legal literacy and resource constraints. National or international NGOs and groups with a “sufficient interest” in the matter may be less affected by those constraints and so be better placed to present claims on behalf of those victimized or directly affected. In some cases, such as a challenge to legislation that is incompatible with the Women’s Convention, CEDAW could carry out its work more effectively and efficiently by considering one claim from an organization that had “sufficient interest” than by considering a series of claims from individual victims.

²¹Suggestion 7 at page 9, para. 7.

On the other hand, the concept of “sufficient interest”, taken together with language which disallows complaints which are “an abuse of the right to submit a communication” or “incompatible with the provisions of the Convention” will allow the Committee to guard against spurious complaints or complaints made by inappropriate parties. Such language is found in both alternative versions of Article 4 in the revised text.

Thus, to provide a real remedy for women, Amnesty International strongly supports the grant of standing to both: 1) individuals, groups and organizations either suffering detriment from a violation, or directly affected by the failure of a State Party to comply with its obligations under the Convention, and 2) to individuals, groups or organizations with a sufficient interest in the matter. Such formulations provide real accessibility to victims but also provide clear criteria to safeguard against hypothetical or speculative complaints, since CEDAW would carefully examine all complaints to ensure that the authors fit into one of the requisite categories. Technical arguments should not obscure what is at stake here: how best to provide remedies for women suffering from violations of their rights.

3.2 Article 4 - Admissibility of a Complaint

The revised draft text of Article 4 contains two alternative versions of the text. A number of criteria for admissibility are suggested.²² These include the requirement that a communication to be admissible not be incompatible with the provisions of the Convention, nor an abuse of the right to submit a communication.

The addition of other criteria for determining admissibility, with no precedent in international law, such as political motivation of the complainant should be avoided. Amnesty International believes that this language is inappropriate, vague and subject to misinterpretation. As long as a complainant has a legitimate complaint to make in accordance with Article 2, the motivation is irrelevant and difficult to assess. It will be up to CEDAW to carefully consider admissibility criteria and reject abusive complaints. No other human rights treaty contains such language and women victims should not be subjected to such a restriction on “political” complaints when a genuine rights violation is at stake.

3.2.1 - Exhaustion of Domestic Remedies

Both alternative versions of Article 4 set out that a complaint will not be declared admissible unless all available domestic remedies have been sought. The Committee would be able to

²²CEDAW in Suggestion 7 recommended the elements that should be required for admissibility. These include: the communication must concern a State Party to the Protocol, it must not be anonymous, it must show an alleged violation of rights or failure to give effect to obligations under the Convention, and it must not be an abuse of the right to submit a communication.

waive the need to exhaust domestic remedies first if they were either “unreasonably prolonged” or “unlikely to bring effective relief”, though these possibilities are currently in square brackets. CEDAW has recommended that “A communication would be declared inadmissible by the Committee if all domestic remedies had not been exhausted, unless the Committee considered that requirement unreasonable.”²³

Most international and regional human rights instruments also require victims to exhaust domestic remedies before making a complaint provided these remedies are effective and not unduly prolonged.²⁴ Note for example the Convention against Torture Article 22(5) which states that: “The Committee shall not consider any communication...unless it has ascertained that:...b) the individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the...victim.” Effective is usually understood to mean both available and sufficient. For a remedy to be sufficient, it must fully redress the wrong. To be available, it must have some prospect of success. With regard to timeliness, this depends on the particular circumstances of the case, so no particular time limits can be specified.

Amnesty International believes that the Protocol should embrace a formula in accordance with international standards and jurisprudence and recognizing women’s experience and allow for qualifications to the exhaustion of domestic remedies rule as suggested by CEDAW. In practice, this rule needs to be interpreted flexibly in a manner which ensures recourse for women.

3.3 Article 5 - Interim Measures

Article 5 of the revised text allows CEDAW, at any time after the receipt of a communication and before a determination on the merits, to request the State Party concerned to take appropriate interim measures. The Committee may request such measures “as may be necessary to preserve the status quo or to avoid irreparable harm.” Draft article 5(2) states that “The State Party concerned shall take all necessary steps to comply with a request made by the Committee under paragraph 1” (ie. any interim measures). Amnesty International believes that it is very important for CEDAW to be able to request such measures and for State Parties to

²³Suggestion 7 at page 9, para. 9(f).

²⁴For example, Article 5(2) of the First Optional Protocol to the ICCPR provides that “The Committee shall not consider any communication from an individual unless it has ascertained that ...the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.” The African Charter on Human and Peoples’ Rights provides in its Article 56(5) that the African Commission can only deal with a communication if it is sent “...after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...”

have a concomitant duty to undertake such measures. Other language currently in brackets suggesting that States should merely “give due consideration” to taking such measures is not strong enough to protect victims given the potentially serious damage a victim could suffer if the status quo is not preserved. It is to be noted that, among other bodies, the Human Rights Committee and the Committee against Torture have been enabled to call for interim measures in their rules of procedure as are many national courts.²⁵

As CEDAW is in session only twice a year, it will be vital to preserve the status quo or protect the victim while awaiting a determination on the merits. Consider for example the case of a woman alleging rape or other forms of torture in custody, a violation frequently documented by Amnesty International. Given the severity of the violation and the possible ongoing nature of the harm, it would be crucial to protect the victim from any possible further violation, perhaps by replacing male guards with female guards or providing necessary medical care.

As paragraph 2bis of the revised text notes, the interim measures do not imply that the Committee has decided whether the State has violated the Convention. Interim measures do not prejudice the final outcome. On the other hand, the failure to take such measures may in fact do so. For example, in a case where a woman is forbidden by law from disposing of or administering real property which she owns and a male family member is seeking to sell the property, it would be necessary to temporarily halt the sale or the matter in controversy would be resolved, to the victim’s detriment. Once the property was sold she might be unable to regain it. This would also be the case with a woman facing corporal punishment for gender based offences. Once she had been subjected to the punishment, the harm could not be undone.

Recognizing this reality, CEDAW has suggested that “Pending examination of a communication, the Committee should have the right to request that the status quo be preserved, and a State Party should give an undertaking to that effect, in order to avoid irreparable harm. Such a request should be accompanied by information confirming that no inference could be

²⁵Under its rules of procedure, “The (Human Rights) Committee may, prior to forwarding its views on the communication to the State Party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.” Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev. 5, 11 August 1997, at Rule 86. (HRC Rules of Procedure) The CAT rules of procedure state that “In the course of the consideration of the question of the admissibility of a communication, the Committee....may request the State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation.” Committee against Torture, Rules of Procedure, CAT/C/3/Rev.2, 31 January 1997 at Rule 108(9) (CAT Rules of Procedure).

drawn that the Committee had determined the merits of the communication.”²⁶ Amnesty International supports such a procedure.

3.4 Article 8 -Remedial Measures

After considering an admissible complaint, CEDAW will adopt its “views” on whether or not a violation of the Convention is found in the case, making appropriate recommendations for how to remedy or redress any violation. These shall be sent to the State Party and the complainant(s). (Revised article 7(3)) The possibility of making recommendations needs to be explicitly recognized so that CEDAW can offer its expert advice in the most concrete terms.

After the views and recommendations have been adopted and transmitted, Article 8 of the revised text provides that the “Committee may request that the State Party concerned take specific measures to remedy any violations or failure to give effect to its obligations under the Convention.”

The second paragraph of the article provides that the State shall “take all steps necessary to remedy any violation of rights or failure to give effect to its obligations under the Convention.” This aspect of the revised text needs to be maintained - allowing CEDAW to recommend such measures and requiring that States Parties follow these recommendations.

Furthermore, the third paragraph which provides a time limit for the State to respond to the Committee explaining what remedial measures it has taken should specify three months (rather than six which is currently also a square bracketed alternative). This allows for the most speedy process.

CEDAW has stated that when the Committee found the communication to be justified “it might recommend remedial measures or measures designed to give effect to obligations under the Convention. The State party would remedy violations and implement recommendations. It would also ensure that an appropriate remedy (which might include adequate reparation) was provided. It would also provide the Committee within a set period with details of the remedial measures taken.”²⁷

Amnesty International believes that for the Protocol to provide an effective remedy the power of CEDAW to make concrete recommendations as a part of the expression of its “views” should be explicitly recognized in the text. State Parties should have a concurrent duty

²⁶Suggestion 7 at page 9, para. 10.

²⁷Suggestion 7, at page 10, para. 13.

to implement the recommended measures and to report to the Committee in a short time frame about such implementation.²⁸ This is vital if the Protocol is to offer a real remedy for real violations and not simply exist on paper.

3.5 Article 9 - Follow Up Measures

Article 9 in the revised text explicitly recognizes the power of CEDAW to seek a dialogue with States on measures they have undertaken to implement the views of the Committee. It also clearly sets out the power of the Committee to suggest that further information on these issues be included in subsequent State Party reports under Article 18 of the Convention. CEDAW has also recognized this as an important element of a Protocol.²⁹

Many other human rights treaty bodies have developed follow up procedures, recognizing the vital role of this aspect of their work to ensuring rights in practice. For example, the Human Rights Committee may, under its Rules of Procedure, designate a Special Rapporteur for follow up who considers implementation measures taken and keeps the Committee informed. Aspects of follow up may even be included in the Human Rights Committee's annual report.³⁰ Meanwhile, the Committee against Torture is able to invite State Parties to brief the Committee about implementation.³¹

In the view of Amnesty International, this is a very important aspect of the Protocol which will assist in implementing the Women's Convention itself - the underlying goal of the project. Furthermore, this addresses the practical reality that in many situations states have failed to implement recommendations of human rights treaty bodies.

3.6 Article 10 - Inquiry Procedure

According to Article 10 of the revised text, CEDAW would be able to undertake an inquiry when it had received "reliable information indicating a serious or systematic violation...of rights set forth in the Convention or of a failure to give effect to obligations set forth in the Convention." The entire text is in square brackets, meaning that it is subject to negotiation.

²⁸Under the Rules of Procedure of the Committee against Torture, "The State Party concerned shall be invited to inform the Committee in due course of the action it takes in conformity with the Committee's views." (Rule 111(5)).

²⁹Suggestion 7 at page 10, para. 14.

³⁰HRC Rules of Procedure, Rule 95.

³¹CAT Rules of Procedure, Rule 111(5).

Amnesty International strongly supports the creation of an inquiry procedure, following the important precedent of Article 20 of the Convention against Torture.³² This would allow CEDAW to most efficiently contend with the phenomenon of systematic or widespread discrimination. While it might be used infrequently, as is the case with Article 20 of the Convention against Torture, it could be an important tool with regard to some of the most serious violations. Furthermore, Amnesty International believes that an inquiry should be possible when the violations in question are either serious *or* systematic.³³ This gives CEDAW scope to determine when it needs to react using this procedure. The inquiry procedure could focus international attention on issues affecting women on a widespread basis such as trafficking, sexual exploitation or systemic discrimination at work or in educational institutions. Beyond the remedy available in particular cases under the complaints procedure, the inquiry procedure would enable in-depth examination of the underlying causes of patterns of discrimination against women.

As with the Convention against Torture, under the revised Article 10, CEDAW will seek the cooperation of the State Party concerned and may designate one of its members to conduct an inquiry, including by visiting the State Party, with its consent.³⁴ In the view of Amnesty International, this provision must be maintained although it may be used rarely. It provides the Committee with one of the best fact-finding tools. The Committee against Torture also has such powers, but so far has only carried out one such visit. CEDAW has also suggested such procedures be included in the present Protocol.³⁵

In the view of Amnesty International, it is important that CEDAW have the possibility to publish a report of such an inquiry after taking into account any observations made by the State Party. This provides an important counter-balance to the confidential nature of the process. It also makes the inquiry procedure most effective in combatting patterns of

³²Article 20(1) of the Convention against Torture provides that: "If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned."

³³CEDAW has also embraced this formula encompassing either serious *or* systematic violations. See Suggestion 7 at page 10, para. 17.

³⁴Article 20(2) of the Convention against Torture states that "...the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently." According to Article 20(3), "In agreement with that State Party, such an inquiry may include a visit to its territory."

³⁵See Suggestion 7 at paragraph 18, page 10.

discrimination. CEDAW has stated that at the end of the process of an inquiry the Committee “should be empowered to publish a report.”³⁶

The text must also ensure that the State Party assists CEDAW in its work under the inquiry procedure and that no one is victimized for or interfered with in the process of assisting the Committee in the conduct of an inquiry.³⁷ Such provisions are vitally important in the view of Amnesty International given its long experience in monitoring the work of international human rights mechanisms.

3.7 Article 18 - Number of Ratifications Necessary for Entry Into Force

The revised text contains three alternatives in square brackets, allowing for entry into force after the fifth, tenth or twentieth ratification or accession. Amnesty International considers that the Protocol should enter into force with a small number of ratifications, such as the five proposed. This allows the system created under the Protocol to begin functioning as soon as possible and gives CEDAW space to develop its working methods with a manageable number of States Parties.

The First Optional Protocol to the ICCPR required only 10 ratifications before entry into force. Despite this, it is to be noted that the First Optional Protocol did not enter into force for nearly ten years after adoption, given the pace of ratification. Today it has some 92 parties. Many victims would be denied a remedy if the work of CEDAW under this Protocol was similarly delayed. Furthermore, it would be in contravention of the Beijing Declaration and Platform for Action which called for a Protocol which could “enter into force as soon as possible.”³⁸

3.8 Article 20 - Reservations

The revised text provides that no reservations should be made by States when ratifying or acceding to the Protocol, but the text of this article is currently in square brackets. CEDAW

³⁶Suggestion 7 at paragraph 22, page 11.

³⁷CEDAW also suggested such an element: “...the State party would undertake to assist the Committee in its inquiries and to prevent any obstacles to, or victimization of, any person who provides the Committee with information or assists it in its inquiries.” Suggestion 7 at page 11, para. 23.

³⁸See above at note 3.

has also suggested that under the Protocol, “no reservations (should be) permitted”.³⁹ Since this is a procedural mechanism which does not create new substantive standards, but rather a mechanism to better implement a pre-existing standard, reservations would be highly detrimental and could potentially greatly reduce the value of ratification. Amnesty International has consistently opposed limiting reservations to human rights treaties.

An alternative text for Article 20, currently present in square brackets allows for reservations, “unless such a reservation is incompatible with the object and purpose of the present Protocol and the Convention, in accordance with the rules of international law”. This framework is adapted from the Vienna Convention on the Law of Treaties. Hence, such language is unnecessary because international law already prohibits such reservations. It is to be noted that the Vienna Convention framework has caused a great deal of confusion and debate. No workable way has been found to ensure that a reservation which does not meet the criteria of international law is declared invalid.⁴⁰ In addition, Amnesty International believes that any limiting reservations to human rights treaties tend to defeat their purpose and object. Furthermore, the Vienna Convention itself clearly offers the legal possibility that a treaty may prohibit reservations.⁴¹

The extent to which limiting reservations to the Women’s Convention have undermined the protection which the Convention offers to women in many countries is well known. CEDAW has noted this problem⁴² which has also been discussed at length by observers. The Beijing Declaration and Platform for Action calls on states, *inter alia*, to “regularly review them

³⁹Suggestion 7 at page 11, paragraph 28.

⁴⁰Note for example the variety of comments on the subject made by members of the International Law Commission during their recent discussion of this topic. Some members noted that “several aspects of the procedure for formulating reservations and objections, as well as the method of determining the permissibility of reservations, gave rise to considerable problems.” Furthermore, this process “gave rise to great confusion because there was no single authoritative body which might take a decision in the matter and because each State made such a determination itself...There was no denying the value of the Vienna rules, but they were complicated and sometimes difficult to understand.” Report of the International Law Commission on the work of its forty-ninth session, 12 May - 18 July 1997, UN Doc. No. A/52/10 at paras. 104 and 105.

⁴¹“A State may.....formulate a reservation unless..(a)the reservation is prohibited by the treaty..” Article 19 of the Vienna Convention on the Law of Treaties.

⁴²See for example, General Recommendation No. 20, “Reservations to the Convention” in which CEDAW, *inter alia*, called on States Parties to “reconsider such reservations with a view to strengthening the implementation of all human rights treaties.” General Recommendation No. 20 (11th session, 1992) at paragraph 2(b).

(reservations to the Women's Convention) with a view to withdrawing them."⁴³ The drafters of the Protocol have an opportunity to avoid the renewal of this problem by prohibiting reservations.

States often argue that reservations should be allowed to increase the number of ratifications. However, widespread adherence to a potentially enfeebled instrument would do little to prevent discrimination against women.

4. General Issues

4.1 Justiciability

Some delegations have during the drafting process questioned whether the rights in the Women's Convention are justiciable. Are the obligations of the state sufficiently defined and specific to be able to decide when they have been breached? Can a quasi-judicial body like CEDAW offer a remedy for victims of these types of violations? This subject has also dominated the debate over economic, social and cultural rights at the international and national levels.

Amnesty International believes that all of the substantive rights in the Women's Convention, contained in Articles 1-16 and Article 24 should be covered by the Optional Protocol. The question of justiciability in a particular case should be left to the discretion of CEDAW itself, since the answer to this question is case-specific and the strongest Protocol will be one which offers women a guarantee of the widest scope of their rights.

The argument about justiciability in the context of the Protocol to the Women's Convention concerns the perceived nature of a number of the Convention's provisions. These are argued to be programmatic, setting up rights to be implemented over time, rather than obviously normative. However, in fact, the Women's Convention does not differ greatly from other human rights treaties like the Convention on Racial Discrimination in recognizing that a variety of options may be available to states as to how to best combat discrimination.

Furthermore, certain civil and political rights deemed justiciable are also programmatic in nature in that they require an overall government program - beyond merely legal measures - to address them in full and the investment of resources. To truly end torture and cruel, inhuman or degrading treatment or punishment may require police training programs and improvements in prison conditions which might need new resources. The provision of a fair trial may require

⁴³Beijing Declaration and Platform for Action, Paragraph 230(c). It is positive to note that a few states have in fact lifted such reservations, including those reservations linked to cultural and religious laws and practices.

the costly development of the judiciary and the legal profession and the provision of free legal aid. This does not for a moment detract from the justiciable nature of these rights.

The principle of non-discrimination, the central tenet of the Convention, is well-established and found even in the UN Charter. Most importantly, the rights to equality and non-discrimination are clearly recognized as justiciable with regard to civil and political rights as well as economic, social and cultural rights. While the Human Rights Committee considers such issues in the civil and political sphere, the Committee on Racial Discrimination can consider these also with regard to economic, social and cultural rights through the Article 14 procedure. When Cecilia Quiroga and Fausto Pocar, members of the Human Rights Committee, addressed the Working Group in 1996 they underlined these points, indicating that they viewed all of the rights in the Women's Convention to be justiciable. While they recognized that some of the Convention's provisions could give rise to some difficulty in assessing compliance, they emphasized the role of CEDAW, as is currently fulfilled by other treaty bodies, in making any such determinations.⁴⁴

Most existing procedures such as those under the Convention against Torture, the Convention on Racial Discrimination, the First Optional Protocol to the ICCPR, the European Convention and the American Convention cover all the substantive obligations under the respective treaty. Commentators have noted that this promotes the integrity of the underlying Convention.

Solutions based on drawing lines among the different categories of rights will have unfortunate consequences, appearing to prioritize some rights over others. If such line-drawing is based on classical notions about justiciability (ie. civil and political rights are justiciable and economic, social and cultural rights are not), crucial areas of importance for women such as health, education and even possibly employment might be excluded from the Protocol, greatly undermining its usefulness. This may create a kind of discrimination among rights, when the overall objective of the Convention is to end discrimination. As one commentator noted about this issue in a national context:

“It is important to realize that traditional distinctions between classical or negative rights, and social or positive rights, and the willingness to provide for judicial enforcement of one but not the other, operate in fact to discriminate against the poor...Inclusion of certain rights and principles

⁴⁴See Commission on the Status of Women, Report on the fortieth session (11-22 March 1996) at Appendix, page 124, paras. 3 and 4.

(in the constitution) says a great deal about their stature and importance; omission of others has the same effect...”⁴⁵

To make distinctions among rights in this context is to undermine the basic principle of indivisibility of human rights, stressed time and again in the UN.⁴⁶ To be subjected to an international complaints and inquiry procedure helps to provide a remedy for rights violations. It also signals international recognition of the seriousness of the issues at stake.

4.2 NGO Participation

During the 1997 session of the Working Group, one state objected to the participation of NGOs in the drafting process. As a result, NGO participation was limited to “technical” comments to be made at the end of the discussion on each point, after all state representatives have made all their comments. This greatly circumscribes the role that NGOs can play and the ways in which they can contribute to the discussion. Furthermore, a number of women speaking on behalf of NGOs were interrupted when their remarks were deemed not to meet these criteria. This had a chilling effect on NGO participation.

So far, a number of NGOs have closely followed the Working Group’s progress. These have included cross-regional networks, women’s human rights groups from all regions and other international human rights groups. NGOs can offer support to the Working Group in a number of ways. Some have tremendous expertise in working with women victims of discrimination at the grassroots level and are thus well placed to explain the practical implications for women of different versions of draft provisions. Others have long years of experience in standard setting in the United Nations or of studying the existing mechanisms and can offer useful perspectives on this basis.

NGOs should be allowed to contribute throughout the discussion of this Protocol as they have done regularly with regard to other standards being created through the UN such as the Convention on the Rights of the Child and the draft Optional Protocol to the Convention against Torture. It is unconscionable that where, as here, the NGOs are largely from among women’s NGOs the rules for participation should be different. The key role in the fight for women’s

⁴⁵This comment comes from the debate about the justiciability of rights in Canadian law, See Martha Jackman, *Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate* in Henry Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press (1996) at 301.

⁴⁶Note for example, article I5 of the Vienna Declaration and Programme of Action.

human rights of NGOs has been formally recognized in the Beijing Declaration and Platform for Action: "Non-governmental organizations, women's organizations and feminist groups have played a catalytic role in the promotion of the human rights of women through grass-roots activities, networking and advocacy and need encouragement, support and access to information from Governments in order to carry out these activities."⁴⁷ Furthermore, in the Beijing Declaration and Platform for Action NGOs are recognized as one of the sets of actors needed to take action to achieve full implementation of the strategic objectives. To be able to contribute to this process they must be fully enabled to participate in the Working Group.

5. The Way Ahead

The Working Group drafting the Protocol will reconvene during the 1998 meeting of the Commission on the Status of Women to be held at the UN in New York from 2-13 March 1998. During this session the Working Group will begin the second reading of the draft text. The text which will be adopted by the Working Group to be sent to the Commission on the Status of Women and then to the Economic and Social Council and the General Assembly for final adoption will be finalized during the second reading.

6. Recommendations

Amnesty International believes that this Protocol can, and should be, adopted in 1998, bearing in mind that the key objective is to achieve agreement on a strong text which provides a real remedy for women. This would be a most constructive way to celebrate the fiftieth anniversary of the Universal Declaration of Human Rights.

For this to be achieved, the efforts of those supporting a strong Protocol need to be marshalled during the second reading of the draft text to push ahead with drafting and adoption and to ensure that the strongest possible text is adopted.

Such a text should:

1) grant standing to make a complaint to, both: a) individuals, groups and organizations either suffering detriment from a violation, or directly affected by the failure of a State Party to comply with its obligations under the Convention, and b) to individuals, groups or organizations with a sufficient interest in the matter;

2) allow for the usual qualifications to the exhaustion of domestic remedies rule if such remedies are unreasonably prolonged or ineffective;

⁴⁷Beijing Declaration and Platform for Action, at paragraph 228.

- 3) allow CEDAW to request interim measures as may be necessary to preserve the status quo or to avoid irreparable harm pending decision on a complaint and require that a State Party comply with such a request;
- 4) explicitly recognize the power of CEDAW to make recommendations when adopting views on a case and ensure that State Parties have a concurrent duty to implement the recommended measures and to report to the Committee in a short time frame about such implementation;
- 5) enable CEDAW to seek dialogue with states on measures taken to implement its views and recommendations;
- 6) create an inquiry procedure allowing CEDAW to most efficiently contend with the phenomenon of systematic or serious discrimination;
- 7) allow entry into force with a small number of ratifications, such as the five proposed in the revised text, allowing the Protocol to begin offering a remedy for women as soon as possible;
- 8) prohibit reservations since this is a procedural mechanism which does not create new substantive standards, but rather a mechanism to better implement a pre-existing standard, and reservations could potentially undermine the effectiveness of the system and
- 9) cover all substantive rights in the Convention.