

Brooklyn Journal of International Law

Volume 21

Issue 3

Symposium:

Women's Rights Are Human Rights: Selected

Article 3

Articles Dedicated to Women in the International

Human Rights Arena

3-1-1996

Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?

Andrew Byrnes

Jane Connors

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 Brook. J. Int'l L. 679 (2017).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol21/iss3/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

ENFORCING THE HUMAN RIGHTS OF WOMEN: A COMPLAINTS PROCEDURE FOR THE WOMEN'S CONVENTION?

Andrew Byrnes and Jane Connors***

Table of Contents

I.	Introduction	682
II.	Background	684
	A. Discussion of a Complaints Procedure During the Drafting of the Convention	684
	B. Developments Following the Entry into Force of the Convention	689
III.	General Issues and Concerns	696
	A. The Justification for a Communications Procedure Under the Women's Convention	698
	B. Existing Individual Communications Procedures	699
	C. Justification for an Inquiry Procedure	704
	D. An Inter-State Procedure	705
IV.	General Concerns	707
	A. The Justiciability Issue	708
	1. The Justiciability of Guarantees of Non-Discrimination	716
	2. The Types of Obligations Imposed by the Convention	718
	a. Obligations to Ensure/Accord/Grant a Right (719); b. Obligations of Undertaking to ... (722); c. Obligations to Take all Appropriate Measures (in order to ensure) ... (726)	
	3. Justiciability of Obligations "to take all appropriate measures"	726

* Faculty of Law, University of Hong Kong.

** Department of Law, School of Oriental and African Studies, University of London.

4. The Different Types of Obligations to Take all Appropriate Measures	727
a. Obligations to "take all appropriate measures" to Achieve a Specified Goal, Without Further Qualification (727); b. Obligations to "take all appropriate measures," accompanied by Explicit Obligations to "ensure" Rights (729); c. Obligations to "take all appropriate measures" in Order to Ensure in Particular Specified Goals of the Enjoyment of Specified Rights (730)	
5. Conclusion	733
B. The Application of the Convention with Respect to the Acts of Private Persons	734
C. Reservations	737
V. Obligations Subject to the Procedures	742
A. Individual Complaints Procedure	743
B. Inquiry by the Committee on its Own Motion	747
VI. The Maastricht Draft	747
A. Individual Communications Procedure (Part I of the Draft Optional Protocol)	748
1. Who May Complain?	748
2. Procedural Matters	754
3. Admissibility Matters	756
a. Anonymity (756); b. Substantive Coverage (Admissibility <i>Ratione Materiae</i>) (756)	
4. Temporal Applicability (Admissibility <i>Ratione Temporis</i>)	757
5. Abuse of the Right of Petition	759
6. The Requirement of Exhaustion of Domestic Remedies	760
7. Desirability of a Time Limit for the Lodging of Communications	761
8. Relationship to Other Complaint Mechanisms	762
9. Need for an Urgent Action Procedure	764
10. The Possibility of Settlement	764

11. Fact-Finding Procedures and Evidentiary Matters	765
12. The Status of a Decision by the Committee	766
13. Follow-Up Power	768
14. Procedural Obligations of States Parties with Respect to Complaints Under the Optional Protocol	769
B. Inquiry by the Committee on its own Motion (Part II of the Draft Optional Protocol)	770
C. Submission to Both Procedures	773
D. Institutional Implications of the Adoption of a Petition Procedure Under the Convention	775
1. Overlapping/Duplicative Procedures	775
2. Normative Conflicts	777
E. The Need for Additional Resources for CEDAW	779
VII. Conclusion	782
Appendix: Maastricht Draft Optional Protocol	784

I. INTRODUCTION¹

The fifty years since the end of the Second World War have seen a proliferation of human rights standards at the international and regional levels. The United Nations has been the primary forum for the elaboration of many of those standards and there now exists an extensive corpus of international standards providing formal protection for a wide range of human rights. Yet the challenge of human rights lies ultimately in ensuring the actual enjoyment of those rights, though the setting of standards is important and necessary to achieve this goal. The need for effective implementation procedures has led to the establishment, within the U.N. system, of a wide range of bodies, procedures, and mechanisms intended to enhance the enjoyment of human rights at the national level by those to whom these rights are guaranteed. The develop-

1. This article is based on Andrew Byrnes and Jane Connors, *The Adoption of a Petition Procedure under the Convention on the Elimination of All Forms of Discrimination against Women* (Sept. 29-Oct. 1, 1994) (Background Paper prepared for the Expert Group Meeting on the Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, organized by the Women in the Law Project, International Human Rights Law Group and the Maastricht Centre for Human Rights, University of Limburg, Maastricht, Netherlands, on file with the *Brooklyn Journal of International Law*). We would like to thank Donna Sullivan and Cees Flinterman for their comments on a draft of the original paper (which has been extensively revised following the Maastricht meeting) and to our fellow participants in that meeting. We would like to acknowledge the important role played by the International Human Rights Law Group, and especially of Donna Sullivan, Director of its Women in the Law Project, in the campaign for the adoption of an optional protocol to the Women's Convention. We also acknowledge our considerable indebtedness to the work of Philip Alston and the Committee on Economic, Social and Cultural Rights on the development of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, in particular *Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical Paper Adopted by the Committee on Economic, Social and Cultural Rights at its Seventh Session*, U.N. ESCOR, 7th Sess., Supp. No. 2, Annex IV, at 87, U.N. Doc. E/1993/22, E/C.12/1992/2 (1992) [hereinafter *ESCR Analytical Paper*].

We would like to dedicate this article to Arvonne Fraser on the occasion of her 70th birthday. As a founder and first Director of the International Women's Rights Action Watch, she has inspired many (including us) in the struggle to ensure women's human rights through the Women's Convention.

The research on which this article is based was supported in part by grants from the Committee on Research and Conference Grants of the University of Hong Kong and the Hong Kong Research Grants Council.

ment of these implementation mechanisms has taken place very much in the last 25 years with a burst of activity since the early 1980s.²

There is now a wide variety of enforcement mechanisms within the U.N. human rights system. The so-called Charter-based mechanisms include the Resolution 1503 procedure, thematic working groups and special rapporteurs, country and situation rapporteurs, and the public debates of the responsible human rights organs. The so-called treaty-based procedures, established under the major U.N. human rights treaties, include reporting procedures, individual complaint procedures, interstate complaints procedures, and inquiry procedures.

This pattern of elaboration of standards followed by an emphasis on the development of effective international implementation mechanisms has been evident both in the general human rights field and in those areas of the U.N. human rights system concerned primarily with matters relating to the status of women. However, the developments in these two areas have taken different tracks. As is well-known, standard-setting and the development of implementation mechanisms with regard to the human rights of women have evolved in a separate sphere to other developments with respect to "human rights." One of the results of this separation has been that the mechanisms which have been developed for the enforcement of "women-specific" human rights standards have been less effective than those developed for more general "human rights" standards. The implementation procedures provided for under the Convention on the Elimination of All Forms of Discrimination against Women (the Convention or the Women's Convention)³ are limited, and the communications mechanism of the

2. See generally PHILIP ALSTON, *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* (1992) [hereinafter *A CRITICAL APPRAISAL*]; Nigel Rodley, *TOWARDS A MORE EFFECTIVE AND INTEGRATED SYSTEM OF HUMAN RIGHTS PROTECTION BY THE UNITED NATIONS*, World Conf. on Hum. Rts. Preparatory Comm., 4th Sess., Agenda Item 5, at 3, U.N. Doc. A/CONF.157/PC/60/Add.6 (1993). For the relevance of U.N. mechanisms to the enforcement of the human rights of women, see Andrew Byrnes, *Towards More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Procedures*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 189 (Rebecca J. Cook ed., 1994) [hereinafter *HUMAN RIGHTS OF WOMEN*]; Rebecca J. Cook, *Women*, in 1 *UNITED NATIONS LEGAL ORDER* 433 (Oscar Schachter & Christopher C. Joyner eds., 1994).

3. Convention on the Elimination of All Forms of Discrimination against

Commission on the Status of Women (the Commission) is little known and of little effect.⁴

In recent years, calls have been made, particularly from within the non-governmental organization (NGO) community, to strengthen the mechanisms which currently exist for the protection and enforcement of the human rights of women. One of the demands made is that the Women's Convention be strengthened by the addition of a complaints mechanism, in the form of an optional protocol, which would allow individual women to bring complaints before the Committee on the Elimination of Discrimination against Women (CEDAW or the Committee), alleging that their countries had failed to carry out their obligations under the Convention. Advocates claim that not only would the addition of such a procedure place the Convention and CEDAW on an equal footing with other U.N. human rights treaties and treaty bodies, but also that a complaints procedure would ensure more effective implementation of the rights guaranteed in the Convention.

Moves to elaborate a complaints procedure for the Convention have gained considerable momentum over the last few years and the eventual adoption of an optional protocol incorporating such a procedure seems likely. In this article, we examine the background to demands for such an optional protocol and its desirability and feasibility. We consider the major legal issues that might arise in the elaboration of such a protocol and the form it might take. We also review current proposals for such a protocol.

II. BACKGROUND

A. *Discussion of a Complaints Procedure During the Drafting of the Convention*

During the drafting of the Convention, there was little discussion of whether it should provide for a procedure under which individuals or States Parties could lodge with the body

Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women's Convention].

4. *Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women: Measures to Publicize the Communications Mechanism of the Commission on the Status of Women*, Comm'n on the Status of Women, 38th Sess., Agenda Item 4, U.N. Doc. E/CN.6/1994/8 (1994).

responsible for monitoring implementation of the Convention complaints alleging violations of the Convention by a State Party. This lack of discussion was due partly to the fact that there was considerable debate over the appropriate monitoring procedure and the body that should perform this task.⁵ These issues were not finally resolved until the matter was voted on by the General Assembly.⁶

In the early stages of the preparation of the Convention, a number of states had suggested that consideration be given to the adoption of both individual complaint and interstate complaint procedures.⁷ Despite these suggestions, no draft of an individual complaint procedure was put forward at any stage of the consideration of the draft Convention, and it was only in the Third Committee of the General Assembly in 1979 that a draft interstate procedure was proposed. This draft was eventually adopted as article 29 of the Convention.⁸

5. See generally LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 187-203 (Int'l Studies in Hum. Rts. Series Vol. 29, 1993); Kiku Fukuda, *Article 17: Committee on the Elimination of Discrimination Against Women*, in COMMENTARY ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 307, 307-16 (Japanese Ass'n of Int'l Women's Rts. ed., 1995) [hereinafter JAPANESE COMMENTARY]; Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETH. INT'L L. REV. 419, 452-58 (1985); Margaret E. Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463, 480-81 (1984).

6. In the draft of the Convention which it forwarded to the General Assembly in 1976, the Commission on the Status of Women had proposed that States Parties to the Convention should submit reports every two years to the Secretary-General. These reports would be considered by an *ad hoc* Group established by the Commission on the Status of Women. The Group would consist of ten to fifteen persons who would serve in their personal capacity and would be elected by the Commission from nominees of States Parties (including both States Parties which were and those which were not members of the Commission). *Commission on the Status of Women: Report on the Twenty-Sixth and Resumed Twenty-Sixth Sessions*, U.N. ESCOR, 62d Sess., Supp. No. 3, Art. 19(2), at 10-11, U.N. Doc. E/5909, E/CN.6/608 (1976). The matter was further considered in the Third Committee of the General Assembly. It put forward three proposals for consideration by the plenary assembly: the original proposal put forward by the Commission, an Ecuadorian proposal for the establishment of an *ad hoc* group under the Economic and Social Council, and a Swedish proposal (which was adopted and became article 17 of the Convention). Galey, *supra* note 5, at 480-81.

7. *Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General*, Comm'n on the Status of Women, 25th Sess., Agenda Item 4(b), ¶¶ 100-107, U.N. Doc. E/CN.6/573 (1973) (Sweden and Canada specifically proposed an individual complaints procedure).

8. Abe Kouki, *Article 29: Settlement of Disputes*, in JAPANESE COMMENTARY,

The discussion of implementation and enforcement measures for the Convention concerned three main issues:

- 1) whether any form of monitoring procedure was necessary or desirable, or whether the Commission on the Status of Women as part of its overall activities could supervise the general implementation of the Convention;
- 2) if a monitoring procedure was desirable, whether a reporting system was the appropriate method and whether this should be supplemented by other procedures; and
- 3) the body to which reports under the Convention should be submitted, the main options being the Commission on the Status of Women, an ad hoc group of the Commission, or a body of independent experts established for the purpose of reviewing States Parties' reports.

The Commission proposed the establishment of an ad hoc group to consider reports submitted by States Parties. What emerged from consideration of the matter in the General Assembly was article 17 of the Convention, which provides for the establishment of a body of independent experts which would perform the function of reviewing States Parties' reports. This procedure drew heavily on the existing arrangements under the International Convention on the Elimination of All Forms of Racial Discrimination⁹ (Racial Discrimination Convention) and the International Covenant on Civil and Political Rights¹⁰ (ICCPR).

Although it did not loom large in the discussions of the draft Convention, the question of a complaints procedure was raised during the Commission's deliberations. Following the Commission's adoption, at its 1976 session, of the proposal for the establishment of an ad hoc group, Belgium proposed the inclusion of an additional article in CEDAW which called on States Parties to examine, in the Commission, the possibility of establishing complaints procedures for individuals and States Parties.¹¹ As the Commission's consideration of the draft Con-

supra note 5, at 414, 414-16; REHOF, *supra* note 5, at 238-39.

9. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Racial Discrimination Convention].

10. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

11. *Commission on the Status of Women: Summary Record of the 673d Meet-*

vention was by then in its final stages, the Belgian representative did not put forward a detailed draft. Rather, by the proposal she sought to commit states to examine the question of complaints procedures within a short time after the Convention entered into force.

A number of Western countries supported the Belgian proposal, but it was eventually defeated.¹² Some delegations raised technical queries about whether it was appropriate to refer such a matter to the Commission. A number of delegations also argued that there was a difference between conventions dealing with "serious international crimes"¹³ such as apartheid and racial discrimination, as opposed to those addressing areas such as discrimination against women, where states had already begun to cooperate and in which it was inappropriate to set up a body which would act as a "court of judgment."¹⁴ These objections reflect what has for a long time been the prevailing attitude in the Commission towards the elimination of discrimination against women.¹⁵ They also reflect the view that discrimination against women is not as grave as other forms of rights violations. The reluctance of delegations to take up the Belgian proposal may also have been influenced by the fact that the existing procedures under the ICCPR and Racial Discrimination Convention had not yet

ing, Resumed 26th Sess., 673d mtg. ¶¶ 93-94, U.N. Doc. E/CN.6/SR.673 (1976). The proposed article read:

As soon as this Convention enters into force, the States Parties undertake to examine, in the Commission on the Status of Women, the possibility of establishing procedures for the implementation of this Convention with a view to enabling States Parties and their nationals to address themselves to the *ad hoc* Group.

Id. ¶ 94.

12. See *Commission on the Status of Women: Summary Record of the 674th Meeting*, Resumed 26th Sess., 674th Mtg. ¶¶ 1-31, U.N. Doc. E/CN.6/SR.674 (1976) [hereinafter CSW 674th Mtg.].

13. *Id.* ¶ 4 (representative of Hungary).

14. *Id.* ¶ 12 (representative of Pakistan).

15. See generally Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11 (1981) [hereinafter *Human Rights and Women's Rights*]; Laura Reanda, *The Commission on the Status of Women*, in A CRITICAL APPRAISAL, *supra* note 2, at 265. For an institutional view of the separate development, see *Contribution from the Centre for Social Development and Humanitarian Affairs: Work of the Centre for Social Development and Humanitarian Affairs in Human Rights*, World Conf. on Hum. Rts. Preparatory Comm., 4th Sess., Agenda Item 5, at 3-9, U.N. Doc. A/CONF.157/PC/61/Add.5 (1993).

produced any significant body of case law which permitted an assessment of the effectiveness of those procedures.¹⁶ Some opposition was presumably also due to the stage of the Commission's deliberations at which the Belgian proposal was put forward. However, the draft article establishing the interstate procedure, now contained in article 29, was proposed and considered even later, during the General Assembly's consideration of the draft Convention and much later than the Belgian proposal.

The issue of the need for a complaints procedure was raised once again following the Commission's conclusion of its deliberations. The Netherlands, in its comments on the Commission's draft, suggested that the Convention should contain a provision for interstate complaints, and also that "serious consideration should be given to including in the draft Convention the right of individual petition, providing persons under the jurisdiction of the States Parties with the opportunity to submit complaints to the supervisory body."¹⁷ However, the Netherlands government did not propose a draft of such a procedure.

The only implementation mechanism contained in the Convention which confers powers on CEDAW is thus the reporting obligation under article 18 of the Convention,¹⁸ which obliges States Parties to submit regular reports to the Committee on the steps they have taken to implement the Convention. In addition, article 29 of the Convention—which is the subject of a large number of reservations and has never been utilized—establishes a procedure for States Parties to refer disputes over the interpretation or application of the Convention to the International Court of Justice.¹⁹

16. Although the (First) Optional Protocol to the ICCPR entered into force in 1976, the first decisions taken under the Protocol by the Human Rights Committee were published in the report of the Human Rights Committee in 1979. See Optional Protocol to the International Covenant on Civil and Political Rights, done Dec. 16, 1966, 999 U.N.T.S. 171, 301 [hereinafter First Optional Protocol]; Torkel Opsahl, *The Human Rights Committee*, in A CRITICAL APPRAISAL, *supra* note 2, at 369, 421 n.220. Article 14 of the Racial Discrimination Convention, which establishes the individual complaints procedure under that Convention, entered into force only in 1982. See *supra* note 9, art. 14, 660 U.N.T.S. at 230.

17. *Draft Convention on the Elimination of Discrimination Against Women: Report of the Secretary General*, ¶ 151, U.N. Doc. A/32/218 (1977).

18. Women's Convention, *supra* note 3, art. 18, 1249 U.N.T.S. at 22.

19. *Id.* art. 29., 1249 U.N.T.S. at 23.

B. Developments Following the Entry into Force of the Convention

In the years following the entry into force of the Convention, both CEDAW and those who began to follow its work focused their attention primarily on establishing the efficient operation of the reporting procedure. Subsequently, especially since the late 1980s, efforts have also been devoted to developing other aspects of the work of the Committee falling within the existing scope of the Convention, such as the formulation of general recommendations. Nevertheless, both before and after the establishment of the Committee commentators noted the lack of an individual communications procedure and the consequent weakness of the Convention's implementation mechanisms when compared with those procedures of the ICCPR and the Racial Discrimination Convention.²⁰ The possibility of the adoption of an optional protocol was raised by individual members of CEDAW on a couple of occasions,²¹ but aroused no general interest in the Committee until the early 1990s.

20. See, e.g., THEODOR MERON, *HUMAN RIGHTS LAW MAKING IN THE UNITED NATIONS* 81-82 (1986); Burrows, *supra* note 5, at 456-57; Noreen Burrows, *International Law and Human Rights: the Case of Women's Rights*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 80, 93-94, 96 (Tom Campbell et al. eds., 1986); Jost Delbrück, *Die Konvention der Vereinten Nationen zur Beseitigung jeder Form der Diskriminierung der Frau von 1979 im Kontext der Bemühungen um einen völkerrechtlicher Schutz der Menschenrechte*, in *STAATSRECHT-VÖLKERRECHT-EUROPARECHT: FESTSCHRIFT FÜR HANS JURGEN SCHLOCHAUER* 260 (Ingo von Münch ed., 1981); Malvina H. Guggenheim, *The Implementation of Human Rights by the UN Commission on the Status of Women: A Brief Comment*, 12 *TEX. INT'L L.J.* 239, 244 (1977); Theodor Meron, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 *AM. J. INT'L L.* 213, 216-17 (1990); Reanda, *Human Rights and Women's Rights*, *supra* note 15, at 22-23; Sarah Z. Zearfoss, Note, *The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable or Reactionary?*, 12 *MICH. J. INT'L L.* 903, 922-24 (1991). But see Edith Oeser, *A New Stage in the Struggle for Equal Rights and the Promotion of Women: On the Entry into Force of the Convention on the Elimination of Discrimination Against Women*, 1982 *GDR COMMITTEE HUM. RTS. BULL.* 43, 53 (CEDAW "should be regarded as a body facilitating the co-operation of States Parties for the elimination of all forms of discrimination against women, and not as a high court judge and collecting centre for violations of the treaty").

21. For example, the suggestion was made at the tenth session of the Committee in 1991 that the Committee should propose the possibility of an optional protocol as part of its contribution to the World Conference on Human Rights. ANDREW BYRNES, *INT'L WOMEN'S RIGHTS ACTION WATCH, CEDAW #10: BUILDING ON A DECADE OF ACHIEVEMENT* 22-23 (1991).

The early 1990s saw the evolution of greater interest in the possibility of a communications procedure under the Convention along with a number of important institutional developments. In 1991, the Commission conducted a review of its own procedure for receiving communications on the status of women (a previous review had been conducted in the early 1980s).²² A report prepared by the Secretary-General for the Commission noted that the existing procedure was weak when compared to other mechanisms elsewhere in the U.N. human rights system, and that relatively little attention was given to human rights issues of particular concern to women under other mechanisms, whether treaty-based or Charter-based. The report set out a number of ways in which existing procedures might be improved or supplemented in order to ensure that effective international procedures were available for the enforcement of women's internationally guaranteed human rights.²³ These methods included the establishment of a thematic special rapporteur²⁴ and the adoption of an individual complaints procedure in an optional protocol to the Convention. Although it eventually took up a number of the suggestions in the report, at this stage the Commission did not endorse the suggestion that a communications procedure be developed for the Convention.²⁵

At the same time as the Commission was reviewing its communications procedure, the issue of a protocol additional to

22. *Examining Existing Mechanisms for Communications on the Status of Women: Report of the Secretary General*, Comm'n on the Status of Women, 35th Sess., Agenda Item 4, ¶¶ 136-156, U.N. Doc. E/CN.6/1991/10 (1991).

23. *Id.* ¶¶ 136-156.

24. This has since occurred in the form of the appointment, by the Commission on Human Rights, of a Special Rapporteur on Violence against Women. *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence Against women*, C.H.R. Res. 1994/45, U.N. ESCOR, 50th Sess., Supp. No. 4, at 140, U.N. Doc. E/1994/24, E/CN.4/1994/132 (1994). The first report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, was submitted to the 1995 session of the Commission on Human Rights. *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Cause and Consequences, Ms. Radhika Coomaraswamy*, Comm'n on Hum. Rts., 50th Sess., Agenda Item 11(a), U.N. Doc. E/CN.4/1995/42 (1994) [hereinafter *Coomaraswamy First Report*].

25. *Draft Resolution III, Report of the Commission on the Status of Women on its Thirty-Seventh Session*, Comm'n on the Status of Women, 37th Sess., Supp. No. 7, at 16-17, U.N. Doc. E/1993/27, E/CN.6/1993/18 (1993).

the Convention arose in another context—that of developing a new international instrument on violence against women. At the initiative of the Canadian government, an expert group meeting was held in November 1991 to consider various options. These options included the adoption of a substantive protocol to the Convention dealing with the issue of violence against women, a protocol to the Convention which would provide both substantive coverage of violence and a complaints mechanism in respect of violence against women, a protocol which would provide a complaints procedure in respect of all the rights guaranteed in the Convention, or a new declaration or convention dealing with violence against women.²⁶ The recommendation of the expert group and that endorsed by the Commission and the General Assembly was the adoption of a separate declaration on the subject, leading to the adoption of the Declaration of the Elimination of Violence against Women in December 1993.²⁷

These developments were parallel to and, indeed, formed part of the mobilization for the 1993 World Conference on Human Rights by NGOs concerned with the human rights of women.²⁸ A consistent demand put forward by NGOs and oth-

26. See *Report of the Expert Group Meeting on Violence Against Women*, Division for the Advancement of Women, ¶¶ 34-37, U.N. Doc. EGM/VAW/1991/1 (1991). This document contains a fuller report of the discussion than the final version of the report submitted to the Commission on the Status of Women. *Violence Against Women in all its Forms: Report of the Secretary-General*, Comm'n on the Status of Women, 36th Sess., Agenda Item 4, ¶¶ 25-27, U.N. Doc. E/CN.6/1992/4 (1991). For further discussion of the issues, see *Issues in the Development of an International Instrument on Violence Against Women: Working Paper Prepared by the Government of Canada*, U.N. Doc. EGM/VAW/1991/WP.1 (1991); Andrew Byrnes, *Observations on the Background Paper Prepared by the Government on Canada on Issues in the Development of an International Instrument on Violence Against Women* (Nov. 11-15, 1991) (corrected version of draft of Nov. 4, 1991 presented to the Expert Group Meeting on Violence against Women, Vienna, on file with author). See also Elizabeth Evatt, *Violence and the Convention on the Elimination of All Forms of Discrimination Against Women*, in INTERNATIONAL LEAGUE FOR HUMAN RIGHTS: COMBATING VIOLENCE AGAINST WOMEN 33, 38-39 (1993); Elizabeth Evatt, *Eliminating Discrimination Against Women: The Impact of the UN Convention*, 18 MELBOURNE UNIV. L. REV. 435 (1991).

27. *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994).

28. See generally Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152 (1994); Florence Butegwa, *Women's Human Rights: A Challenge to the International Human Rights Community*, THE REVIEW (INT'L COMM'N OF JURISTS), June 1993, at 71.

ers²⁹ was that the institutions responsible for overseeing women's human rights issues, namely the Commission and the Committee, be strengthened. In addition, calls for an optional protocol to the Convention were frequently made, as in the final report of the NGO Forum in Vienna.³⁰

This advocacy campaign was effective and was reflected in the final document adopted by the World Conference, the Vienna Declaration, and Programme of Action.³¹ The Vienna Declaration stressed the need for women to make effective use of existing procedures under international human rights instruments. However, it also emphasized the need for the adoption of new procedures, stating:

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.³²

The question of the preparation of such a protocol to the Convention was taken up by CEDAW at its 1994 session. The Committee suggested that the Commission request the convening of an expert group during 1994 to prepare a draft optional protocol to the Convention and that the report of this meeting should then be presented to the Committee for its comments and the Commission for action.³³ The Committee also desig-

29. See, for example, the contribution by the United Nations Development Fund for Women (UNIFEM), which also suggested the adoption of a complaints mechanism, in the *Report Submitted by the United Nations Development Fund for Women (UNIFEM) to the World Conference on Human Rights*, World Conf. on Hum. Rts. Preparatory Comm., 4th Sess., Agenda Item 5, at 3, 19-20, U.N. Doc. A/CONF.157/PC/61/Add.17 (1993).

30. *NGO Forum Final Report: Recommendations Adopted by the Forum of Non-Governmental Organizations*, HUMAN RIGHTS: THE NEW CONSENSUS, June 1993, at 230, ¶ 6, at 231, ¶ 4, at 235. The *NGO Forum Report* is also reprinted in the extremely useful compendium of documents from the World Conference prepared by Manfred Nowak entitled *WORLD CONFERENCE ON HUMAN RIGHTS: THE CONTRIBUTIONS OF NGOS* 77, at 78, 81 (Manfred Nowak ed., 1994).

31. *Report of the World Conference on Human Rights*, U.N. GAOR, 48th Sess., pt. II, U.N. Doc. A/CONF.157/24 (1993) [hereinafter *Vienna Declaration*].

32. *Id.* ¶ 40.

33. *Suggestion No. 5, Report of the Committee on the Elimination of Discrimination*.

nated one of its members to prepare a paper on the subject for its 1995 session. At its 1994 session, the Commission did not call for such a meeting, but decided it would examine the feasibility of introducing the right of petition under the Convention at its 1995 session, "taking into account the results of any governmental expert meeting on the question that may be convened" prior to that session.³⁴ This course of action was approved by the Economic and Social Council (ECOSOC).³⁵

Although no governmental expert group meeting was convened during 1994, an independent expert group meeting was convened by the Women in the Law Project of the International Human Rights Law Group in conjunction with the Maastricht Centre for Human Rights at the University of Limburg, with the financial assistance of the Dutch and Australian governments as well as the European Human Rights Foundation.³⁶ Following detailed consideration of a draft before the meeting,³⁷ the expert group adopted a draft optional protocol to the Convention.³⁸ This draft confers jurisdiction on CEDAW under two complaint procedures, an individual com-

ination Against Women, U.N. GAOR, 13th Sess., Supp. No. 38, at 10, U.N. Doc. A/49/38 (1994).

34. *Draft Resolution III*, *supra* note 25, ¶ 4.

35. E.S.C. Res. 1994/7, U.N. ESCOR, 40th Plen. Mtg., U.N. Doc. E/RES/1994/7, E/1994/INF/6 (1994).

36. Participants in the meeting, who came from all regions, included members of CEDAW, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and other experts in the field of international human rights and the human rights of women.

37. The discussion draft was annexed to a background paper prepared by the present authors for the Maastricht meeting. *See generally* Byrnes & Connors, *supra* note 1. Background papers were also presented by Justice Silvia Cartwright, Impact of a Complaints Procedure on CEDAW's Work (Sept. 29-Oct. 1, 1994) (background paper prepared for the Expert Group Meeting on the Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, organized by the Women in the Law Project, International Human Rights Law Group and the Maastricht Centre for Human Rights, University of Limburg, Maastricht, Netherlands, on file with the *Brooklyn Journal of International Law*), and Professor Manfred Nowak, while other participants made oral presentations.

38. The text of the Maastricht draft is appended at the end of this article. For a detailed discussion of the Maastricht draft which highlights some of its novel or potentially controversial aspects and which proposes a number of changes, see Ben Rimmer, *Proposals for a Communications and Inquiry Procedure to the Convention on the Elimination of All Forms of Discrimination Against Women* (Aug. 1995) (internship paper for the Australian National Internship Program, on file with the *Brooklyn Journal of International Law*).

plaints procedure and an inquiry procedure under which the Committee could investigate situations in which systematic or serious violations of the Convention are alleged.

At its session held in early 1995, CEDAW once again took up the issue, basing its consideration on, among other materials, a paper prepared by Justice Silvia Cartwright, one of the members of the Committee who had attended the Maastricht meeting.³⁹ Her paper outlined the content of the Maastricht draft, raised a number of additional matters which she believed the Committee might wish to consider in its examination of the issue, and proposed that the Committee endorse the draft and recommend its adoption by the General Assembly.⁴⁰ Following considerable discussion of both general issues and the specific provisions of the Maastricht draft in one of its working groups, the Committee adopted, almost unanimously,⁴¹ a proposal setting out in detail what it considered to be

39. Silvia Rose Cartwright, *An Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, Comm. on the Elimination of Discrimination against Women, 14th Sess., at 1, U.N. Doc. CEDAW/C/1995/WG.1/WP.1 (1994). The Committee also had before it a paper prepared by the Professor Philip Alston, Chairperson of the Committee on Economic, Social and Cultural Rights, which dealt with the issue of a draft optional protocol containing a complaints procedure under the International Covenant on Economic, Social and Cultural Rights and which contained a draft similar in many respects to the Maastricht draft. See *Draft Optional Protocol Providing for the Consideration of Communications*, Report Submitted by Mr. Philip Alston, Comm. on Economic, Social and Cultural Rights, 11th Sess., U.N. Doc. E/C.12/1994/12 (1994), reprinted in RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS 178-98 (Fons Coomans & Fried van Hoof eds., 1995) [hereinafter RIGHT TO COMPLAIN]. An Expert Group meeting held in Utrecht in late January 1995 took the Alston draft as a basis for its discussions and adopted a draft optional protocol which drew heavily on the Alston draft. DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ADOPTED BY THE UTRECHT EXPERT GROUP MEETING (Netherlands Institute of Human Rights, 1995), reprinted in RIGHT TO COMPLAIN, *supra*, at 233 [hereinafter *Utrecht Draft Protocol*]. Both of these instruments also drew on the Maastricht draft. For a discussion of the Alston draft by the Committee, see *Summary Record of the 50th Meeting*, Comm. on Economic, Social and Cultural Rights, 13th Sess., U.N. Doc. E/C.12/1995/SR.50 (1995) (comments by ILO, American Association of Jurists, and Foodfirst Information and Action Network).

40. Cartwright, *supra* note 39, at 5.

41. Although only one member of the Committee, the expert from Indonesia (Ms. Hartono), chose to dissent from the Committee's decision, the experts from China (Ms. Lin) and Japan (Ms. Sato) expressed reservations about various aspects of the proposal in the course of the discussions within the Committee. See *Summary Record of the 282nd Meeting*, Comm. on the Elimination of Discrimination against Women, 14th Sess., 282d mtg., ¶¶ 13-19, U.N. Doc. CEDAW/C/SR.282

the desirable features of an optional protocol to the Convention (Suggestion No. 7).⁴² The views expressed by the Committee correspond in essence to the content of the Maastricht draft, but apparently the Committee thought that it was more appropriate to express its support in this form rather than simply to endorse what was in effect an NGO draft.⁴³

At its 1995 session, the Commission once again took up the issue of an optional protocol to the Convention, on the basis of CEDAW's suggestion. On this occasion, the Commission requested that the Secretary-General invite governments, intergovernmental organizations, and NGOs "to submit their views on an optional protocol to the Convention, including those related to feasibility, taking into account the elements suggested by the Committee in its Suggestion No. 7."⁴⁴ The Commission further requested the Secretary-General to compile a report based on these comments⁴⁵ which would then be considered by a sessional working group of the Commission at its 1996 session, "with a view to elaborating a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women."⁴⁶ This course of action was endorsed by the Economic and Social Council.⁴⁷

In August 1995, the Secretary-General of the United Nations circulated notes verbales in terms of the ECOSOC resolution. Member states, as well as intergovernmental and non-governmental organizations framed their views against the

(1995).

42. *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 50th Sess., Supp. No. 38, at 8, U.N. Doc. A/50/38 (1995). For a summary of the proposal endorsed by the Committee, see INT'L HUM. RTS. LAW GROUP, THE ADOPTION OF A PETITION PROCEDURE UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: THE PROPOSAL BY THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (1995).

43. Support for an optional protocol was also expressed by the Special Rapporteur on Violence against Women in her initial report, *Coomaraswamy First Report*, *supra* note 24, ¶ 317, as well as by the meeting organized by the Council of Europe as part of its contribution to the World Conference on Women. "Equality and democracy: Utopia or challenge?" - Reports from the Discussion Groups and Conclusions by the General Rapporteur, EG/DEM(95)19 at 36.

44. *Report of the Thirty-Ninth Session: Draft Resolution III*, U.N. ESCOR, 39th Sess., Supp. No. 6, at 5, U.N. Doc. E/1995/26, E/CN.6/1995/14 (1995).

45. *Id.* ¶ 6.

46. *Id.* ¶ 7.

47. E.S.C. Res. 1995/29 (1995).

background of the outcome of the Fourth World Conference on Women, held in Beijing in September 1995. The Beijing Declaration and Platform for Action gave further momentum to the process, stating that in light of the report the Secretary-General would provide, States Parties should "support the process initiated by the Commission on the Status of Women with a view to elaborating a draft [optional protocol] that could enter into force as soon as possible."⁴⁸

In the following sections of this article we address the issues of the desirability and feasibility of an optional protocol to the Women's Convention. The draft optional protocol adopted by the Maastricht expert group meeting forms the basis of our discussion. This is because CEDAW's Suggestion No. 7, setting out the elements of an optional protocol, essentially adopts the content of the draft optional protocol adopted by the Maastricht expert group meeting, and can therefore be taken as an endorsement of that draft. It was also the Maastricht draft which framed the discussion of the issue of an optional protocol during the Commission's 1995 session and which is likely to feature in any future discussion of the form and content of an optional protocol.

III. GENERAL ISSUES AND CONCERNS

The Maastricht draft proposes to confer on the Committee⁴⁹ the following powers:

48. *Beijing Declaration and Platform for Action*, Fourth World Conf. on Women, ¶ 230, U.N. Doc. A/CONF.177/20 (1995).

49. At the time of the preparation of the First Optional Protocol to the International Covenant on Civil and Political Rights, suggestions were made that States Parties should establish a committee separate from that established under the ICCPR for the consideration of communications. This suggestion was not taken up. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* ¶ 4.4, at 124 (1991). Thus, communications under the ICCPR, as well as under the Racial Discrimination Convention, *supra* note 9, the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Torture Convention*], and the International Convention on the Protection of All Migrant Workers and Members of Their Families, *opened for signature* May 2, 1991, G.A. Res. 45/148, U.N. GAOR, 45th Sess., Supp. No. 49, at 261, U.N. Doc. A/45/49 (1990), *reprinted in* 30 I.L.M. 1517 [hereinafter *MWC*], are channelled to the expert committees established under those treaties. In the discussion about an optional protocol to the Women's Convention, it has been taken for granted that CEDAW will exercise a similar jurisdiction.

- 1) to receive complaints from individuals or groups that they have suffered harm as a consequence of a failure by a State to fulfil its obligations under the Convention (an individual complaints procedure); and
- 2) to inquire on its own motion into the situation in a State Party on the receipt by the Committee of reliable information which indicates a systematic pattern of serious violations of the Convention (an inquiry procedure).

The proposed protocol to the Convention is strictly optional and would apply only to those States Parties who ratify or accede to its terms. No additional substantive or procedural obligations would be imposed upon States Parties to the Convention which chose not to ratify the protocol.

This proposal for an optional protocol, like other similar proposals, gives rise to a number of fundamental questions which need to be addressed. What is the justification for adopting such a procedure? Is it likely to advance efforts to ensure that women enjoy their human rights in practice? Are the obligations contained in the Convention really amenable to a quasi-judicial procedure? Would such a procedure unnecessarily duplicate the protection available under existing human rights instruments? Would the human and financial resources necessary to the effective functioning of such a procedure be made available? Before examining the fundamental question of whether the obligations contained in the Convention are justiciable or amenable to enforcement procedures of the type contained in the Maastricht draft, and before considering the Maastricht draft in detail, we canvass the justification for adopting mechanisms such as those proposed.

If an optional protocol is adopted and enters into force, it is highly likely that a number of the members of CEDAW will be nationals of states which are not party to the Optional Protocol and may, indeed, be nationals of states who oppose the Protocol. The practice of other expert committees, such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as well as the European Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights is to allow independent experts, no matter what the position of the state of their nationality, to participate fully in the communications process. Again, there seems no reason why this practice should not be followed in the context of CEDAW.

A. The Justification for a Communications Procedure Under the Women's Convention

The means of implementation and enforcement provided for under the Convention are limited to a reporting procedure involving submission of regular reports to the Committee pursuant to article 18⁵⁰ and a limited interstate procedure under article 29 which confers jurisdiction not on the Committee, but on the International Court of Justice.⁵¹ Unlike a number of other human rights treaties, the Convention has no individual communications procedure. The ultimate justification for adopting a communications procedure for the Convention must be that it will promote the more effective implementation of the Convention and thereby enhance the enjoyment by women of the rights it guarantees.⁵² The existence of a wide variety of communications procedures, both within the U.N. system and at the regional level, manifests an international consensus that such procedures can play an important role in bringing about the more effective enjoyment of internationally guaranteed human rights. While it would be naive to overstate the achievements and potential of such procedures, experience has shown that they can make a valuable contribution to the protection of human rights.

In our view, the adoption of an individual complaints procedure or an inquiry procedure along the lines of those proposed in the Maastricht draft would contribute significantly to the more effective implementation of the Convention.⁵³ At the same time, we recognize that the proposal gives rise to questions about legal feasibility, the availability of resources, and concerns about the proliferation and overlap of human rights instruments and enforcement procedures. Nevertheless, we

50. Women's Convention, *supra* note 3, art. 18, 1249 U.N.T.S. at 22.

51. *Id.* art. 29, 1249 U.N.T.S. at 23.

52. The Committee on Economic, Social and Cultural Rights stated in relation to arguments that could be adduced in support of an optional protocol to the Economic Covenant: "Ultimately, of course, the most compelling is that the aggregate enjoyment of economic rights by individuals and groups throughout the world will be significantly enhanced thereby." *ESCR Analytical Paper*, *supra* note 1, ¶ 20.

53. This is a view shared by many commentators, as well as by the Committee on the Elimination of Discrimination against Women itself. See *Report by the Committee on the Elimination of Discrimination Against Women*, Fourth World Conference on Women, ¶ 59, U.N. Doc. A/CONF.177/7 (1995) [hereinafter *CEDAW World Conference Report*].

argue that concerns relating to these issues can be overcome, or are not so significant as to outweigh the advantages of communications procedures. We maintain that providing an avenue for an independent expert body to evaluate allegations that a State Party has failed to give effect to its obligations under the Convention has the potential to provide redress for individual grievances, to stimulate changes in discriminatory laws and practices, and to create greater public awareness of international human rights standards relating to discrimination against women. The adoption of such a procedure would make a significant additional contribution to the existing mechanisms for the implementation of human rights presently available within the U.N. system.

The procedures proposed in the Maastricht draft are based on existing international models which have made an important contribution to the implementation of international human rights standards. Each of the proposed procedures offers a different approach to enhancing the implementation of the obligations assumed by States Parties to the Convention, and different issues and types of complaints may arise under the two mechanisms.

B. Existing Individual Communications Procedures

At present, three out of the six major U.N. human rights treaties in force vest their supervisory bodies with jurisdiction to receive and consider individual complaints.⁵⁴

54. At the regional level, individual and interstate procedures are included in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights], and the American Convention on Human Rights: "Pact of San José, Costa Rica," adopted Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention on Human Rights]. The African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982), contains an interstate communications procedure, as well as a procedure for considering communications which evidence serious or massive violations of human or peoples' rights. Charter on the Rights and Welfare of the African Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), opened for signature June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995), also make provision for individual complaints. Within the framework of the International Labour Organization, "individual" complaints procedures (under which a complaint may be made by a workers' organization or

The International Convention on the Protection of All Migrant Workers and Members of Their Families (the MWC),⁵⁵ which is not yet in force, also establishes such a procedure. The possible adoption of an individual complaints procedure for the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant)⁵⁶ has been under consideration by the Committee on Economic, Social and Cultural Rights in recent years,⁵⁷ as has the adoption of a communications procedure of limited scope to the Convention on the Rights of the Child (Children's Convention).⁵⁸

an organization of employers) and interstate complaints procedures exist, as well as a procedure which can be initiated by the Governing Body of the ILO on its own motion. Instrument for the Amendment of the Constitution of the International Labour Organization, *adopted* Oct. 9, 1946, art. 26, 15 U.N.T.S. 35, 86 [hereinafter ILO Constitution]. For a positive assessment of the impact of the various ILO procedures, see Klaus Samson, *The Standard-Setting and Supervisory System of the International Labour Organization*, in *SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE* 115, 142-44 (Krzysztof Drzewicki et al. eds., 1994).

55. MWC, *supra* note 49.

56. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Economic Covenant].

57. See generally MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 98-102 (1995); RIGHT TO COMPLAIN, *supra* note 39.

58. Convention on the Rights of the Child, Nov. 29, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989), *reprinted* in 28 I.L.M. 1448 (1989) (entered into force Sept. 2, 1990). The Commission on Human Rights has recently considered the question of an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts. A proposal for the inclusion of an inquiry procedure similar to that contained in the Convention against Torture was made by Poland. *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts*, Comm'n on Hum. Rts., 51st Sess., Agenda Item 24, ¶¶ 189-194, U.N. Doc. E/CN.4/1995/96 (1995). Discussions on the possible adoption of an optional protocol to the Children's Convention dealing with the sale of children, child prostitution and child pornography are also proceeding in the Commission on Human Rights, but the only implementation mechanism proposed is reporting to the Committee on the Rights of the Child. See *Report of the Working Group on the Question of a Draft Optional Protocol to the Convention on the Rights of the Child Dealing with the Sale of Children, Child Prostitution and Child Pornography, as well as the Basic Measures Needed for Their Prevention and Eradication*, Comm'n on Hum. Rts., 51st Sess., Agenda Item 24(d), U.N. Doc. E/CN.4/1995/95 (1995). The adoption of a complaints mechanism under the European Social Charter has also been under consideration. See *Request for an Opinion from the Comm. of Ministers on the Draft Second Additional Protocol to the European Social Charter*, Parl. Ass., Doc. No. 6730 (1993). See generally D.J. Harris, *A Fresh Impetus for the European Social Charter*, 41 INT'L & COMP. L.Q. 659, 673-74 (1992). The Additional Protocol was adopted on June 22, 1995

The existence of individual communications procedures under international and regional treaties currently in force, and the proposed new procedures, suggest that there is a consensus on the importance of such an individual complaints procedure to supplement reporting as a means of promoting and monitoring the implementation of international human rights treaties. This belief underlies the existing procedures of the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), and the Racial Discrimination Convention, and has been advanced in support of proposals that an individual complaints procedure be adopted for the Economic Covenant. While the impact of international procedures may appear limited, the experience of the Human Rights Committee under the ICCPR, as well as that of other bodies exercising a similar competence, has had a beneficial impact on the development of human rights standards and their implementation at the national level, as well as leading to the resolution of a number of individual complaints.

An individual communications procedure would contribute to the implementation of the Convention's goals by providing the possibility for specific redress in individual cases and by affording the opportunity for development by the Committee of a detailed jurisprudence of these goals. This goal would help to bring about changes to laws and practices which presently discriminate against women. The development of a body of case law under the Convention would assist States Parties in determining the content of their obligations under the Convention and thus assist them in implementing those obligations.

Rein Müllerson, a former member of the Human Rights Committee, has identified three different functions which individual complaints procedures may, in principle, promote:

[F]irst, as a result of considering such a complaint an individual, whose rights have been violated, may have a remedy

and opened for signature on November 9, 1995. 34 I.L.M. 1453 (1995). There are also proposals for the inclusion of a guarantee of the right of women and men to equality in the European Convention on Human Rights, which would extend the present justiciable guarantee to all categories of rights. *See* Steering Committee for Equality between Women and Men: Reasoned Proposal on a Fundamental Right of Women and Men to Equality for Inclusion in a Protocol to the European Convention on Human Rights, CDEG(94)3 addendum I.

against the wrong suffered by him, and the violation could be stopped and/or compensation paid, etc.; second, considering a complaint may result not only in a remedy for the victim of the violation, whose complaint has been considered, but also in changes to internal legislation and practice; and third, an individual complaint (or more often, a series of complaints) may serve as evidence of systematic and/or massive violations of certain rights in a given country.⁵⁹

However, Müllerson is of the opinion that in practice an individual complaint procedure serves only the second function.⁶⁰ In a similar vein, Bernhard Graefrath, another former member of that Committee, maintains that such a procedure "can do little" to protect an individual's rights, as it "starts too late, takes too much time, does not lead to binding results and lacks any effective enforcement."⁶¹ While there is a good element of truth in this criticism, the assessment of the worth of such procedures from the perspective of the individual complainant appears unduly negative. Nevertheless, Müllerson, Graefrath, and other commentators accept the importance of such procedures for the elaboration of the legal content of international human rights standards.⁶²

In its discussion of the desirability of an individual complaints procedure under the Economic Covenant, the Committee on Economic, Social and Cultural Rights noted a number of advantages that might follow from the adoption of an individual complaints procedure.⁶³ A number of those advantages apply with similar force to the case of the Women's Convention.

59. Rein Müllerson, *The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR*, in *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 25, 27 (Arie Bloed et al. eds., 1993).

60. *Id.* at 27-28.

61. Bernhard Graefrath, *Reporting and Complaint Systems in Universal Human Rights Treaties*, in *HUMAN RIGHTS IN A CHANGING EAST/WEST PERSPECTIVE* 290, 327 (Allan Rosas & Jan Helgesen eds., 1990); BERNHARD GRAEFRATH, *MENSCHENRECHTE UND INTERNATIONALE KOOPERATION* 170-71 (1988) [hereinafter *INTERNATIONALE KOOPERATION*].

62. *ESCRC Analytical Paper*, *supra* note 1, ¶ 30 ("[T]he vast majority of commentators who have assessed the work of the Human Rights Committee have acknowledged the enormous importance of the procedure [under the (First) Optional Protocol] in terms of its contribution to an enhanced understanding of the normative implications of many of the provisions contained in the Covenant.").

63. *Id.* ¶¶ 33-38.

They include:

- 1) bringing concrete and tangible issues into relief;
- 2) the focus on a particular case provides a framework for inquiry which is otherwise absent, permitting a detailed examination of legislation and facts in context;
- 3) the possibility that complaints will be brought to an international forum should encourage governments to ensure that more effective local remedies are available;
- 4) the availability of a potential international remedy may provide an incentive to individuals and groups to formulate some of their claims in more precise terms in relation to the provisions of the Convention, a development which could contribute towards bridging the gap between human rights concerns narrowly construed and broader social justice issues; and
- 5) the possibility of an adverse finding would give the rights concerned a salience in terms of the political concerns of Governments that those rights very largely lack at present.

The consideration of individual cases provides a supervisory body with the opportunity to interpret human rights guarantees in a manner which general discussions and exegeses do not provide. For example, although the Human Rights Committee has in its general comments explained the content of many of the rights contained in the ICCPR, these comments tend to provide only very limited assistance in the resolution of individual cases at the national level. On the other hand, the Human Rights Committee's case law, as well as the decisions of other international and regional bodies with a complaints jurisdiction, have often proved of much greater utility in that regard.⁶⁴ The detailed general recommendations of CEDAW, some of which are extremely useful, suffer from the same limitations in this context as the general comments of the Human Rights Committee.

An individual communications procedure would enhance the profile of the Convention and CEDAW, thereby generating greater awareness of the obligations of States Parties, particu-

64. Cf. Opsahl, *supra* note 16, at 440; *ESCRC Analytical Paper*, *supra* note 1, ¶¶ 28, 31. This has certainly been the case in Hong Kong, where the ICCPR has been directly incorporated as part of domestic law.

larly at the national level.⁶⁵ Again, the experience of the Human Rights Committee is instructive here. Communications to and resolution of those communications by the Human Rights Committee attract far more attention at all levels, including among the press and public, than the reports submitted by States Parties pursuant to article 40 of the ICCPR.

C. *Justification for an Inquiry Procedure*

The Maastricht draft proposes the adoption of an inquiry procedure based on the one contained in article 20 of the Torture Convention, which itself draws on other models, including International Labour Organization (ILO) inquiry procedures and the Resolution 1503 procedure.⁶⁶ The purpose of this inquiry procedure is to provide the Committee with the power to investigate a situation in which it is clear that there are grave or systematic violations of the Convention in a State Party. The proposed procedure, which could be used to address serious one-off violations, such as *sati*, or widespread violations such as trafficking in women, or violations of women's human rights in situations of armed conflict, would allow for particularly egregious cases or large-scale abuses to be addressed on a timely basis.

There are a number of reasons which justify the inclusion of an inquiry procedure in the draft. First, individual communications may fail to reflect the systematic nature of widespread violations. Second, in situations of very serious or widespread violations, individuals or groups may face acute dan-

65. *But see ECSRC Analytical Paper, supra* note 1, ¶ 12.

66. Other models drawn on include the communications procedure established by UNESCO Executive Board. *See Evaluations of the Procedures Adopted by the Executive Board for the Examination of Communications Concerning Violations of Human Rights Falling Within UNESCO's Fields of Competence: 104 EX/Decision 3.3*, United Nations Educational, Scientific and Cultural Organization Executive Board, 120th Sess., Decision 120 EX/17, Annex III, Agenda Item 5.5.1, U.N. Doc. 23 C/17 (1984) (104 EX/Decision 3.3 is set forth in Annex III) [hereinafter *UNESCO Decision*]. This permits UNESCO to consider not just cases involving individual violations of the rights within UNESCO's sphere of competence, but also "questions of massive, systematic or flagrant violations of human rights resulting either from a policy contrary to human rights, applied *de jure* or *de facto* by a state, or from an accumulation of individual cases forming a consistent pattern." *The Administration of Justice and The Human Rights of Detainees: Report of the Secretary-General*, Comm'n. on Human Rights, 47th Sess., Agenda Item 10, at 12, U.N. Doc. E/CN.4/Sub.2/1995/17/Add.1 (1995).

gers of reprisal or practical constraints on their ability to submit communications.⁶⁷ Third, the experience of the Committee against Torture (CAT) suggests that an inquiry procedure allows an international body to address a broader range of issues than it is able to in the context of individual communications. Finally, again drawing on the experience of the CAT, an inquiry procedure provides the international body with an opportunity to recommend measures to combat the structural causes of violations. CAT's first report, for example, set out a series of broad recommendations, which included the enforcement and amendment of laws and the establishment of national machinery to combat torture, as well as other detailed measures.⁶⁸

D. An Interstate Procedure

Although the draft put before the Maastricht meeting did include an interstate procedure, such a procedure was not included in the final Maastricht draft. As existing interstate procedures in UN human rights treaties have never been utilized, the meeting decided that inclusion of such a procedure would amount to an essentially empty gesture.

It is certainly the case that, to date, existing interstate procedures under other U.N. human rights treaties have not been used.⁶⁹ Moreover, the limited interstate mechanism in

67. For example, the organization which has been most prominent in activating the article 20 procedure under the Torture Convention has been Amnesty International. Such international NGOs — which are often in a better position to document systematic violations of rights without fear of reprisal — may not have standing to submit complaints under the individual communications procedure, while individuals and groups with standing may not be able to do so, either for lack of resources or for fear of reprisal.

68. Summary account of the proceedings concerning the inquiry on Turkey, *Report of the Committee Against Torture*, U.N. GAOR, 48th Sess., Supp. No. 44, U.N. Doc. A/48/44/Add.1 (1993). See also Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, in *A CRITICAL APPRAISAL*, *supra* note 2, at 580, 609-11; Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note 2, at 257, 273-74.

69. See generally Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249 (1988). The procedure under the ICCPR has been described by a former member of the Human Rights Committee, Judge Rosalyn Higgins, as "a Pandora's Box, which all parties prefer to keep shut." Rosalyn Higgins, *Encouraging Human*

the Women's Convention itself has never been used and is subject to a large number of reservations. It well may be that factors which have inhibited recourse to these procedures in the past would affect any interstate procedure established under the Women's Convention.

Nevertheless, despite the lack of use of existing interstate procedures, they have been included in other treaties recently adopted (for example, the Torture Convention⁷⁰ and the MWC⁷¹). Interstate procedures have been used both within the ILO and the European human rights systems.⁷² The recent trend towards greater recourse to binding international adjudication within the International Court of Justice also suggests that there is more promise in an interstate procedure than might have been thought a decade ago. It may be unfortunate, therefore, that an interstate procedure was not included in the Maastricht draft.⁷³ Excluding the current faint pos-

Rights, 2 L.S.E. Q. 249, 254 (1988).

70. Torture Convention, *supra* note 49, art. 21.

71. MWC, *supra* note 49, art. 76, 30 I.L.M. at 1531.

72. See Andrew Byrnes, *The Committee against Torture*, in A CRITICAL APPRAISAL, *supra* note 2, at 509, 533-34.

73. There are two main models for such a procedure. The first model is the one which appears in existing United Nations human rights treaties, see, for example, article 41 of the ICCPR, *supra* note 10, 999 U.N.T.S. at 182, and article 21 of the Torture Convention, *supra* note 49, as well as articles 11 to 13 of the Racial Discrimination Convention, *supra* note 9, 660 U.N.T.S. at 226-30.

These procedures are essentially a *conciliation or mediation procedure*, in which the relevant committee offers its good offices in order to help bring about a settlement between the States Parties concerned. If this cannot be achieved, the matter may then be referred to an ad hoc conciliation commission which has a similar function. If still no settlement is possible, neither the Committee nor the ad hoc commission is empowered to express its opinion on whether a violation of the Convention has occurred, nor is provision made for reference to binding adjudication by a body such as the International Court of Justice (ICJ).

The second model and the one embodied in the draft before the Maastricht meeting is that contained in articles 26 to 34 of the ILO Constitution. Under this procedure the supervisory body is given conciliation or mediation functions, but receives in addition a substantive power to express a view on the merits and to make recommendations to the State Party. The State Party concerned is expected to comply with these recommendations, unless it proposes to refer the matter to the ICJ. ILO Constitution, *supra* note 54, arts. 26-34, 15 U.N.T.S. at 84-93.

The significant difference between a procedure drawing on the ILO model and existing models is that the role of the Committee would not be limited to conciliation or mediation, but would extend to the formulation of a view on the merits, with which States Parties would be obliged to comply. The procedure under the Racial Discrimination Convention provides that the conciliation commission may make recommendations; however, the States Parties are free to accept or

sibility of interstate complaints would mean that the Women's Convention is once again not placed on a par with existing human rights treaties, although it should be noted that the current proposals for a communications procedure for the Economic Covenant contain neither an interstate nor an inquiry procedure. On the other hand, that interstate procedures are rarely used suggests the procedures may be unsatisfactory and thus that a new model may be required.⁷⁴ In all likelihood, inclusion of such a procedure would have considerably lengthened any draft protocol and complicated the process of persuading states to adopt a protocol to the Convention.

IV. GENERAL CONCERNS

The elaboration and adoption of any complaints procedure to the Women's Convention is likely to raise, yet again, the issue of the international community's real commitment to the rhetoric of universality, indivisibility, and interdependence of human rights generally, and the inalienability, integrity, and indivisibility of the human rights of women in particular⁷⁵—issues most recently addressed at the Fourth World Conference on Women in September 1995. While discussion of the proposed protocol is likely to focus on legal and technical matters apparently unrelated to states' avowed commitment to strengthening the enforcement mechanisms for the human rights of women, it is likely that some states at least will rely on these arguments to conceal a fundamental unwillingness to give effect to that commitment in practice.

In this section of the article, we review the major concerns

reject these recommendations. Racial Discrimination Convention, *supra* note 9, art. 13(2), 660 U.N.T.S. at 230.

The existing U.N. procedures have been criticized for their failure to include such a power, and in our view a procedure along the lines of the ILO procedure is to be preferred. The procedure proposed in the draft before the Maastricht meeting was, in fact, similar to that which was originally proposed by the Commission on Human Rights for the First Optional Protocol to the ICCPR, but that proposal was watered down during the drafting process. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 587-89 (1993).

74. Fried van Hoof, *Explanatory Note on the Utrecht Draft Optional Protocol*, in *RIGHT TO COMPLAIN*, *supra* note 39, at 147, 158-59, suggests in the context of the Economic Covenant adoption of a protocol involves an attempt to "juridify" the issue, and that a system of inter-state communications "might very well produce the opposite result."

75. *Vienna Declaration*, *supra* note 31, ¶¶ 5, 18.

that are likely to be raised. These concerns include the question of justiciability, the fact that many violations of women's human rights occur at the hands of private individuals, and the question of whether a complaints procedure is inappropriate or should be limited because of the impact of custom, culture, and religion in the context of women's rights. We then consider the relevance of reservations to any complaints procedure.

A. *The Justiciability Issue*

A major concern relating to any proposed optional protocol to the Convention is whether the obligations accepted by States Parties to the Convention are ones which can or should be made subject to communications procedures, particularly of the nature proposed. In other words, if an optional protocol establishes a procedure for considering complaints against States Parties alleging a failure to fulfill their obligations, these obligations must be capable of measurement or determination by that body.⁷⁶ Many of the obligations in the Convention leave a large measure of discretion to States Parties. This

76. The question of whether the Convention's obligations are "justiciable" from an international perspective is analytically distinct from whether it will be considered "self-executing" or directly applicable in whole or part under national law. See Marc J. Bossuyt, *The Direct Applicability of International Instruments on Human Rights (with special reference to Belgian and U.S. law)*, 15 *RÉVUE BELGE DE DROIT INT'L* 317, 317-20 (1981). The Committee on the Elimination of Racial Discrimination, for example, notes that some of the provisions of the Racial Discrimination Convention may not be self-executing under national law, but this does not lead it to suggest that they would not be amenable to review under the individual complaints procedure under article 14 of that Convention. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, *THE FIRST TWENTY YEARS: PROGRESS REPORT OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION*, at 24-25, U.N. Doc. HR/PUB/91/4 (1991). Similarly, the Committee on Economic, Social and Cultural Rights accepts that the unwillingness of some national courts to enforce the provisions of the Covenant does not mean that the Committee would not be able to scrutinize the performance of States Parties at the international level. *ESCR Analytical Paper*, *supra* note 1, ¶¶ 24-35. Of course, some of the same factors which might lead a domestic court to refuse to enforce a treaty provision directly—such as vagueness—may well make it non-justiciable at the international level. However, the factors are not identical. For example, a treaty provision that requires a state to enact implementing legislation might be justiciable as a matter of international law, but may not give rise to an enforceable individual right under many national systems of law. See also Martin Scheinin, *Direct Applicability of Economic, Social and Cultural Rights: A Critique of the Doctrine of Self-Executing Treaties*, in *SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE*, *supra* note 54, at 73, 79-85.

discretionary element leads to arguments that the obligations imposed are largely a matter of self-regulation and self-judgment by individual States Parties, and are thus too open-ended to be the subject of meaningful external scrutiny.⁷⁷ The element of discretion also leads to arguments that, because of the claimed difficulty of meaningfully assessing whether a state has violated or failed to fulfill these obligations, to subject them to a communication procedure which requires a "decision" on that issue will tend to bring the process of enforcement under other procedures, which deal with obligations which may appear to be more precise, into disrepute.⁷⁸

This concern—which, broadly speaking, may be termed the justiciability issue—has also arisen in the context of the Economic Covenant, and more generally in the discussion of the nature of economic, social, and cultural rights (which discussion has considered the appropriateness of designating these as "rights" at all). From the outset, it should be emphasized that not all of the obligations contained in the Convention are discretionary despite the views expressed by some commentators.⁷⁹ Accordingly, many provisions of the Convention impose

77. See, e.g., Delbrück, *supra* note 20, at 261-62.

78. Cf. Matti Pellonpää, *Economic, Social and Cultural Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 855, 871-72 (R. St. J. Macdonald et al. eds., 1993).

79. One commentator, for example, maintains that "this Convention is promotional and programmatic; it does not impose immediately binding legal obligations but requires parties to take 'all appropriate measures . . .'" WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 193 (1983). However, this assessment appears to overlook those provisions of the Convention which plainly do impose immediate obligations, and represents the more traditional view of "programmatic" obligations which has been fundamentally challenged since McKean wrote. See Yuji Iwasawa, *The Impact of International Human Rights Law on Japanese Law: The Third Reformation for Japanese Women*, 34 *JAPANESE ANN. INT'L L.* 21, 26-28 (1991). The Swiss government, in its message to the Swiss legislature proposing ratification of the Convention recognizes that a number of articles may be capable of direct application as part of Swiss law. *Botschaft betreffend das Übereinkommen von 1979 zur Beseitigung jeder Form von Diskriminierung der Frau* [Message concerning the Convention of 1979 on the Elimination of All Forms of Discrimination against Women] (Aug. 25-27, 1995). However, the argumentation does not discuss the very clear wording of article 2, nor does it address the developments in thinking about the nature of economic, social and cultural rights and obligations of progressive implementation. Similarly, the Letter of Submittal to President Carter from the United States Department of State, which accompanied the President's Letter of Transmittal to the United States Senate in 1980 recommending ratification of the Convention by the United States, also claimed that "[v]irtually all the articles of the Convention are, in our

obligations which are clearly justiciable. However, other provisions may not at first glance appear to be justiciable to those whose views are predominantly shaped by the traditional thinking that only classical civil and political rights guarantees are justiciable. We argue, however, that such provisions are in fact justiciable.

There have been a number of developments in international human rights law that challenge this "traditional" approach and which should, therefore, help to allay concerns relating to the justiciability of the provisions of the Women's Convention. First, considerable progress has been made in the analysis of the nature of economic, social, and cultural rights. Second, obligations of progressive implementation have been shown to be amenable to external scrutiny.⁸⁰

Traditional ideas about the difference in nature of civil and political rights, and economic, social, and cultural rights have been shown to be oversimplistic in that they unduly emphasize the negative dimensions of the former category, while neglecting the positive steps that states must take to afford those rights. Conversely, there has been an overemphasis on the positive obligations of the state in the context of economic,

judgment, not self-executing and would probably not be construed as such since they appear to contemplate that legislative or other implementing action be taken by the parties (beyond ratification) in order to carry out the Convention's provisions." Letter of Submittal by the Secretary of State to the President (Oct. 23, 1980), reprinted in MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* 135-38 (1987). These national assessments, like similar assessments by the Austrian and German governments referred to in the Swiss government's message, may well be influenced by the domestic context in which they are made, namely the existence of a political imperative to minimize the impact of the provisions of treaties on existing domestic law, especially where the treaties will override that law if inconsistent with it and found to be directly applicable or self-executing. Botschaft, *supra*, at 27.

80. As the Inter-American Court of Human Rights has commented:

The dividing line between those economic, social and cultural rights that may come to enjoy an international protection on a regional basis in which the Inter-American Court may intervene, and the remaining rights, which cannot today be covered by a judicial protection system that is part of the Court's adjudicatory jurisdiction, is not an immutable and fixed line resulting from an ontological distinction. Rather, in large part, the dividing line will be the product of the historical circumstances surrounding the development of the law.

Observations of the Inter-American Court of Human Rights on the Draft Additional Protocol to the American Convention on Human Rights, 1986 INTER-AM. Y.B. HUM. RTS. 440, ¶ 11, at 446.

social, and cultural rights, at the expense of recognition that these rights may also be promoted by insisting that the state refrain from taking certain actions.⁸¹ A more nuanced model of state obligation has now emerged. A state's obligation in relation to all categories of rights may be seen as involving different types of obligations which can be fulfilled variously by positive action, by refraining from acting, or by creating an environment in which rights can be achieved. A commitment to elucidating the content of a number of key economic, social, and cultural rights, such as the right to food, housing⁸² and health, and an exploration of the use of statistical indicators, has belied the traditional claim that these rights are too vague and insufficiently detailed to admit of measurement.

A popular typology identifies three, or perhaps four, dimensions of the obligations of a state in relation to any given human right. These dimensions have been described in the context of economic, social, and cultural rights (in particular the right to food) as:

- 1) at a primary level, the obligation to *respect*, which "calls for the non-interference by the State, in all cases where the individuals, or groups, can take care of their own needs"
- 2) at a secondary level, the obligation to *protect*, which "implies the responsibility of States to counteract or prevent activities and processes which negatively affect [the enjoyment of the right]"

81. See, e.g., G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in *THE RIGHT TO FOOD* 97 (P. Alston & K. Tomasevski eds., 1984); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 *OSGOODE HALL L.J.* 769, 832-41 (1989); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUM. RTS. Q.* 156 (1987); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in the New South African Constitution*, 141 *U. PA. L. REV.* 1, 72-84 (1992); *The Realization of Economic, Social and Cultural Rights, Final Report submitted by Mr. Danilo Türk, Special Rapporteur*, Comm'n on Hum. Rts., 44th Sess., Agenda Item 8, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992); CRAVEN, *supra* note 57, at 106-14; ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW TO USE IT* 99-102 (1994).

82. Scott Leckie, *The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach*, 11 *HUM. RTS. Q.* 522 (1989); *The Right to Adequate Housing: Progress Report Submitted by Mr. Rajindar Sachar, Special Rapporteur*, Comm'n on Hum. Rts., 45th Sess., Agenda Item 8, U.N. Doc. E/CN.4/Sub.2/1993/15 (1993).

3) at a tertiary level, the obligation to *assist* and to *fulfill*, that is to provide to those who do not have the resources to provide for themselves.⁸³

This analysis has been bolstered by the many recent developments in the jurisprudence of international and regional human rights bodies in which the positive obligation side of civil and political rights, traditionally described as "negative" rights, has been stressed.⁸⁴ Not only has it been pointed out that many of the classic rights which require the state only to refrain from infringing conduct also require the expenditure of considerable social resources to provide the relevant institutions (the right to a fair trial before an independent and impartial tribunal, for example, requires the allocation of considerable resources in order to erect and maintain a court system), but also that a state may be required to take positive steps to ensure that a right is enjoyed, or protected against infringement by private individuals. These developments have broken down the rigid characterizations of civil and political rights, and economic, social, and cultural rights as inherently different conceptual categories. It has also been shown that many aspects of economic, social, and cultural rights are in fact dealt with within the framework of existing civil and political rights guarantees, largely because these guarantees are generally

83. ASBJØRN EIDE, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT ¶¶ 169-81, U.N. Sales No. E.89.XIV.2 (1989); Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 21, 37-38 (Asbjørn Eide et al. eds., 1995); Asbjørn Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, *supra*, at 89, 99-105 (proposing an additional dimension in this context, the duty to be the provider). In his application of this framework to the right to housing, Scott Leckie adds the obligation to *promote* the right, which "compels governments to recognize the multifaceted human rights dimensions of housing and to take steps to ensure that no measures are taken with the intention of deliberately eroding the legal and practical status of this right." Scott Leckie, *The Right to Housing*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, *supra*, at 107, 113-14; Cees Flinterman, *The Protection of Economic, Social and Cultural Rights and the European Convention on Human Rights*, in 3 THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE 165 (Rick Lawson & Matthijs de Blois eds., 1994); CRAVEN, *supra* note 57, at 106-14.

84. See Andrew Clapham's exhaustive study, HUMAN RIGHTS IN THE PRIVATE SPHERE 188-244 (1993). See also Veli-Pekka Viljanen, *Abstention or Involvement? The Nature of State Obligations under Different Categories of Rights*, in SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE, *supra* note 54, at 43, 52-60; Scott & Macklem, *supra* note 81, at 43-71.

accompanied by a complaints procedure.⁸⁵

Two aspects of these developments are of particular relevance to concerns about the justiciability of many of the obligations under the Women's Convention. First, claims that economic, social, and cultural rights are too vaguely formulated to be justiciable have been seriously challenged. Indeed, international and national cases convincingly show that many economic, social and cultural rights are justiciable in important respects.⁸⁶ Second, the claim that the manner in which a state carries out its obligations of result or of progressive implementation, such as the obligation to take "necessary" or "appropriate" steps to achieve a stated goal, is not capable of meaningful external scrutiny by international bodies has also been called into question. It has been maintained that obligations of pro-

85. See, e.g., Leckie, *supra* note 83, at 116-18; Martin Scheinin, *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, *supra* note 83, at 41, 44-52.

86. It may also be noted that the Committee on Economic, Social and Cultural Rights has on occasion stated, following the review of States Parties' reports, that it considers that the position in a state is inconsistent with provisions of the Economic Covenant. See, e.g., *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations on the Report of the United Kingdom*, Comm. on Economic, Social and Cultural Rights, ¶ 26, U.N. Doc E/C.12/1994/19 (1994) (stating that the separation of families under Hong Kong immigration law was "inconsistent with obligations under article 10 of the Covenant"). See Andrew Byrnes, *Will the Government Put Its Money Where its Mouth Is?: The Verdict of the UN Committee on Economic, Social and Cultural Rights on Hong Kong's Human Rights Record*, 25 HONG KONG L.J. 156 (1995). In similar and indeed more pronounced fashion, the Committee of Independent Experts established to review reports of States Parties under the European Social Charter regularly pronounces on whether it considers that a state has "complied" or failed to comply "fully" with the obligations it has assumed under the Charter. Interestingly, the Committee also allows itself a third option, a conclusion that the Committee is "unable to say" whether the state is or is not complying with the provisions. For example, the Committee was prepared to find that a state had not complied fully with obligations to provide for additional paid holidays or reduced working hours for workers in dangerous or unhealthy occupations, EUROPEAN SOCIAL CHARTER: COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS XI-2, at 59 (1991) [hereinafter CIE, CONCLUSIONS], or to provide adequate social and medical assistance. *Id.* at 119. Similarly, the Committee concluded that states had not fully complied with obligations to issue health and safety regulations to ensure safe and healthy working conditions for the self-employed, EUROPEAN SOCIAL CHARTER: COMMITTEE OF INDEPENDENT EXPERTS, CONCLUSIONS XX-1, at 82 (1992); to ensure that children in full-time education should not be employed in such work as would deprive them of the full benefit of their education, *id.* at 136; and to provide adequate social security benefits for women taking maternity leave, *id.* at 151. For further examples from the practice of the Committee, see Scott & Macklem, *supra* note 81, at 101-05.

gressive implementation are not entirely open-ended obligations whose interpretation is solely in the hands of the state.⁸⁷ Rather, it has been argued that the performance of such obligations can be monitored. The Committee on Economic, Social and Cultural Rights has been in the forefront of this work, noting for example in its General Comment 1⁸⁸ that the obligations under the Economic Covenant, while permitting in many cases progressive implementation, also oblige States Parties to take immediate, identifiable steps in pursuit of the goals set out in the Economic Covenant. Furthermore, whether the means chosen to work towards the implementation of a right are discriminatory is also a justiciable question.⁸⁹

The greater recognition given to the positive dimensions of states' obligations in relation to civil and political rights also shows that the assessment of whether a state has discharged its obligations may involve an assessment similar to that required to determine whether a state has carried out its obligations "to take appropriate steps" under the Women's Convention. One example of this is the obligation of due diligence incumbent on a State Party under customary and conventional international law to protect individuals against violations of their human rights by other individuals. In the *Velásquez Rodríguez* case,⁹⁰ the Inter-American Court of Human Rights held that the obligation of Honduras to ensure the enjoyment

87. The report by the International Human Rights Law Group argues in relation to articles 2(e) and (f) and the other substantive articles of the Convention that "it is for States Parties to determine which measures are appropriate to implement the provisions of the Convention." INTERNATIONAL HUMAN RIGHTS LAW GROUP, U.S. RATIFICATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: AN OVERVIEW AND ANALYSIS OF U.S. LAW RELATING TO THE OBLIGATIONS OF THE WOMEN'S CONVENTION 27 (1994). While correct as stated, the inference cannot be drawn from the materials cited in the Law Group's report that the question of appropriateness is solely and finally to be determined by the State Party concerned, and not subject to international supervision.

88. *Committee on Economic, Social and Cultural Rights, General Comment 1 (Third Session, 1989): Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 43-45, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

89. *Committee on Economic, Social and Cultural Rights, General Comment 3 (Fifth Session, 1990): Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶¶ 2, 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994) [hereinafter *General comment 3*].

90. *Velásquez Rodríguez Case*, 4 Inter-Am. Ct. H.R. (ser. C) (1988).

of various rights included an obligation:

166. . . . to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.⁹¹

For an international body to evaluate whether a State Party has organized its governmental apparatus to ensure the enjoyment of human rights and whether it has taken "reasonable" steps to prevent and punish violations raises complex issues similar to the type commonly involved in pronouncing on violations of economic, social, and cultural rights. However, there does not appear to be much difference between an obligation to take reasonable steps, and an obligation to take "necessary" or "all appropriate" measures to eliminate discrimination (both of which involve an assessment of what steps are reasonably available to a State Party in its particular circumstances). Thus, the determination of many civil and political rights may involve an assessment very similar to that involved in assessing whether a State Party has given effect to an economic, social, or cultural right. Economic, social, and cultural rights have no monopoly on factual and legal complexity may be seen from cases before the Human Rights Committee such as the *Lubicon Lake Band* case in which the Committee was required to consider whether rights guaranteed by the ICCPR had been violated by a State Party where expropriation of traditional lands of the Lubicon Lake Band for oil and gas exploration was causing irreparable injury to the Band by destroying its traditional way of life and means of subsistence and livelihood.⁹²

91. *Id.* ¶¶ 166, 174.

92. See *Bernard Ominayah, Chief of the Lubicon Lake Band v. Canada*, Com-

1. The Justiciability of Guarantees of Non-Discrimination

The Women's Convention does not consist of obligations to ensure the enjoyment of independent rights by women, but rather obliges States Parties to afford women equality with men in the enjoyment of rights and to eliminate discrimination against women. Guarantees of equality and non-discrimination are widely accepted as justiciable at the international and national level, although in concrete cases they may give rise to complex questions of fact and difficult evaluations.

Guarantees of equality and non-discrimination have been accepted as justiciable in relation both to civil and political rights, and economic, social, and cultural rights.⁹³ Obligations of non-discrimination on the basis of race guaranteed under the Racial Discrimination Convention cover all categories of rights and are justiciable under the optional individual complaints procedure established by article 14 of that Convention.⁹⁴ Similarly, the guarantee of equality before the law and equal protection of the law contained in article 26 of the ICCPR—which has been held to be an independent guarantee of equality and non-discrimination extending to economic, social, and cultural rights—has been accepted as justiciable,⁹⁵ as is shown by the case law under the First Optional Protocol to the ICCPR.⁹⁶ The Committee on Economic, Social and Cul-

munication No. 167/1984, Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Annex IX, at 1, U.N. Doc. A/45/40 (1990). Similarly complex evidence was before the European Court of Human Rights in *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985), in which the Court had to decide whether discrimination in U.K. immigration law and practice was reasonable.

93. See Torkel Opsahl, *Equality in Human Rights Law With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights*, in FORTSCHRITT IM BEWUSTSEIN DER GRUND UND MENSCHENRECHTE 51-67 (Manfred Nowak et al. eds., 1988); Scott & Macklem, *supra* note 81; Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990); SACHA PRECHAL & NOREEN BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY (1990).

94. Racial Discrimination Convention, *supra* note 9, art. 14, 660 U.N.T.S. at 230-32.

95. ICCPR, *supra* note 10, art. 26, 999 U.N.T.S. at 179.

96. Two separate concurring opinions of members of the Human Rights Committee argue that the content of the obligation of non-discrimination in relation to economic, social and cultural rights may be different than in the case of civil and political rights. *Sprenger v. Netherlands*, Communication No. 396/1990, Report of the Human Rights Committee, U.N. GAOR, 47th Sess., Supp. No. 40, at 311, U.N. Doc. A/47/40 (1994); *Oulajin & Kaiss v. Netherlands*, Communications Nos.

tural Rights (Economic Committee) has also observed that the guarantee of the enjoyment of rights without discrimination contained in article 2(3) of the Economic Covenant "will often be promoted, in part, through the provision of judicial or other effective remedies."⁹⁷

However, the Convention does not merely provide that a State Party shall accord women "the right to equality and non-discrimination" in all areas of public and private life, although some of its provisions do impose specific obligations of this sort. Many of the obligations imposed by the Convention involve an obligation to take "appropriate" steps towards the goal of eliminating discrimination against women. The issue, thus, is not whether guarantees of non-discrimination are themselves justiciable—as they self-evidently are—but whether obligations to work towards the elimination of discrimination are justiciable.

While it must be recognized that obligations to take appropriate measures may be more difficult to monitor than more precisely circumscribed rights, meaningful scrutiny of a state's performance in implementing its obligations under the Convention is nevertheless possible.⁹⁸ The supervisory body will inevitably have to defer to the state's margin of judgment in determining what is "appropriate" in many cases, but it *will* be able to assess at least whether a state has taken the minimum steps necessary to demonstrate a bona fide fulfillment of its obligation. This is particularly true considering that the goal of equality and non-discrimination is not vague or open-ended, but is itself a justiciable guarantee.

406/1990 and 426/1990, *Report of the Human Rights Committee*, U.N. GAOR, 48th Sess., Supp. No. 40, Vol. II, at 131, U.N. Doc. A/48/40 (1993). Nevertheless, those members apparently still considered the obligation to be justiciable in relation to economic, social and cultural rights.

97. *General Comment 3*, *supra* note 89, ¶ 5; CRAVEN, *supra* note 57, at 181-82.

98. See, e.g., ICCPR, *supra* note 10, art. 2(2), 999 U.N.T.S. at 173 (requiring States Parties to take "necessary steps" to ensure the rights guaranteed in the Covenant). However, the Human Rights Committee has held that complaints that a state has failed to fulfil its obligations under article 2 cannot be considered in isolation under the First Optional Protocol. *M.G.B. v. Trinidad and Tobago*, *Communication No. 268/1987*, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. II, at 157, U.N. Doc. A/45/40 (1990); *S.E. v. Argentina*, *Communication No. 275/1988*, *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. II, at 159, U.N. Doc. A/45/40 (1990).

Similar deference to the judgment of a state on the appropriateness of measures adopted often forms part of the process of determining whether a state has infringed upon civil or political rights traditionally considered justiciable. For example, when determining whether an infringement of a protected right is permissible under the European Convention on Human Rights or the ICCPR, the Strasbourg organs and the Human Rights Committee must determine whether the limitation on a given right is "necessary" to achieve a particular purpose.⁹⁹ This determination may involve assessing what range of options is reasonably open to a state and whether the option chosen falls within that range. This is similar to the process of judging whether the steps taken by a State Party in purported fulfillment of its obligation to eliminate discrimination against women are appropriate measures for the achievement of that goal. In the following section, the major types of obligations imposed by the Convention are examined, and illustrations are given of the ways in which the Committee could determine whether a State Party has given effect to its obligations.

2. The Types of Obligations Imposed by the Convention¹⁰⁰

The obligations contained in the Convention are formulated in a number of different ways and these differences in wording can be of considerable legal significance.¹⁰¹ There are three principal categories of obligation, formulated as follows:

- 1) States Parties shall ensure/shall accord/shall grant the right . . .
- 2) States Parties undertake to . . .

99. In the European Convention on Human Rights context much of this inquiry is carried out under the rubric of the "margin of appreciation," within which contracting states possess discretion to implement potentially discriminatory policies. The boundaries of this margin are not clear nor fixed, but vary according to the circumstances, the subject matter and the background. See R. St. J. MacDonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 77, at 83; see also Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982). The Human Rights Committee, however, generally simply asks whether a measure is "necessary."

100. See generally Rebecca Cook, *State Responsibility for Violations of Women's Rights*, 7 HARV. HUM. RTS. J. 125, 158-69 (1994).

101. See the similar analysis of the differences in wording of the various provisions of the International Covenant on Economic, Social and Cultural Rights in Alston & Quinn, *supra* note 81, at 183-86.

- 3) States Parties shall take all appropriate measures (in order to ensure) . . .

The first category comprises justiciable obligations of the type seen in classical civil and political rights catalogues. The second type of obligation is, we maintain, also justiciable. The third category does not fall into the classical civil and political rights mold, but nonetheless, the obligations imposed are capable of independent external scrutiny, even though they may provide the State Party with a margin of discretion and judgment in determining what measures are appropriate in the national context. While these latter types of obligations will no doubt raise some new interpretive challenges, other international supervisory bodies engage in analogous exercises under their complaint mechanisms. Accordingly, we argue that a state's fulfillment of each category of obligations under the Convention can be meaningfully reviewed.

a. Obligations to Ensure/Accord/Grant a Right

A number of articles of the Convention impose an explicit obligation on States Parties to ensure, grant, or accord a specific right or guarantee of equality, or to ensure that a particular legal situation obtains within their jurisdiction. They include:

- (a) article 9(1) and (2): "States Parties *shall grant* women equal rights with men" in relation to nationality and the nationality of their children and "*shall ensure*" that marriage to a foreigner does not of itself have effects on a woman's nationality.¹⁰²
- (b) article 15(1), (2), (4): "States Parties *shall accord*" to women equality with men before the law, equal legal capacity to men and the same rights in relation to liberty of movement and the freedom to choose a residence and domicile.¹⁰³
- (c) article 16(1): "States Parties . . . in particular *shall ensure*, on the basis of equality of men and women" that women have the same rights as men in a number of matters related to marriage.¹⁰⁴

102. Women's Convention, *supra* note 3, art. 9(1)-(2), 1249 U.N.T.S. at 17 (emphasis added).

103. *Id.* art. 15(1)-(2), (4), 1249 U.N.T.S. at 20 (emphasis added).

104. *Id.* art. 16(1), 1249 U.N.T.S. at 20 (emphasis added). The preambular part

(d) article 7: "States Parties . . . in particular *shall ensure* to women, on the basis of equality of men and women" that women have the right to vote and to be eligible for election, to participate in the formulation of government policy, to hold public office and perform public functions, and to participate in non-governmental organizations and associations.¹⁰⁵

(e) articles 15(3) and 16(2): "States Parties agree that all contracts . . . shall be deemed null and void", "[States Parties have agreed:] [t]he betrothal and marriage of a child *shall have no legal effect*"¹⁰⁶

All the provisions referred to above mandate that states take immediate and concrete steps in order to fulfill the obligations¹⁰⁷ and are accordingly clearly justiciable. For example, whether a State Party has accorded women equal rights with respect to nationality is clearly a justiciable question, answered by determining whether the state has in its laws and administrative practice conferred those rights. These questions have been the subject of international and national litigation.¹⁰⁸ Similarly, the duty to accord equal legal capacity,¹⁰⁹

of article 16(1) commences with the words: "States Parties *shall take all appropriate measures* to eliminate discrimination against women in all matters relating to marriage and family relations," before going on to specify a number of specific rights that must be "ensured." *Id.* (emphasis added). It is a reasonable interpretation of this article that the guarantees of the specific rights mentioned in article 16(1)(a)-(g) are specific ways of achieving that broad goal and that States Parties have accepted a firmer obligation in relation to those specific rights, as is underlined by the undertaking to "ensure."

105. *Id.* art. 7, 1249 U.N.T.S. at 17 (emphasis added). Although the preambular part of article 7 commences with the words: "States Parties *shall take all appropriate measures* to eliminate discrimination against women in the political and public life of the country," it is a reasonable interpretation that the guaranteeing of the specific rights mentioned in article 7(a)-(c) are specific ways of achieving that broad goal and that States Parties have accepted a firmer obligation in relation to those specific rights, as is underlined by the undertaking to "ensure."

106. *Id.* arts. 15(3), 16(2), 1249 U.N.T.S. at 20 (emphasis added).

107. *Cf.* Alston & Quinn, *supra* note 81, at 185-86.

108. See Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, 1984 Inter-Am. Ct. H.R. (Ser. A) No. 4, 79 I.L.R. 282 (1984); *Unity Dow v. Att'y Gen. of Botswana*, [1992] L.R.C. 623 (Ct. App.) (Bots.); *Rattigan v. Chief Immigration Officer of Zimbabwe*, [1994] 1 L.R.C. 343 (Zimb.); *Salem v. Chief Immigration Officer of Zimbabwe*, [1994] 1 L.R.C. 354 (Zimb).

109. *Avellanal v. Peru*, Communication No. 202/1986, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 196, U.N. Doc. A/44/40 (1989) (same formal legal rights to legal personality).

the equal right to choose a residence, and the equal right to choose a domicile are also justiciable.

The obligations under article 7(a) requiring States Parties to ensure that women have the right, on equal terms with men, to vote in elections and public referenda and to be eligible for election to all publicly elected bodies are also clearly justiciable. While the first part of article 7(b), requiring equal participation in the formulation and implementation of government policy, appears vague, it is comparable with article 25(a) of the ICCPR which guarantees the right to take part "in the conduct of public affairs."¹¹⁰ The second part of article 7(b), obliging States Parties to ensure that women have equal rights with men to perform all public functions at all levels of government, is relatively clear and, thus, it should be possible to identify the scope of activities and offices encompassed by paragraph 7(b). The same is true for article 7(c), which ensures equality of opportunity in NGO participation and other public and political associations.

The obligation under article 16(1) to ensure equal rights in relation to marriage and the family is also justiciable. Each of the relevant rights in paragraphs (a) to (g) is specified with reasonable precision, and it should be possible to determine whether a state has in fact ensured that right, whether by legislation, case law or other ways.¹¹¹ The recent detailed treatment afforded these articles by CEDAW in its General Recommendation 21 shows that the obligations, far from being open-ended, can be concretized easily, even though an assessment of what is discriminatory may be contentious.¹¹²

The rights guaranteed in article 15(3) and the first part of

110. ICCPR, *supra* note 10, art. 25(a), 999 U.N.T.S. at 179.

111. The specific rights mentioned in article 16(1)(a)-(g) are very similar to the matters mentioned by the Human Rights Committee in its general comment relating to article 23 of the ICCPR, which provides in article 23(4) that States Parties shall take appropriate steps to ensure equality of rights and responsibilities in marriage, during marriage and at its dissolution. *General Comment No. 19 (39): Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, at 175, U.N. Doc. A/45/40 (1990). Article 5 of Protocol No. 7 to the European Convention on Human Rights covers substantially the same ground as article 16 of the Convention. European Convention on Human Rights, Nov. 22, 1984, Protocol No. 7, Europ. T.S. No. 117.

112. *Report of the Committee on the Elimination of Discrimination against Women*, U.N. GAOR, 49th Sess., Supp. No. 38, at 1, U.N. Doc. A/49/38 (1994).

article 16(2) are also justiciable.¹¹³ If the legal situation in a State Party is not already in conformity with the Convention's requirements, then a state must take steps to amend its law to ensure that the contracts referred to in article 15(3) and child betrothal and child marriage have no effect under national law. Whether this has been done can be verified by an examination of national legislation, case law, and practice.

b. Obligations of Undertaking to . . .

A second group of provisions, largely found in article 2 of the Convention,¹¹⁴ also imposes on States Parties obligations to take specific types of action; whether a state has in fact fulfilled those obligations would appear to be a justiciable question.

Under article 2(a), States Parties "undertake" to:

(a) . . . [1] *embody* the principle of the equality of men and women *in their national constitutions or other appropriate legislation* if not yet incorporated therein and [2] *to ensure*, through law and other appropriate means, the practical realization of this principle.¹¹⁵

The first part of this paragraph gives rise to few difficulties when it comes to assessing compliance: a state must be able to point to a provision in its constitution, to a general anti-discrimination law, or to some other form of legal guarantee of the principle of equality (as many states have done in their reports under article 18 of the Convention). The second part of the paragraph emphasizes that the formal guarantees of equality must actually be enjoyed in practice, also an obligation the performance of which can be assessed by reference to specific criteria.¹¹⁶

113. Women's Convention, *supra* note 3, arts. 15(3), 16(2), 1249 U.N.T.S. at 20.

114. See generally *Implementation of Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women: Analysis of Article 2 of the Convention*, Comm. on the Elimination of Discrimination against Women, 14th Sess., Agenda Item 7, U.N. Doc. CEDAW/C/1995/4 (1994) [hereinafter *Article 2 Analysis*], which sets out in detail under each paragraph of article 2 the type of actions taken by States Parties and recommended by the Committee which would contribute to the fulfillment of the obligations accepted under the article.

115. Women's Convention, *supra* note 3, art. 2, 1249 U.N.T.S. at 16 (emphasis added).

116. See *Article 2 Analysis*, *supra* note 114, ¶¶ 16-27.

Paragraphs 2(b) and (c)¹¹⁷ require the adoption of appropriate legislative and other measures *prohibiting* discrimination and the establishment of effective remedies for any act of discrimination.¹¹⁸ While the exact content of legislation and the institutional and remedial arrangements will depend on the situation in the State Party concerned, it is clear that some legislation must be adopted which prohibits discrimination and provides remedies which can reasonably be viewed as being accessible and effective.¹¹⁹ A failure to enact such legislation, or a patently ineffectual system of implementation, would amount to failure on the part of the State Party to carry out its obligations under these provisions. If a state has enacted such legislation and there is in place a functioning, though perhaps not optimal, system of enforcement, it seems likely that a supervisory body would hold that the steps taken by the state satisfy its minimum obligation. The exact form these steps took would fall within the state's margin of discretion. Paragraph 2(b) is analogous to article 2(1)(d) of the Racial Discrimination Convention,¹²⁰ while paragraph 2(c) is analogous to article 6 of the same Convention.¹²¹ Both these articles are amenable to individual complaints under procedures established by article 14 of that Convention. Accordingly, paragraphs 2(b) and 2(c) can be equally viewed as justiciable.¹²²

Paragraph 2(d) of the Convention, which requires a State Party to "refrain from engaging in any act or practice of dis-

117. The text of article 2(b) and (c) provides that State Parties "undertake":

(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.

Women's Convention, *supra* note 3, art. 2(b)-(c), 1249 U.N.T.S. at 16.

118. See *Article 2 Analysis*, *supra* note 114, ¶¶ 28-55.

119. See Alston & Quinn, *supra* note 81, at 165-72.

120. See Racial Discrimination Convention, *supra* note 9, art. 2(1)(d), 660 U.N.T.S. at 218.

121. See *id.* art. 6, 660 U.N.T.S. at 220.

122. See *Yilmaz-Dogan v. Netherlands*, Communication No. 1/1984, Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 43d Sess., Supp. No. 18, Annex IV, at 59, U.N. Doc. A/43/18 (1988); *L.K. v. Netherlands*, Communication No. 4/1991, Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 48th Sess., Annex IV, at 130, U.N. Doc. A/48/18 (1993) (failure to fulfill obligation under article 6).

crimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation,"¹²³ is in essence a statement of a state's obligation to "respect" a particular right, in this case the right to be free from discrimination at the hands of state authorities.¹²⁴ Paragraph 2(d) has a counterpart in article 2(1)(a) of the Racial Discrimination Convention,¹²⁵ a provision which is subject to that Convention's individual complaints procedure. The substantive content of paragraph 2(d) is also much the same as articles 2(1) and 26 of the ICCPR,¹²⁶ generally considered to be justiciable obligations of immediate effect. Consequently, paragraph 2(d) can reasonably be viewed as a justiciable obligation.

Paragraph 2(g), which requires States Parties to repeal all national penal provisions which constitute discrimination against women, is also phrased in terms which make it a justiciable obligation of immediate effect, in that the continued existence of discriminatory statutes is something that can be readily evaluated in most cases.¹²⁷ Thus, five of the seven paragraphs of article 2, a central provision of the Convention,

123. Women's Convention, *supra* note 3, art. 2(d), 1249 U.N.T.S. at 16.

124. See *Article 2 Analysis*, *supra* note 114, ¶¶ 56-59.

125. Article 2(1)(a) of the Racial Discrimination Convention provides that:
Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.

Racial Discrimination Convention, *supra* note 9, art. 2(1)(a), 660 U.N.T.S. at 218.

126. ICCPR, *supra* note 10, arts. 2(1), 26, 999 U.N.T.S. at 173, 179. Article 2 provides:

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

Id. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id.

127. See Women's Convention, *supra* note 3, art. 2(g), 1249 U.N.T.S. at 16; *Article 2 Analysis*, *supra* note 114, ¶¶ 81-89.

are justiciable obligations in a traditional sense, and have direct parallels or analogous provisions in other U.N. treaties which are subject to individual complaint procedures.¹²⁸

The first part of article 14(1) of the Convention requires States Parties to "take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy."¹²⁹ A state's minimum level of performance with regard to this obligation could be assessed, for example, by examining whether efforts have been made to determine the particular needs of rural women and to address these needs through policies which affect the rural population. Article 14(2), providing that States Parties shall "ensure" to rural women a number of rights and benefits, gives the scope of the obligation in article 14(1) greater focus.¹³⁰ Consequently, article 14(2) allows at least an assessment of whether the State Party has performed the obligation at a minimum level and thus whether

128. See *infra* notes 134-41 and accompanying text for a discussion of paragraph 2(e).

129. Women's Convention, *supra* note 3, art. 14(1), 1249 U.N.T.S. at 19.

130. Article 14(2) provides that:

2. States Parties *shall take all appropriate measures* to eliminate discrimination against women in rural areas *in order to ensure*, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal or non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Id. art. 14(2)(a)-(h), 1249 U.N.T.S. at 19-20 (emphasis added).

the state has ensured the rights, benefits, or opportunities specified.

c. Obligations to Take all Appropriate Measures (in order to ensure) . . .

Unlike the obligations discussed above, a number of the other provisions in the Convention require that State Parties "take all appropriate measures" to ensure the rights delineated. Insofar as these obligations are concerned, it may be argued that States Parties have been left with so much discretion to determine the means appropriate to eliminate discrimination in the specific fields covered by those articles, that it is impracticable for a independent quasi-judicial body to assess, by means of a communications procedure of the types proposed, whether States Parties have complied with those obligations.

3. Justiciability of Obligations "to take all appropriate measures"

Nevertheless, the view that an obligation to take appropriate steps (sometimes equated, not entirely accurately, with an obligation of progressive implementation) is not justiciable has come under increasing criticism.¹³¹ An obligation to take appropriate measures to achieve a goal has been characterized as an obligation of result rather than an obligation of means or conduct. However, this characterization does not necessarily mean that steps taken by the state concerned to achieve the specified goal are wholly within the discretion of that state. This issue has been examined in some detail by the Economic Committee, generally, and in relation to the possible adoption of an individual complaints procedure under the Economic Covenant. The Economic Committee has expressed the view that, although the obligation to take appropriate steps may not require a State Party to bring about the *full* enjoyment of a guaranteed right immediately, a good faith interpretation of such an obligation means that some steps must be taken immediately. These include, for example, steps to establish the

131. For a lucid discussion of the issues, arguing that many economic, social and cultural rights are in fact justiciable, see Scott & Macklem, *supra* note 81, at 72-114.

extent and causes of a problem, the development of a plan of action to address the problem, and the establishment of goals and targets which permit the measurement of progress over time.¹³² The Economic Committee has also stated that "the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make."¹³³

Most of the obligations to take all appropriate steps or measures under the Convention can be subjected to the same analysis, with the result that the Committee would be in a position to assess at least whether a State Party had taken the minimum steps necessary for it to carry out its obligation in good faith. In this context, the general recommendations adopted by the Committee may also contribute to the more precise definition of the steps that a state must take in order to give effect to its obligations.

4. The Different Types of Obligations to Take all Appropriate Measures

There are slight variations in wording within this category of obligations, but in general the obligation is that the State Party agrees that it "shall take all appropriate measures" to eliminate discrimination against women or to ensure particular rights on the basis of equality of women and men.

a. Obligations to "take all appropriate measures" to Achieve a Specified Goal, Without Further Qualification

A number of provisions simply provide that States Parties shall take all appropriate measures to achieve a specified objective with no further elaboration of the detailed goals that might contribute to the achievement of that objective. Article 6, for example, requires a State Party to take all appropriate measures to suppress all forms of traffic in women and exploitation of women.¹³⁴ A State Party which does not have legislation in place which makes trafficking in women and exploita-

132. See *General Comment 3*, *supra* note 89, ¶ 2; *General Comment 6*, Comm. on Economic, Social and Cultural Rights, 13th Sess., ¶ 18, U.N. Doc. E/C.12/1995/16 (1995); Alston & Quinn, *supra* note 81, at 166-72.

133. *General Comment 3*, *supra* note 89, ¶ 4.

134. Women's Convention, *supra* note 3, art. 6, 1249 U.N.T.S. at 17. Paragraphs 2(e) and 2(f) also fall into this category.

tion of the prostitution of women a criminal offense would, in our view, have failed to fulfill its obligations under the Convention. In addition, one could also require that the state take reasonable steps towards the actual enforcement of those laws; a failure to take such measures would also constitute a failure to fulfill the obligation imposed by article 6.¹³⁵

Article 8 requires States Parties to take all appropriate measures to ensure to women the opportunity to represent their government at the international level and to participate in the work of international organizations.¹³⁶ Assessing whether a state has done this would involve evaluating the distribution of women within the foreign service and other international departments, determining whether there are formal guarantees of equal opportunity in employment in these fields of employment and whether they are effective in practice, and evaluating the record of a State Party in nominating women to positions in international organizations. Such matters are justiciable and, indeed, have been litigated at the national level.¹³⁷

Article 12, obliging States Parties to take all appropriate steps to eliminate discrimination in the field of health care in order to ensure women's equal access to health services and appropriate services in connection with pregnancy, also contains obligations which are capable of meaningful review.¹³⁸ The right to health, traditionally viewed as a social right requiring progressive implementation, has been the subject of sustained examination to assess its detailed content and also to concretize the obligation of states under the Economic Covenant as well as other instruments which guarantee the right to health.¹³⁹ Considerable attention has been focused on dis-

135. See generally *Analysis of Article 6 (and Other Articles Relating to Violence Towards Women and the Sexual Harassment and Sexual Exploitation of Women) of the Convention on the Elimination of All Forms of Discrimination against Women*, Comm. on the Elimination of All Forms of Discrimination against Women, 11th Sess., Agenda Item 3, U.N. Doc. CEDAW/C/1992/4 (1992).

136. Women's Convention, *supra* note 3, art. 8, 1249 U.N.T.S. at 17.

137. See, e.g., *Secretary of the Dep't of Foreign Affairs & Trade v. Styles*, [1989] EOC ¶ 92 (Full Court of the Federal Court of Australia) (challenge to overseas posting decision by foreign service).

138. Women's Convention, *supra* note 3, art. 12, 1249 U.N.T.S. at 19.

139. For an overview, see Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24 (1994); Lucie Bernier, *A Selected Bibliography of Human Rights and the Right to Health*, 1 HEALTH &

crimination against women in the context of the right to health. This attention has generated a large body of work which suggests that not only is it possible to identify patterns of discrimination against women in the field of health,¹⁴⁰ but it is also practicable to identify the steps states reasonably can be expected to take to eliminate such discrimination, and to assess whether a state is in a position to take those steps.¹⁴¹

b. Obligations to "take all appropriate measures,"
accompanied by Explicit Obligations to "ensure" Rights

A number of provisions contain a general obligation to take all appropriate measures to eliminate discrimination and then go on to require States Parties to "ensure" specific rights (for example, articles 7 and 16). As argued above, this latter obligation is justiciable. However, the former, more general obligation may be problematic. It is clearly inclusive of the obligation to guarantee the rights specified in the rest of the article, but is broader. Nevertheless, while such an obligation may appear open-ended, it should still be possible to demand and measure a minimal level of performance, including at least an assessment of the extent of discrimination and its causes, and the adoption by a State Party of a plan to address the discrimination.

HUM. RTS. 110 (1994). That the right to health can be justiciable may be seen from the decision of the Inter-American Commission of Human Rights in the case brought by the Yanomami Indians against Brazil, in which the Commission held that acts and omissions of the government had violated (among other rights) the right of the petitioners to the preservation of their health guaranteed by article 11 of the American Declaration of the Rights and Duties of Man. Case 7615, Inter-Am. C.H.R. 24, OEA/ser. L/V/II.66 doc. 10 rev. 1 (1985). The *Open Door Counseling* case, brought under article 10 of the European Convention claiming a violation of the right to freedom of expression, could equally well have been analyzed as a violation of article 10 of the Women's Convention, if such a guarantee had been amenable to a complaints procedure. *Open Door Counselling & Dublin Well Woman Centre v. Ireland*, 246 Eur. Ct. H.R. (ser. A) (1992).

140. See generally Rebecca Cook, *Human Rights in Relation to Women's Health: The Promotion and Protection of Women's Health Through International Human Rights Law*, at 25-30, WHO Doc. WHO/DGH/93.1 (1993); Audrey R. Chapman, *Monitoring Women's Right to Health Under the International Covenant on Economic, Social and Cultural Rights*, 44 AM. U. L. REV. 1157, 1168-75 (1995).

141. Cook, *supra* note 140, at 17-23.

c. Obligations to "take all appropriate measures" in Order to Ensure in Particular Specified Goals of the Enjoyment of Specified Rights

A number of articles provide that a State Party shall take all appropriate measures to eliminate discrimination in a particular field generally, but then go on to specify a number of specific equality goals within that area. For example, article 10 requires that States Parties take all appropriate measures to eliminate discrimination against women in order to ensure equal rights with men in the field of education and, in particular, to ensure the same opportunities in areas such as curricula and access to scholarships.¹⁴² Article 11, dealing with employment, is structured in a similar way.¹⁴³

The specification of particular goals in articles 10(a)-(h) as well as 11(1) and (2) means that there are identified criteria against which the implementation of the general obligation can be assessed. While the general obligation to eliminate discrimination in relation to education or employment may require more than achieving the specific goals stated, these clearly constitute the central core of the obligation. Many of the goals specified in both articles 10 and 11 are capable of supervision. The minimal content of the obligation would be to ascertain the extent of any discrimination faced by women in the field of education or employment, followed by the adoption of a detailed policy to address the causes of this discrimination.¹⁴⁴

For example, whether women have the same opportunities to benefit from scholarships or have access to the same curricula is a question capable of judicial determination and has been the subject of litigation in some countries. It should also

142. Women's Convention, *supra* note 3, art. 10, 1249 U.N.T.S. at 17-18.

143. *Id.* art. 11, 1249 U.N.T.S. at 18-19.

144. Compare the comments of Melchior, who considers that the right to work could be subjected to the complaints procedure of the European Convention:

[T]his right may be considered and even defined as implying that the State is under an obligation to set up a minimum number of mechanisms to ensure the practical realization of the right: this might entail, for example, a placement system, matching employment vacancies with demand, a system of vocational guidance and training. In the case of individual applications the judicial supervisory body might ascertain whether such mechanisms exist, or might even examine, at a later stage, whether they are appropriate, and later still whether they are really effective.

Michel Melchior, *Rights Not Covered by the Convention*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 78, at 593, 599.

be possible to determine whether appropriate steps to reduce female drop-out rates at all levels of education have been taken. For example, a State Party may be asked whether it has identified the drop-out rate and its causes, whether any steps have been taken to address these issues, and whether they have had any impact. Obligations that appear more imprecise, such as paragraphs 10(c) and (h),¹⁴⁵ would also be capable of monitoring by the use of this type of approach.

In the case of employment, some of the specified goals are similar or identical to those that are already subject to judicial supervision at the national level or to complaints procedures at the international level. For example, article 2 of ILO Convention No. 111 on Discrimination in Occupation and Employment, obliges contracting states to "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in any aspect thereof."¹⁴⁶ Other matters dealt with in article 11 are also covered by ILO conventions, for example the right to equal remuneration for work of equal value (ILO No. 100)¹⁴⁷ and the adoption of measures to allow women and men to combine their family and work responsibilities (ILO No. 156).¹⁴⁸ All these ILO Conventions are subject to the various complaints procedures available under the ILO Constitution, and the nature

145. Paragraph 10(c) states that States Parties shall "ensure":

The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods.

Women's Convention, *supra* note 3, 1249 U.N.T.S. at 18. Paragraph 10(h) adds that States Parties shall "ensure . . . [a]ccess to specific educational information to help ensure the health and well-being of families, including information and advice on family planning." *Id.* art. 10(h), 1249 U.N.T.S. at 18.

146. Convention Concerning Discrimination in Respect of Employment and Occupation (ILO Convention No. 111), June 25, 1958, 362 U.N.T.S. 31, 34 (entered into force June 15, 1960).

147. Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO Convention No. 100), *adopted* June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953).

148. Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Convention No. 156), *adopted* June 23, 1981, 1331 U.N.T.S. 295 (entered into force Aug. 11, 1983).

and extent of the obligations under them are also considered in detail by the Committee of Experts on the Application of Conventions and Recommendations.¹⁴⁹

Article 13, which obliges States Parties to take all appropriate measures to ensure equality in access to various economic and social benefits also admits of external scrutiny.¹⁵⁰ For example, ensuring equal rights to family benefits involves appropriate legislative and administrative measures on the part of the state. Equal access to credit needs both legislative and administrative support from government in order to ensure de facto as well as de jure access. The right to participate on an equal basis in recreational activities, sports, and all aspects of cultural life requires that a state must, at a minimum, ascertain whether men's and women's access to such activities is unequal and adopt a strategy to address any inequality.

Articles 3 and 24 of the Convention are the most broadly stated of the obligations to take appropriate or necessary measures.¹⁵¹ They appear to add little, if anything, substantive to the more specific provisions of the Convention. Conceivably, there may be areas not explicitly covered by the other provisions, in which case it would be necessary to rely on article 3 or 24. An example might be discrimination against women in the enjoyment of one of the human rights incorporated in the Convention by reference to the definition of discrimination in article 1. In such a case, however, the analysis applied above would still be applicable, although what a State Party would have to do to satisfy its obligation may be relatively modest.

149. See, e.g., Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation: General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111)*, Int'l Labour Conf., 75th Sess., Agenda Item 3 (International Labour Office 1988).

150. Women's Convention, *supra* note 3, art. 13, 1249 U.N.T.S. at 19.

151. *Id.* arts. 3, 24, 1249 U.N.T.S. at 16, 22.

5. Conclusion

While the process of assessing whether a State Party has complied with its obligations under the Convention may pose greater difficulties than the similar task under the ICCPR, concerns about the justiciability of the obligations contained in the Convention should not be overemphasized. The Convention contains a number of obligations which are clearly justiciable, and even in the case of obligations to take all appropriate measures, it would be possible for the Committee to exercise a meaningful level of scrutiny over steps taken by States Parties to achieve the stated goals. Furthermore, as the Economic Committee has observed, one of the most effective ways to give detailed content to obligations that may not look justiciable is to subject them to a procedure in which they must be the subject of judicial interpretation.¹⁵² Perhaps the real issue regarding the justiciability of obligations created by the Convention is whether a disproportionate number of complaints will concern those Convention obligations which are less precise and which allow the state a wide margin of discretion to determine appropriate action. If such complaints do dominate, they are likely to be prolonged and contentious. Consequently, their resolution may contribute little to achieving the underlying aims of the Convention.

In any event, it is not essential for all provisions of a treaty to be justiciable for it to be the subject of a complaints procedure. National courts in jurisdictions where the complete text of treaties becomes part of domestic law, whether as a result of a constitutional provision or by the promulgation or adoption of the text by executive or legislative act, have been prepared to apply those parts of a treaty which are held to be

152. Compare Tardu, who observes that:

Experience of the procedures under articles 24 and 26 of the ILO Constitution and the ILO freedom of association procedure has shown that it is possible for a quasi-judicial body to reach a finding on the will of States to implement progressive clauses such as those of the International Covenant on Economic, Social and Cultural Rights, as well as on their conduct with regard to the immediately applicable International Covenant on Civil and Political Rights.

Maxime Tardu, *The Effectiveness of United Nations Methods and Mechanisms in the Field of Human Rights: A Critical Overview*, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, addendum, ¶ 125, U.N. Doc. A/CONF.157/PC/60/Add.5 (1993).

capable of application to particular cases, while at the same time holding that other parts of the treaty cannot be applied.¹⁵³ Accordingly, it would be possible, in the resolution of complaints under the proposed protocol, to apply only those parts of the Convention considered justiciable.

B. The Application of the Convention in Respect to the Acts of Private Persons

Concerns relating to the justiciability of obligations contained in the Convention are likely to dominate discussion of the feasibility of any optional protocol allowing complaints. Among other concerns that may be raised is the appropriateness of a communications procedure under the Convention given that many of the serious violations of women's human rights are carried out by private individuals. The international legal principles regarding state responsibility are primarily concerned with the accountability of states for their own activities and those of their agents, with activities of private individuals rarely engaging such responsibility. A procedure allowing for communications relating to obligations in the Convention will, inevitably, focus on state, rather than individual, action. Further, although it is important to recognize that many of the violations of women's human rights occur at the hands of individuals, such recognition should not distract attention from violations by the state. States violate the human rights of women directly and, by maintaining discriminatory laws and practices, also violate these rights by way of discrimination.¹⁵⁴

Nor should the fact that many of the important forms of

153. See, for example, the decision of the Central Appeals Court of the Netherlands on article 7(a)(i) of the Economic Covenant, 19 NETH. Y.B. INT'L L. 427, 429 (1988) (holding that, although most of the rights in the Covenant did not have direct effect as part of Netherlands law "it would be wrong to assume that a provision such as Article 7(a)(i) can never as a matter of principle have direct effect"). Cf. Iwasawa, *supra* note 79, at 50. See also the decisions of other Dutch courts accepting that article 6(4) of the European Social Charter can be given direct effect, although other provisions might not be held directly applicable. Lammy Betten & Teun Jaspers, *The Netherlands, in 25 YEARS EUROPEAN SOCIAL CHARTER* 131, 133-34 (A. Ph. C. M. Jaspers & L. Betten eds., 1988).

154. Dorothy Q. Thomas, *Acting Unnaturally: In Defense of the Civil and Political Rights of Women*, in *FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN'S CLAIMS TO HUMAN RIGHTS* 41 (Margaret A. Schuler ed., 1995).

discrimination against women are carried out by private actors lead to the conclusion that a complaints procedure is inappropriate in the context of the Convention. The nature of the responsibility of the state is somewhat different under general human rights law when a violation is committed by a private individual than it is when the violation is directly attributable to the state.¹⁵⁵ In the case of private acts, the state's international responsibility is generally only engaged if it has failed to take adequate preventive, remedial, punitive or compensatory measures. However, state responsibility arising out of the acts of private individuals is a well-established area of international law having its origins in the body of law dealing with injuries to aliens. In the context of the general obligations to ensure the enjoyment of human rights, issues of state responsibility where nonstate actors have committed human rights violations have been considered with increasing frequency in recent years by international human rights bodies.¹⁵⁶

The Women's Convention provides explicitly in article 2 that States Parties are under an obligation to take appropriate measures to eliminate discrimination by any person, including private persons.¹⁵⁷ The addition of an optional complaints procedure would inevitably lead to claims that by failing to prevent, punish, or remedy discrimination by a private person or organization, a State Party had failed to take appropriate measures within the meaning of article 2(e) to eliminate discrimination by any person, organization or enterprise. Article 2(1)(a) of the Racial Discrimination Convention,¹⁵⁸ obliging each State Party to prohibit and bring to an end, by legislation and other means, racial discrimination by any persons, group or organization, is similar to article 2(e) of the Women's Con-

155. See Clapham, *supra* note 84, at 188-244; TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS: THE CASE LAW OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE 87-94, 99-109 (1994); Andrew Byrnes, *Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues*, 12 AUSTL. Y.B. INT'L L. 205, 225-39 (1992).

156. See, e.g., Velásquez Rodríguez Case, 4 Inter-Am. Ct. H.R. (ser. C) (1988); X. & Y. v. Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985); L.K. v Netherlands, *Communication No. 4/1991*, *supra* note 122; Cook, *supra* note 100.

157. Women's Convention, *supra* note 3, art. 2, 1249 U.N.T.S. at 16.

158. Racial Discrimination Convention, *supra* note 9, art. 2(a)(1), 660 U.N.T.S. at 16.

vention, and this provision has been the subject of decisions by the Committee on the Elimination of Racial Discrimination (CERD) under that Convention's international complaints procedure.¹⁵⁹ In short, there is no conceptual or legal reason why the question of state responsibility arising out of discrimination by private persons or bodies should not be within the scope of a communications procedure.

Similarly, arguments suggesting that the obligations of the Convention do not lend themselves to any form of complaints mechanism because they concern "social issues," "private life" or relate to issues of "custom," "religion" or "culture" may be raised both as objections to the very idea of a complaints mechanism or to limit its purview to selected articles of the Convention. A large proportion of the Convention's provisions—for example those in articles 2, 3, 5, 8, 9, 10, 11, 13 and 15—are concerned exclusively or primarily with "public" life, with only a minority concerning the "private" sphere. So far as this latter category of obligations is concerned, subject to any valid reservations they have entered in this regard, States Parties to the Convention have already accepted legal obligations in respect of the "private" sphere, as well as with respect to customary, religious and cultural practices. An additional optional mechanism for oversight and enforcement of legal obligations already accepted in these areas should not be problematic. In any event, recent consensual expressions of the member states of the United Nations, such as the Vienna Declaration and Programme of Action, declare the duty of all states, regardless of their political, economic, and cultural systems to promote and protect all human rights and fundamental freedoms.¹⁶⁰ These expressions stress the importance of the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional, customary practices, and cultural practices as well as religious extremism.¹⁶¹ In addition, article 4 of the Declaration on the Elimination of Violence against Women obliges states to condemn violence against women and not to invoke custom, religion, or culture to limit their obligations with respect to its elimination.¹⁶² Like-

159. *L.K. v Netherlands*, Communication No. 4/1991, *supra* note 122.

160. *Vienna Declaration*, *supra* note 31, ¶ 5.

161. *Id.* ¶ 38.

162. *Declaration on the Elimination of Violence against Women*, G.A. Res. 104,

wise, the Beijing Declaration and Platform for Action requires states to prohibit and eliminate any harmful aspect of traditional or customary practices.¹⁶³ These above agreements render arguments which seek to limit the impact of agreed treaty obligations in areas affected by custom, religion or culture or within private and social life unpersuasive.

C. Reservations

As is well known, the Women's Convention is subject to a large number of reservations, many of them substantive and broad in scope.¹⁶⁴ Some of these reservations appear to be incompatible with the object and purpose of the Convention, and therefore impermissible under article 28(2).¹⁶⁵ Indeed, some States Parties have objected to them on this ground. However, unlike the Racial Discrimination Convention, article 20(2) of which provides that a reservation shall be considered incompatible if at least two-thirds of States Parties object,¹⁶⁶ the only procedure provided for under the Convention is article 29(1),¹⁶⁷ which provides for reference of any dispute over the application or interpretation of the Convention to the International Court of Justice. As already noted, this provision is the subject of a large number of reservations—many by States Parties which have entered arguably impermissible reservations to other provisions—and seems unlikely to provide an avenue for the resolution of questions of the incompatibility of reservations.

On the question of whether a supervisory body has the competence to pronounce authoritatively on a reservation's validity, there are differing international practices. Under the European Convention, the European Commission of Human

U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1994).

163. *Beijing Declaration and Platform for Action*, *supra* note 48, ¶ 224.

164. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); LIESBETH LJNZAAD, *RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN?* 298-370 (1995).

165. Article 28(2) provides that: "[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted." Women's Convention, *supra* note 3, art. 28(2), 1249 U.N.T.S. at 23.

166. Racial Discrimination Convention, *supra* note 9, art. 660 U.N.T.S. at 236.

167. Women's Convention, *supra* note 3, art. 29(1), 1249 U.N.T.S. at 23.

Rights (European Commission) has taken the view that it can express an opinion on whether a reservation is consistent with article 64 of the European Convention, which requires that "general" reservations not be made and that any reservation be accompanied by a brief statement of the law concerned.¹⁶⁸ Further, if the European Commission considers that the reservation is invalid, it may then go on to consider the substantive claim under the European Convention, disregarding the reservation.¹⁶⁹

By contrast, the view that has generally been taken within the U.N. system is that a treaty body does not have the power to declare a reservation inconsistent with the object and purpose of the relevant treaty.¹⁷⁰ This view, originally articulated in response to a request by the CERD¹⁷¹ for clarification in response to its powers in relation to reservations, has been repeated in response to similar requests by CEDAW¹⁷² and the Committee on the Rights of the Child.¹⁷³ While these opinions have been provided in relation to the reporting procedure, it is not clear whether the same applies in relation to a communications procedure. The difficulty here is if the Committee determines that a reservation covering the subject matter of a complaint is invalid, does it have the power to declare this reservation invalid and then proceed to consider the com-

168. See, e.g., *Temeltasch v. Switzerland*, App. No. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 120, 127-29 (1983).

169. See, e.g., *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) at 21 (1988).

170. See Fausto Pocar, *Enhancing the Universal Application of Human Rights Standards and Instruments*, World Conf. on Hum. Rts., 4th Sess. of Prep. Comm., Agenda Item 5, addendum, ¶¶ 26-35, U.N. Doc. A/CONF.157/PC/60/Add.4 (1993).

171. LIJNZAAD, *supra* note 164, at 139.

172. An opinion provided to the CEDAW at its third session by the Treaty Section of the United Nations Office of Legal Affairs stated:

[U]nder article 21, the Committee is to report annually to the General Assembly on its activities and "may make suggestions and general recommendations based on the examination of reports and information received from the States Parties." Thus, the functions of the Committee do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly affect the application of the Convention and the Committee might have to comment thereon in its reports in this context.

Report of the Committee on the Elimination of Discrimination against Women on its Third Session, U.N. GAOR, 39th Sess., Supp. No. 45, Annex III, vol. II, ¶ 2(d), U.N. Doc. A/39/45 (1984).

173. Pocar, *supra* note 170, ¶ 32.

plaint on the merits, or is it bound to accept the reservation as barring further inquiry?

Until recently, the practice of the Human Rights Committee suggested that it did not consider it had the competence to declare a reservation invalid and then proceed to consider the merits of a complaint after severing the reservation. This consideration was based on the reasoning that, despite the invalidity of the reservation, the State Party would still have become a party to the treaty. Rather, discussion in the Committee had focused on the question of how to approach the consideration of a complaint which is covered by a statement designated as an "interpretive declaration."

In November 1994, however, the Human Rights Committee adopted a general comment on the question of reservations to the ICCPR which appears to foresee a more active role for itself.¹⁷⁴ After noting that many of the traditional rules relating to reservations were based on a model of mutual exchange and benefit between contracting states that was not appropriate to human rights treaties, the Committee commented:

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States Parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a state's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. *The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a*

174. *General Comment No. 24 (52): Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp. No. 40, Annex V, at 124, U.N. Doc. A/50/40 (1995). CEDAW "noted with approval" in General Comment 24(52) that "it may be up to the Committee itself to make this determination [of incompatibility of reservations]." *CEDAW World Conference Report*, *supra* note 53, ¶ 53.

reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving state and other states parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, states should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.¹⁷⁵

175. *Id.* ¶¶ 18-19 (emphasis added). The views of the Human Rights Committee expressed in General Comment 24 (52) have proved controversial, with the Legal Adviser of the United States Department of State suggesting that some aspects of the Committee's position on the reservations, while interesting, runs contrary to the Covenant scheme and international law. Particular exception is taken by the Legal Adviser to paragraph 18, where the Committee suggests that reservations which the Committee deems invalid "will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation," which he argues is at odds with the regime established in the Vienna Convention on the Law of Treaties. *Report of the Human Rights Committee: Observations of States Parties Under 40, Paragraph 5, of the Covenant*, U.N. GAOR, 50th Sess., Supp. No. 40, Annex VI, at 134-35, U.N. Doc. A/50/40 (1995). Observations by the United Kingdom on the General Comment similarly take exception to the view that an unacceptable reservation will generally be severable and the Covenant be operative for the reserving party as if the reservation had not been entered. While the United Kingdom considers severability of a kind may well be a

However, while the Human Rights Committee has on many occasions considered the effect of reservations under the Optional Protocol,¹⁷⁶ it does not appear to have had the opportunity to consider a reservation challenged by the complainant on the ground of incompatibility with the object and purpose of the ICCPR.

Under the Maastricht draft, the issue of the Committee's powers in relation to reservations to the Convention is not explicitly addressed.¹⁷⁷ Thus, it does not provide any guidance as to whether the Committee could proceed to hear a case falling within the substantive scope of a reservation where the Committee considered that the reservation was invalid on the ground of incompatibility with the object and purpose of the Convention. While CEDAW itself has expressed clear views on the incompatibility of some types of reservations with the object and purpose of the Convention,¹⁷⁸ CEDAW would no

solution in this context, it would entail severance of both the reservation and parts of the treaty to which it applies on the basis that to proceed otherwise would entail binding the reserving state to obligations which it had expressly rejected. *Id.* at 138-39.

176. For a detailed (and critical) assessment of the work of the Human Rights Committee under the Optional Protocol in relation to reservations, see LIJNZAAD, *supra* note 164, at 280-91, 295-97.

177. Article 20 of the Maastricht draft provides that no reservations to the protocol are permissible. See *infra* appendix.

178. CEDAW has stated that:

Each State Party that has entered substantive reservations to the Convention should include information on them in each of its periodic reports.

In reporting on reservations, the State Party should indicate why it considered the reservation to be necessary and whether reservations the State Party may or may not have entered on obligations with regard to the same right in other conventions are consistent with the reservations to the Convention on the Elimination of All Forms of Discrimination against Women, as well as the precise effect of the reservation in terms of national law and policy. It should indicate the plans that it has to limit the effect of reservations and ultimately withdraw them and, whenever possible, specify a timetable for withdrawing them.

States Parties which have entered general reservations that do not refer to a specific article of the Convention or reservations to articles 2 and 3 should make a particular effort to report on the effect and interpretation of them. The Committee considers these to be incompatible with the object and purpose of the present Convention.

Report of the Committee on the Elimination of Discrimination against Women in its Thirteenth Session, U.N. GAOR, 49th Sess., Supp. No. 38, at 13, U.N. Doc. A/49/38 (1994) [hereinafter CEDAW 1994 Report]. These views are now incorporated in the Committee's guidelines for the content of States Parties' reports. *Guidelines Re-*

doubt be guided by the experience of the Human Rights Committee in dealing with such a case.

In the case of reservations deemed compatible with the object and purpose of the Convention, it is again likely that CEDAW would follow the approach adopted by the Human Rights Committee. Thus, the Committee would first consider whether the reservation applied to the subject matter of the communication. If it did, then the Committee would not be empowered to proceed further with its consideration of the communication.

If the Committee considered that it did have the power to pronounce on the compatibility of reservations with the object and purpose of the Convention, presumably it would then have to consider the consequences of that invalidity. For example, the Committee would have to determine whether the State Party's ratification of the Convention was effective without the reservation (along the lines proposed by the Human Rights Committee) or whether the impermissible reservation could not be severed from the ratification. Some assistance in this regard may be derived from the practice of the States Parties to the Convention. While a number of States Parties have objected to some reservations as being incompatible with the object and purpose of the Convention, these objecting states have not stated that this prevents the Convention from entering into force as between the states concerned. Indeed, on various occasions they have expressly stated the contrary.¹⁷⁹

V. OBLIGATIONS SUBJECT TO THE PROCEDURES

One issue which is raised in the context of any complaints procedure to a human rights treaty is whether such a procedure should be applicable to all the obligations created by the treaty, or whether the procedure should apply to selected nominated obligations only. In the following section, we consider this issue in the context of both the individual complaints procedure, created in Part I of the draft protocol and the inquiry procedure, created in Part II.

garding the Form and Content of Initial Reports of States Parties, Comm. on the Elimination of Discrimination against Women, 14th Sess., U.N. Doc. CEDAW/C/7/Rev.1 (1995).

179. See, e.g., REHOF, *supra* note 5, at 276-81 (objections made by Finland, Germany, Mexico and the Netherlands).

A. Individual Complaints Procedure

A number of options are available when considering the substantive scope of an individual complaints procedure. The procedure could be limited to provisions of the Convention that were specified in the protocol; a State Party could be allowed to indicate, at the time of ratification of the protocol, that it accepted the competence of the Committee to hear individual complaints only with respect to certain articles; the procedure could be limited to obligations contained in articles 2-16 and 24; or the procedure could apply to the Convention in its entirety, including, for example, the reporting obligation under article 18.¹⁸⁰

The first approach, limiting coverage to those articles specified in the protocol, raises the question of how one chooses the articles to be included or excluded. One solution likely to be suggested is the selection of only those articles which are commonly accepted as justiciable because of their similarity to guarantees in other treaties already subject to complaint procedures. This approach, for example, was adopted under the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,¹⁸¹ which provides that individual complaints can be made only in respect to two of the rights guaranteed in that instrument, the right to organize and join trade unions (article 8(a)) and the right to education (article 13).¹⁸² A slightly different approach was adopted in relation to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).¹⁸³

180. This list of options is based on that discussed in the context of an optional protocol to the Economic Covenant, *ESCRC Analytical Paper*, *supra* note 1, ¶ 68; *see also* van Hoof, *supra* note 74, at 163.

181. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: "Protocol of San Salvador", Nov. 14, 1988, 28 I.L.M. 161 (1989) [hereinafter Additional Protocol].

182. *Id.* art. 19(6), 28 I.L.M. at 168. However, it should be noted that the rights designated as subject to the communications procedure did not include all the rights which the Inter-American Court, in its views on the draft additional Protocol, considered justiciable. *See Observations of the Inter-American Court of Human Rights on the Draft Additional Protocol to the American Convention on Human Rights*, 1986 INTER-AM. Y.B. H.R. 440, 440-49.

183. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), *supra* note 54.

Article 12 of the Convention of Belém do Pará permits individuals, groups, or non-governmental organizations to lodge petitions with the Inter-American Commission on Human Rights alleging violations of article 7 by a State Party to the Convention, one of the three articles contained in Chapter III of the Convention, headed "Duties of the States."¹⁸⁴

However, we have argued that all obligations contained in the Convention may be considered justiciable and therefore appropriate subjects for a complaints procedure. If only a subset of the rights guaranteed by the Convention were to be included, then major areas of fundamental importance to the elimination of discrimination such as education, health, and possibly employment, would be removed from the scope of the protocol, while other obligations of less significance for many women would be covered. Excluding all but the obligations which are clearly justiciable on a narrow view of justiciability would also deprive the Committee of the opportunity to elaborate further the precise content of some of the more open-ended obligations.¹⁸⁵

Allowing individual States Parties to choose the articles they wish to accept as subject to the complaints procedure would also lead to complexity in the administration of the protocol. It would permit states to embrace the individual complaint procedure, while in effect avoiding scrutiny of major areas of obligation.¹⁸⁶ Indeed, it may allow a state to place an

184. The reason for limiting complaints to alleged violations of article 7 appears to be that under article 7 States Parties "undertake" to do a number of specific things to eliminate violence against women, while in article 8 the States Parties "agree to undertake progressively" specific measures including a number of programs. *Id.* arts. 7-8, 33 I.L.M. at 1536-37. Under article 9 States Parties "shall take special account" of the vulnerability of women to violence by reasons of race, ethnic background or other characteristics. *Id.* art. 9, 33 I.L.M. at 1537. However, this explanation is not completely satisfying, since a number of obligations under article 8 appear capable of external monitoring, while a number of those in article 7 are of a type which might traditionally be characterized as non-justiciable (e.g., the obligation in article 7(e) to take all appropriate measures to modify existing law and practices contributing to violence). *Id.* arts. 7-8, 33 I.L.M. at 1536-37.

185. See *ESCR Analytical Paper*, *supra* note 1, ¶ 70. See the similar views expressed in relation to the Economic Covenant by Habitat International Coalition and Foodfirst Information and Action Network. *Joint Written Statement*, Comm. on Hum. Rts., 47th Sess., Agenda Item 8, ¶ 9(a), U.N. Doc. E/CN.4/Sub.2/NGO/45 (1995).

186. Under the European Social Charter (which still has only a reporting obligation) States Parties are permitted to choose to a limited extent the obligations

exclusion zone around those areas in which its failures to implement its obligations are most pronounced. The interdependence and overlap of many of the obligations in the Convention also militates against permitting this smorgasbord approach. For example, if a state were unwilling to submit to the jurisdiction of the Committee with respect to article 16, but did accept jurisdiction over article 2, it is unclear whether an individual could bring a claim challenging discriminatory divorce laws on the ground of inconsistency with article 2, which covers in general terms what article 16 addresses specifically in relation to marriage.

Under many existing international and regional instruments, including the First Optional Protocol,¹⁸⁷ the Racial Discrimination Convention,¹⁸⁸ the Torture Convention,¹⁸⁹ the European Convention,¹⁹⁰ and the American Convention on Human Rights,¹⁹¹ the approach is that when a State Party accepts the competence of a supervisory body to consider individual complaints, acceptance extends to all substantive obligations accepted by the State Party under the relevant treaty. This approach promotes the integrity of the Convention regime and should be adopted under any proposed protocol to the Women's Convention. By bringing a broader range of potential complaints within the scope of the procedure, more extensive protection of the rights guaranteed in the Convention can be achieved. Moreover, although discrimination against women exists in all countries, different forms of discrimination are of concern from country to country and may vary over time. Limiting the range of articles which can be addressed under the procedure may have the effect of excluding from the Committee's consideration areas in which the most pressing forms of discrimination against women exist. Inclusion of all substantive articles within the reach of the optional protocol

to which they wish to be subject. However, this choice is constrained, to ensure that states accept a minimum core of basic obligations. European Social Charter, Oct. 18, 1961, art. 20, 529 U.N.T.S. 89, 112-15; DAVID J. HARRIS, *THE EUROPEAN SOCIAL CHARTER* 18-21 (1984).

187. *See supra* note 16.

188. *See supra* note 9.

189. *See supra* note 49.

190. *See supra* note 54.

191. *See supra* note 54.

would avoid this dilemma.

It does not appear that individual complaints relating to the failure of a State Party to fulfill its reporting obligations would be receivable under article 14 of the Racial Discrimination Convention¹⁹² or the First Optional Protocol to the ICCPR,¹⁹³ because of the emphasis on rights in the jurisdictional criteria contained in those instruments. No treaty guarantees the right to have one's state submit its report on time or indeed at all. Accordingly, the reporting obligation might be viewed merely as a matter of multilateral interstate concern, with the view being taken that failure to report in a timely manner does not result in any real detriment to individuals subject to the jurisdiction of the State Party.

It is possible, however, to take a more expansive approach. Alston, for example, has noted the importance of reporting for raising awareness of treaty obligations at the national level and has stressed the role that such reports should play in national discussion and policy-making.¹⁹⁴ This perspective is shared by the Committee on Economic, Social and Cultural Rights.¹⁹⁵ While a person might not be a victim or directly affected by a State Party's failure to report, this failure can nonetheless impact on the enjoyment of rights at the national level. The failure of many states to report on time, or at all, under the Women's Convention and other treaties suggests that there may be some point in including this obligation within the scope of an optional protocol. However, this approach assumes that the lodging of an individual complaint might spur a government into action, where notes verbales, informal contacts, and public identification of delinquent states have not. Whether this assumption is correct or whether there are more appropriate ways to encourage states to fulfill these obligations¹⁹⁶ remains to be seen.

192. Racial Discrimination Convention, *supra* note 9, art. 14, 660 U.N.T.S. at 230-33.

193. *See supra* note 16.

194. Philip Alston, *The Purposes of Reporting*, in UNITED NATIONS CENTRE FOR HUMAN RIGHTS AND UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, *MANUAL ON HUMAN RIGHTS REPORTING* 13, 14-16 (1991).

195. *See infra* note 88.

196. The reason given by Alston for excluding the reporting obligation from his proposed draft of an optional protocol to the Economic Covenant, see *ESCRC Analytical Paper*, *supra* note 1, ¶¶ 13, 16.

B. Inquiry by the Committee on its Own Motion

The inquiry procedure proposed in the Maastricht draft would empower the Committee to initiate an inquiry only in cases in which it appears that there are serious or systematic failures by a State Party to fulfill its obligations under the Convention. The threshold requirement for initiation¹⁹⁷ of an inquiry would ensure that only flagrant violations of the Convention would trigger the procedure. Accordingly, it would not seem appropriate to limit the particular articles that can be considered by the Committee in making that assessment.¹⁹⁸

VI. THE MAASTRICHT DRAFT

We have already described the broad outline of the Maastricht draft, which, as may be recalled, proposes the adoption of an optional protocol that would confer on CEDAW the power to receive individual complaints and inquire on its own motion into the situation in a State Party when the Committee receives reliable information indicating the existence of serious or systematic violations of the Convention by a State Party. In parts A, B, and C of this section, we provide a detailed description of the Maastricht draft. In part D of this section, we examine a number of residual concerns that may be raised in discussion about the adoption of any protocol. These concerns relate less to the merits of the proposal than to institutional aspects of the operation of the U.N. human rights system. They include the question of whether any complaint mechanism for the Convention would merely serve to duplicate existing procedures and mechanisms and also relate to resource and institutional implications which would flow from the addi-

197. See *infra* notes 276-79 and accompanying text.

198. Although the Maastricht draft does not propose an interstate procedure, it may be noted that such procedures under other instruments do not directly limit the scope of obligations which can be made the subject of a complaint, and there seems to be no particular reason why this example should not be followed in the present case. Concerns about justiciability have been dealt with above, and would be equally applicable under an interstate procedure. Even if complaints about non-submission of reports are not brought within the individual complaints procedure, a State Party would be able to complain about the failure of another State Party to submit a report, since the communication will involve an allegation that another State Party is not fulfilling its "obligations" under the Convention. This, presumably, would include the reporting obligation under article 18. See *Women's Convention*, *supra* note 3, art. 18, 1259 U.N.T.S. at 22.

tion of any protocol. We conclude by expressing the view that although there may be legal and institutional concerns that might be raised in discussion of any proposed protocol, these can be resolved and should not stand in the way of elaboration and adoption of a protocol modelled very much along the lines of the Maastricht draft. Deviation from the Maastricht model may be appropriate to strengthen its terms, but there appears little reason either to reject it in its entirety or weaken it in any way.

A. Individual Communications Procedure (Part I of the Draft Optional Protocol)

Part I of the Maastricht draft, comprising articles 1-10,¹⁹⁹ contains an individual complaints procedure, modelled on existing individual complaints procedures under the Racial Discrimination Convention, the First Optional Protocol to the ICCPR, and the Torture Convention. The general structure and much of the language of existing procedures under these other treaties have been employed, the intention being that the jurisprudence and practice under comparable procedures will be applicable to the optional protocol. However, by drawing on the experience under those procedures, it seeks to avoid their limitations and deficiencies.²⁰⁰

1. Who May Complain?²⁰¹

All existing complaints procedures permit individuals to lodge complaints. Variations exist with respect to whether others, such as groups or organizations, can also lodge complaints and as to the standing individuals or others must have in order to be entitled to lodge such complaints. For example, article 25 of the European Convention entitles the European

199. See *infra* appendix (for articles 1-10 of the Maastricht draft).

200. See, e.g., Opsahl, *supra* note 16, at 426 (noting that "[t]he haste in which the Optional Protocol [to the ICCPR] was drafted may explain its ambiguity and brevity on essential points"). See generally P. R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication*, 1986 BRITISH Y.B. INT'L L. 201.

201. See generally ZWART, *supra* note 155, at 41-121; A. Cançado Trindade, *Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)*, in 202 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 243-299 (1987).

Commission to receive applications "from any person, non-governmental organization or group of individuals claiming to be the victim of a violation"²⁰² Similarly, article 44 of the American Convention on Human Rights allows petitions to be lodged by "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member States of the Organization"²⁰³ The procedure established by the UNESCO Executive Board permits communications to be submitted by "a person or group of persons who, it can be reasonably presumed, are victims of an alleged violation of [specified] human rights" or by "any person, group of persons or organization having reliable knowledge of those violations"²⁰⁴ Article 14(1) of the Racial Discrimination Convention allows communications from individuals or groups of individuals.²⁰⁵ On the other hand, the First Optional Protocol to the ICCPR provides that only natural persons ("individuals") may submit communications under the Protocol.²⁰⁶ As a result, the Human Rights Committee has held that corporations cannot lodge complaints under the First Optional Protocol²⁰⁷ and that groups as such have no standing, although their members may lodge a composite claim relying on their individual entitlements.²⁰⁸

Article 2 of the draft protocol provides that a communication may be submitted by an individual, group, or organization.²⁰⁹ It provides that:

202. European Convention on Human Rights, *supra* note 54, art. 25, 213 U.N.T.S. at 236.

203. American Convention on Human Rights, *supra* note 54, art. 44, 1144 U.N.T.S. at 155; *see also* Charter on the Rights and Welfare of the African Child, *supra* note 54, art. 44 (permits communications from "any person, group or non-governmental organization" recognized by the OAU, by a member state or by the United Nations).

204. UNESCO Decision, *supra* note 66, ¶ 14(a)(ii). See generally for the UNESCO procedure, David Weissbrodt & Rose Farley, *The UNESCO Human Rights Procedure: An Evaluation*, 16 HUM. RTS. Q. 391 (1994).

205. Racial Discrimination Convention, *supra* note 9, art. 14(1), 660 U.N.T.S. at 230-31.

206. First Optional Protocol, *supra* note 16, art. 2, 999 U.N.T.S. at 302.

207. *A Newspaper Publishing Co. v. Trinidad & Tobago*, Communication No. 360/1989, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, Annex XIL, at 307, U.N. Doc. A/44/40 (1989).

208. *Hartikainen v. Finland*, Communication No. 40/1978, in UNITED NATIONS, 1 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 74 (1985).

209. The Convention itself does not specify its territorial or jurisdictional cover-

1. An individual, group or organization:
 - (a) claiming to have suffered detriment as a result of a violation of any of the rights guaranteed in the Convention, or claiming to be directly affected by the failure on the part of a State Party to the Protocol to give effect to its obligations under the Convention; or
 - (b) claiming that a State Party has violated any of the rights set forth in the Convention or has failed to give effect to any of its obligations under the Convention with respect to a person or group of persons other than the author, and having in the opinion of the Committee a sufficient interest in the matter.²¹⁰

age, unlike other treaties which extend protection to everyone "subject to the jurisdiction" or "within the territory" of a state, but it can be assumed that the Convention's obligations do extend to everyone within the jurisdiction of individual States Parties. As Rimmer points out, the original draft provided that complaints against a State Party could be received "from or on the behalf of individuals, groups of individuals, juridical persons or organizations subject to its jurisdiction," but this phrase is not repeated in the final version of the draft Protocol. Rimmer, *supra* note 38, § 25. Retention of the phrase would have meant that the jurisprudence relating to this phrase under the ICCPR would have been applicable to this provision, so that complaints could deal with not only acts within the physical territory of the State Party, but would also include other exercises of its sovereign jurisdiction. See generally ZWART, *supra* note 155, at 95-99, 109-20.

Rimmer notes that the omission of the phrase might permit persons or organizations *outside* the State Party concerned, and not subject to its jurisdiction in any way, to lodge complaints. Rimmer, *supra* note 38, § 25. This was in fact the reason for the omission of the phrase, as it was felt that in some cases, it might not be possible or safe for women in a State Party or subject to the state's jurisdiction to lodge a complaint. Rimmer argues that the present formulation is too broad to survive the negotiation of a text by states, and that, if it were adopted, it would act as a disincentive to ratification. *Id.*

210. See *infra* appendix (for article 2 of the Maastricht draft). The draft provides that a complaint may be submitted by any person, group or organization who "claim[s] to have suffered detriment as a result of a violation of any of the rights guaranteed in the Convention, or [who] claim[s] to be directly affected by a failure of a State Party . . . to give effect to its obligations under the Convention" *Id.* This contrasts with the language used in a number of the other treaties. For example, article 1 of the First Optional Protocol speaks of persons who claim to be "victims of a violation by a State party of any of the rights set forth in the Covenant." First Optional Protocol, *supra* note 16, art. 1, 999 U.N.T.S. at 302. Article 14 of the Racial Discrimination Convention and article 25 of the European Convention are expressed in similar terms. Racial Discrimination Convention, *supra* note 9, art. 14, 660 U.N.T.S. at 230; European Convention on Human Rights, *supra* note 54, art. 25, 213 U.N.T.S. at 236. Article 22(1) of the Convention against Torture refers to "victims of a violation of the provisions of this Convention." Torture Convention, *supra* note 49, art. 22(i). The difference in wording (between "victims of a violation of rights guaranteed" and "victims of a violation of the provisions of this Convention") is presumably attributable to the fact

This provision is intended to be at least as broad as existing standing requirements; a person who could satisfy the test of being a "victim of a violation" under existing case law²¹¹ would satisfy the standing requirements laid down in the draft article 2. However, the provision goes beyond existing standing requirements, a move motivated by a desire to ensure that systemic discrimination against women is adequately addressed, especially in view of the fact that women may face particular disadvantages in securing information about and access to remedies.

A broad range of individuals and groups, including organizations, are thus permitted to lodge complaints.²¹² A number of reasons can be adduced in support of this approach. First, as with other treaties, the submission of a complaint by an individual may involve considerable danger to that individual. Second, where an individual communication raises more general issues and the particular circumstances of the person's case are not likely to be decisive to the resolution of these issues, there seems to be little point in preventing groups or organizations from submitting complaints. For example, if the complaint is that a State Party has failed to grant women the same rights as men to transmit their nationality to their children, then the claim could be raised equally well by an organization of women affected by this inequality without naming all the individuals. Similarly, in some countries for a married woman to bring an individual complaint concerning the failure of national law to criminalize marital rape may result in con-

that most of the provisions of the ICCPR are statements of rights, whereas the provisions of the Torture Convention are phrased in the terms "States parties shall." However, there appears to be little practical difference between the two formulations, since the Racial Discrimination Convention uses the language more appropriate to rights, while most of its substantive provisions are formulated as a series of explicit undertakings by states ("States shall take . . .").

For a discussion of the use of "hard" language ("violations") and "soft" language ("failure to give effect to obligations"), see *Discussion on the Draft Optional Protocols*, in RIGHT TO COMPLAIN, *supra* note 39, at 209, 213-14 [hereinafter *Discussion*]. The Alston and Utrecht drafts adopt a compromise by using the "softer" language in the context of the Committee's findings.

211. See generally ZWART, *supra* note 155, at 50-71; Tom Zwart, *Standing to Sue in Human Rights Litigation: Abstract and Hypothetical Cases*, in 3 THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE, *supra* note 83, at 361.

212. For a discussion of the advantages and disadvantages of a broadened standing requirement in the context of the Utrecht Draft Protocol (which retains the traditional "victim" requirement), see *Discussion*, *supra* note 210, at 211-12.

siderable personal danger, whereas an organization with a sufficient interest in the matter may be less subject to such threats.

Although article 2(a) goes beyond existing standing requirements, it may still not be sufficiently wide.²¹³ For example, the provision might not permit a family planning organization working with women to submit a complaint in its own name in relation to laws or government practices which restrict women's access to adequate contraceptives. Arguably,

213. Nowak notes that in some cases the Human Rights Committee has been prepared to take a broad view of the interest necessary for a person to qualify as a victim, but this would probably not cover the cases referred to in the text. NOWAK, *supra* note 73, at 659-61.

Rimmer argues that the existing article 2 is unsatisfactory, since it encompasses three tests for standing, each formulated slightly differently and, in his view, likely to give rise to "significant confusion in determining the test to apply in any given circumstance." Rimmer, *supra* note 38, § 26. He proposes that the tests be simplified and that the phrase "directly affected" be used throughout. His suggested version of the article is:

(2)(1) An individual, group or organization:

(a) claiming to be directly affected by a violation of the rights guaranteed in the Convention, or directly affected by the failure on the part of a State Party to this protocol to give effect to its obligations under the Convention; or

(b) claiming that a person or group of persons has been directly affected by a violation of the rights guaranteed in the Convention, or directly by the failure on the part of a State Party to this Protocol to give effect to its obligations under the Convention, and having in the opinion of the Committee a sufficient interest,

may submit a written communication to the Committee for examination

Id. §§ 26-27.

However, Rimmer notes that this change "comes at a cost," namely that a person who suffers detriment (e.g. a child who suffers as a result of discrimination against the child's mother) may not satisfy the directly affected test. *Id.* § 27. Nevertheless, he considers that this would be an acceptable price to pay in order to "remove the requirement to prove harm" that would exist if a person had to show that they had suffered detriment as the result of a violation of the rights in the Convention. *Id.* If his interpretation is correct, then it hardly seems acceptable to exclude from the protection of the Protocol categories of "indirect" victims who would be able to bring a claim under, for example, the First Optional Protocol. If this category of person is not covered by article 2(1)(b) of the draft (as it would appear not to be covered by Rimmer's proposed redraft of article 2(1)(b)), then either the original should be restored or, perhaps, the word "directly" deleted. However, we are not convinced that providing a number of bases of standing is necessarily undesirable or that it would pose problems for the Committee to administer.

Whatever the merits of Rimmer's proposed redraft of article 2(1)(b), it may be useful to state explicitly that the author may be someone other than a person directly affected by a violation or failure by the State Party.

however, such a case would fall within the scope of an organization which is "directly affected" by an alleged failure to give effect to obligations under the Convention. But it is less clear whether a local bar association or association of women lawyers would have standing to bring a complaint concerning the failure to criminalize marital rape, or whether a group monitoring the media would be able to submit a complaint alleging that a State Party has failed to take appropriate measures to address the stereotyped and degrading portrayal of women in the media. Systematic discrimination of this type might be raised in the context of the inquiry procedure in Part II of the draft optional protocol, but that would depend on their being classified as serious or systematic violations of the Convention.

The proposed article 2(b) is intended to allow individual communications of this nature while, at the same time, precluding officious bystanders from lodging complaints. The proposal would permit individuals and groups who, although themselves not victims of a violation, have what the Committee deems to be a "sufficient interest" in the matter. In the first instance this formulation would allow communications to be submitted by another person or group on behalf of an individual claiming to be a victim of a violation.²¹⁴ However, the provision would also allow individuals or groups who are not "directly affected" by violations to lodge communications as long as the Committee considers that they have "a sufficient interest" in the matter. This element is innovative and was intended to take account of the often systematic nature of gender discrimination and the particular obstacles women may face, including dangers of reprisal, low levels of literacy, generally and legal literacy in particular, and resource constraints in seeking remedies for discrimination. It also reflects an awareness that, with regard to structural violations, it may not be possible to identify particular victims over and above other women. Many forms of discrimination against women—such as a state's failure to address the exploitation of prostitution of women, failure to provide adequate maternity leave and benefits, failure to implement measures to discourage sexual ha-

214. It incorporates the practice of the Human Rights Committee and the Committee against Torture insofar as individuals are permitted to bring complaints "on behalf of" other persons.

rassment in the workplace, failure to address the stereotypical portrayal of women in school textbooks, and the failure to ensure adequate health care and nutrition for pregnant women—affect many women. To require the identification of individual victims or those directly affected by a particular law, practice, or policy would not be conducive to the aim of eliminating systematic discrimination.²¹⁵

It is common in discussions of standing under international complaint procedures to state that the procedure should not permit an *actio popularis*, but that a complaint should be lodged only by a person with a direct interest in the outcome. While there may be good reasons for being concerned about “purely hypothetical” cases, it is also important to recognize that requiring in effect that a person be a victim of a violation may unduly restrict the range of complaints that can be considered. In the present case, while the proposal goes beyond existing models for important reasons, the requirement of “sufficient interest” should act as a safeguard against hypothetical or speculative complaints, since it would allow for careful examination to ensure that the complainants did in fact have a sufficiently close interest in the matter.

2. Procedural Matters

The procedure contained in Part I of the draft protocol follows closely the procedure in the First Optional Protocol to the ICCPR and the Torture Convention. There are, however, a

215. Alston considers that such an expanded requirement would, at least in the context of the Economic Covenant, give rise to “speculative complaints” and omits it from his proposed draft *ESCR Analytical Paper*, *supra* note 1, at ¶ 15. However, it is not clear exactly what types of complaints would be considered speculative and why it would not be possible to deal with them under the various heads of inadmissibility proposed. Van Hoof comments in relation to article III of the *Utrecht Draft Protocol*, *supra* note 39, that:

The Optional Protocol’s “admission-policy” should not be too strict nor, however, excessively loose. Concerns about (a flood of) speculative, frivolous or even querulous communications are justified in that they would unjustly damage the State Party concerned and in the final analysis are bound to backfire at the work under the Optional Protocol itself. Prevention of such unintended consequences should not, however, be attempted by limiting the right of communication, but should rather be left to the Protocol Committee through the application of the admissibility conditions.

van Hoof, *supra* note 74, at 161.

number of significant differences. The first formal stage of the procedure is the determination of the admissibility of the communication. The Committee is obliged to decline the complaint if it does not meet all the specified admissibility criteria. The second stage is the consideration of the merits of the communication, involving consideration by the Committee (and the other party) of submissions made to the Committee by one party. The third stage is the adoption by the Committee of its decision or views as to whether there has been a failure by the State Party to give effect to its obligations under the Convention, as well as of any recommendations the Committee wishes to address to the State Party. The fourth stage involves follow up, whereby the State Party would report the steps it has taken to give effect to the views expressed by the Committee, and the Committee would keep the case under review until it was satisfied that any failure to implement obligations had been remedied. The procedure is confidential until the Committee decides to publish its views.²¹⁶

Three major differences exist between the procedure proposed in the draft optional protocol and the procedure under the First Optional Protocol to the ICCPR:

- 1) the Committee is not limited in its consideration of the communication only to written material,²¹⁷ or to material made available to it by the author or the State Party;
- 2) the State Party undertakes an explicit obligation to give effect to the views and recommendations of the Committee; and
- 3) the Committee is not *functus officio* with the adoption of its views, but has express powers to keep the communication under review until, in the Committee's opinion, it has been satisfactorily resolved.

216. The Utrecht draft of an optional protocol to the Economic Covenant does not impose a requirement of confidentiality in the proceedings. *Utrecht Draft Protocol*, art. VIII, *supra* note 39, at 236.

217. There is some dispute as to whether the Human Rights Committee is indeed so limited. See, e.g., GRAEFRATH, *supra* note 61, at 161-62 and NOWAK, *supra* note 73, at 691-92 (who both maintain that it is). But see Opsahl, *supra* note 16, at 427 (who maintain that it is not).

3. Admissibility Matters

a. Anonymity²¹⁸

The draft excludes anonymous complaints, as do other international and regional procedures. However, this prohibition does not necessarily mean the identity of a complainant must be disclosed to the State Party, although it must be made known to the Committee. Of course, in many cases it will be necessary to disclose the identity of the author in order for the state concerned to investigate the facts of the case. Specific provision for the protection of authors of communications could be addressed in the optional protocol itself or, perhaps more appropriately, in the rules of procedure.²¹⁹

b. Substantive Coverage (Admissibility *Ratione Materiae*)²²⁰

The Maastricht draft provides in article 3(2)(a) that a complaint will be inadmissible *ratione materiae* if it does not contain allegations which, if substantiated, would constitute a violation of rights guaranteed by the Convention or a failure by a State Party to give effect to its obligations under article 3(2)(a) of the Convention.²²¹ In other words, a complaint must state a claim which falls within the scope of the Convention and the obligations assumed by the State Party. This requirement is a standard requirement in other individual complaint procedures. However, sometimes the question of whether the author has "sufficiently substantiated" a claim is dealt with as a question of admissibility, and claims which do not reach this threshold are sometimes dismissed on the ground that they are "manifestly ill-founded" or "incompatible with the provisions of" the instrument in question. The inquiry involves an assess-

218. See generally ZWART, *supra* note 155, at 155-56. In relation to the *Utrecht Draft Protocol*, *supra* note 39, which closely follows the Maastricht draft, see van Hoof, *supra* note 74, at 164-70.

219. The Racial Discrimination Convention provides an example of the type of provision which might be adopted. Article 14(6)(a) of that convention provides that "the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent." Racial Discrimination Convention, *supra* note 9, art. 14(6)(a), 660 U.N.T.S. at 232-33. The Maastricht draft does not contain a provision to this effect, as it was considered more appropriate to include such a provision in the rules of procedure.

220. See generally ZWART, *supra* note 155, at 139-54.

221. See *infra* appendix (for article 3(2)(a) of the Maastricht draft).

ment of whether the allegations and supporting evidence provided by the author are sufficient to permit the case to continue—a sort of *prima facie* case requirement.

Dealing with this question as an issue of threshold admissibility, and obscuring the basis of the dismissal in the categories of “manifestly ill-founded” and “incompatible” communications have been criticized by some commentators.²²² Under article 4(1) of the Maastricht draft, the approach adopted is to provide explicitly that the Committee may decline to continue examining a communication if the person submitting the communication fails to provide information which would sufficiently substantiate the allegations, after having been given a reasonable opportunity to do so.²²³

4. Temporal Applicability (Admissibility *Ratione Temporis*)

Once the optional protocol enters into force, it will be necessary to determine whether acts or omissions which occurred before its entry into force, or situations which arose before that time, can be the subject of communications under the protocol. Two issues need to be considered. First, whether the critical date for a State Party is the entry into force of the Convention itself or the date of entry into force of the optional protocol; and second, how one deals with so-called continuing violations.

As a matter of general principle, one might presume that the critical date is the date of entry into force of the protocol and that only acts or omissions occurring after that date would be cognizable under the protocol. However, experience under the First Optional Protocol suggests that it may be desirable to state this clearly in the text of the protocol itself. The Human Rights Committee has taken the view that the critical date is the date of entry into force of the First Optional Protocol and that violations occurring between the entry into force of the Covenant for that state and the entry into force of the First Optional Protocol are inadmissible *ratione temporis* under the Optional Protocol. However, Manfred Nowak argues that the better interpretation is that ratification of the Optional Protocol merely involves recognition of one avenue for redressing violations of the Covenant and that alleged violations after the

222. A notable example is NOWAK, *supra* note 73, at 666-68.

223. See *infra* appendix (for article 4(1) of the Maastricht draft).

entry into force of the Covenant can be considered.²²⁴ While the Human Rights Committee has not accepted this view explicitly,²²⁵ it seems preferable to make the critical date clear in the optional protocol to the Women's Convention. Accordingly, article 3(2)(b) of the draft optional protocol provides that a communication relating to acts or omissions which occurred before the entry into force of the optional protocol for the State Party concerned would not be admissible.²²⁶

This still leaves the question of acts or omissions which occur prior to the entry into force of the optional protocol, but which constitute so-called "continuing violations." The Human Rights Committee has accepted that, even where an act constituting a violation first occurs before the date of entry into force of the complaints procedure, those acts can be considered where the acts "continue[] after the entry into force of the Optional Protocol and allegedly constitute[] a continu[ing] violation of the Covenant or [have] effects that themselves constitute a violation of the Covenant."²²⁷ The Committee has recently observed that:

A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of previous violations of the State Party.²²⁸

This approach has meant, for example, that detention without trial initiated before the entry into force of the Optional Protocol, but which continues after that date, could be considered under the procedure. However, a failure to pay compensation

224. NOWAK, *supra* note 73, at 678-81; Manfred Nowak, *The Activities of the UN-Human Rights Committee: Developments from 1 August 1989 through 21 July 1992*, 14 HUM. RTS. L.J. 9 (1993).

225. See *Parkányi v. Hungary*, Communication No. 410/1990, Report of the Human Rights Committee, U.N. GAOR, 47th Sess., Supp. No. 40, at 317, U.N. Doc. A/47/40 (1994), in which the Committee did consider a violation that occurred before entry into force of the Optional Protocol, on the basis that the State Party had not objected to this.

226. See *infra* appendix (for article 3(2)(b) of the Maastricht draft).

227. *M.T. v. Spain*, Communication No. 310/1988, Report of the Human Rights Committee, U.N. GAOR, 46th Sess., Supp. No. 40, at 284, 285, U.N. Doc. A/46/40 (1991).

228. *E. & A.K. v. Hungary*, Communication No. 520/1992, Report of the Human Rights Committee, U.N. GAOR, 49th Sess., Supp. No. 40, at 336, 339, U.N. Doc. A/49/40 (1994).

for the expropriation of property before the entry into force of the Optional Protocol could not be considered. Consequently, determining whether an alleged violation is a continuing one is a difficult task and ultimately one for the Human Rights Committee to determine in the circumstances of a particular case.

Article 3(2)(b) of the draft optional protocol is intended to set out the position as it exists under the First Optional Protocol. It provides that a communication will be inadmissible where it relates to acts and omissions which occurred before the entry into force for the State Party concerned, unless those acts or omissions:

- (i) constitute a continuing violation of the Convention or a continuing failure to give effect to the state's obligations under the Convention; or
- (ii) have effects which continue beyond the entry into force of this Protocol and those effects themselves constitute a violation of a right guaranteed by the Convention or a failure by the State Party concerned to give effect to its obligations under the Convention.²²⁹

5. Abuse of the Right of Petition²³⁰

Draft article 3(2)(c) provides that the Committee shall decline to consider a communication if it involves an abuse of the right to submit a communication.²³¹ This provision is intended to cover cases in which a complainant may already have submitted the same complaint and there are no new developments, or where a complaint may be vexatious. Arguably, such powers would already be within the implied power of the Committee. This particular ground of inadmissibility along with the criterion of incompatibility with the provisions of the relevant instrument, has been criticized by Maxime Tardu as vague, lending itself to arbitrary interpretation, and more relevant to "the era of grace and favour" or of the "king's pleasure,"²³² but, nonetheless, was regarded as appropriate for inclusion by the Maastricht meeting.

229. See *infra* appendix (for article 3(2)(b)(i)-(ii) of the Maastricht draft).

230. See generally ZWART, *supra* note 155, at 156-68.

231. See *infra* appendix (for article 3(2)(c) of the Maastricht draft).

232. Tardu, *supra* note 152, ¶ 126.

6. The Requirement of Exhaustion of Domestic Remedies²³³

The threshold admissibility criteria adopted by international and regional human rights bodies for individual complaints generally include the requirement that the complainant exhaust domestic remedies before submitting the communication to the international body. The purpose of this requirement is to ensure that the state is given the opportunity to rectify, through its own national, legal, and administrative system, any violation of rights guaranteed by the international instrument. However, various exceptions exist to the strict application of a rule that all local remedies must first be exhausted.²³⁴ Rather than seeking to list all the possible variants,²³⁵ the Maastricht draft opts for a general reference to the rule. Article 3(3)(a) of the draft simply provides that a communication shall not be admissible unless the Committee has ascertained that all available domestic remedies have been exhausted, unless the Committee considers that the application of this requirement would be unreasonable.²³⁶ As women in many countries are very often unaware of their legal rights, a generous interpretation of draft article 3(3)(a) will be required.²³⁷ For example, cases where the complainant was un-

233. See generally ZWART, *supra* note 155, at 187-230.

234. See NOWAK, *supra* note 73, at 703-07; ZWART, *supra* note 155, at 214-19.

235. This was the approach adopted in the discussion draft which provided that the exhaustion requirement would not apply:

where the application of the remedies is unreasonably prolonged, is unlikely to bring effective relief to the person, group or organisation who has been detrimentally affected by the violation of this Convention, where the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have been violated, or the person or group who has been detrimentally affected by the violation of this Convention has been denied access to the remedies of domestic jurisdiction or has been prevented from exhausting them.

236. See *infra* appendix (for article 3(3)(a) of the Maastricht draft). The issue of whether the qualification that the requirement of exhaustion would not be applied if it were unreasonable to do so was the subject of differing views in the drafting of the Utrecht Draft Protocol. See *Utrecht Draft Protocol*, *supra* note 39. One commentator was concerned that such a relaxation of the rule might deter states from ratifying the Protocol, van Hoof, *supra* note 74, at 168-69, while another was not so convinced. Bert Vierdag, *Comments on the Utrecht and Committee Draft Optional Protocols, in THE RIGHT TO COMPLAIN*, *supra* note 39, at 199, 202-03. Although not included in the preliminary Utrecht draft, the phrase appears in article 3(a) of the Final Version. *Utrecht Draft Protocol*, *supra* note 39, at 234.

237. Though it may not be able to be relied on in view of the approach taken by the European Commission in a number of cases in which ignorance of the local

aware of local remedies or the possibility of their use, and is prevented from seeking relief under national law by the time she discovers these remedies, should fall within the exception, unless the State Party concerned can show the Committee that it was unreasonable for a person in the complainant's position to have been unaware of these avenues.

The draft is intended to incorporate the jurisprudence of the Human Rights Committee on the question of the burden of proof in relation to the exhaustion of domestic remedies.²³⁸ Normally, the complainant is required to show that available remedies have been exhausted, would not have been effective, or that there are special circumstances which absolve her from exhausting domestic remedies in the particular case.²³⁹ The State Party is required to give details of the remedies it claims are available and to show that these remedies would be effective. General assertions by the State Party that the complainant has not exhausted domestic remedies, without the provision of further details, would not satisfy the state's burden and, if the state offered no additional information, the Committee would hold that there had been no failure to exhaust available domestic remedies.

7. Desirability of a Time Limit for the Lodging of Communications

Unlike the European Convention and the American Convention on Human Rights, the Maastricht draft does not incorporate any time limit within which complaints must be submitted following the exhaustion of local remedies. The existence of a time limit has been justified by the European Commission on a number of grounds, including the need to ensure legal, administrative, and personal certainty, and the need to ensure that cases raising issues under the European Convention are examined within a reasonable period so as to facilitate timely establishment of the facts. The secretariat to the Human Rights Committee at one time proposed the imposition of a 24

remedies available was held not to justify making an exception to the normal rule. ZWART, *supra* note 155, at 229; 5 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION 273-76 (1985).

238. NOWAK, *supra* note 73, at 706-07.

239. *Id.* at 703-07.

month time limit for the ICCPR, but this proposal was rejected.²⁴⁰ The Human Rights Committee has not felt the need to revisit the issue since that time. The imposition of a time limit in any protocol to the Women's Convention would limit access to the Committee, a result which, in the absence of some convincing reason, seems undesirable.²⁴¹ The fact that women suffer from particular disadvantages, such as low levels of legal literacy and a lack of awareness of the international procedures for the enforcement of their rights, may constitute a further reason for not imposing a time limit at this stage.

If a time limit were considered appropriate, then one alternative would be to provide that, while complaints should be lodged within 24 months of the exhaustion of local remedies, the Committee may, where it considers it reasonable in the circumstances of the case, extend the period. However, stipulating a time limit in cases where either domestic remedies are not available or have been unduly prolonged, or where the violation is a continuing one, may give rise to difficulties. Another option is found in those procedures which provide that communications must be submitted within a reasonable time.²⁴² For example, communications submitted under the Resolution 1503 procedure must be submitted "within a reasonable time after the exhaustion of . . . domestic remedies."²⁴³ Similarly, for a communication to be admissible under the UNESCO communications procedure, it must be submitted "within a reasonable time-limit following the facts which constitute its subject-matter or within a reasonable time-limit after the facts have become known."²⁴⁴

8. Relationship to Other Complaint Mechanisms²⁴⁵

Existing international complaint procedures seek to avoid a situation where the same complaint is considered by two

240. MCGOLDRICK, *supra* note 49, at 129.

241. ZWART, *supra* note 155, at 169-70.

242. This was the approach proposed in the Utrecht draft, van Hoof, *supra* note 74, at 169-70, but was not finally adopted.

243. Subcommission on Prevention of Discrimination and Protection of Minorities, Res. 1(XXIV), ¶ 5, U.N. Doc. E/CN.4/1070, E/CN.4/Sub.2/323 (1971).

244. UNESCO Decision, *supra* note 66, ¶ 14(a)(viii).

245. See generally Trindade, *supra* note 201, at 127-209; ZWART, *supra* note 155, at 173-85.

different international bodies. Two basic approaches have been adopted.²⁴⁶ The first approach provides that, where a complaint is being considered by another international complaint procedure, substantially the same complaint will not be admissible before another body until the matter is no longer pending before the first body. Such an approach views the pending proceedings as having a suspensive effect on the admissibility of the communication. If the complaint procedure before the first body is terminated for whatever reason, it no longer acts as a bar to the admissibility of the communication before the second body. This is the approach adopted in the First Optional Protocol to the ICCPR.²⁴⁷

The second approach excludes from consideration not just a communication which is presently being considered by another body, but it also excludes from consideration a communication raising substantially the same matter which has already been considered by another body. However, if the earlier consideration is to bar its subsequent consideration, the procedure must be similar in nature to the later procedure, the issues must be substantially similar, the parties must be the same, and any earlier decision must have been on the merits. This is the approach adopted, for example, in article 27(1)(b) of the European Convention²⁴⁸ and article 21(5)(a) of the Torture Convention.²⁴⁹

Article 3(3)(b) of the Maastricht draft embodies the second approach, so that the Committee will not be competent to consider a complaint where that complaint raises substantially the same issues of law and fact as an earlier communication.²⁵⁰ This may, however, lead to some difficulties. Assume, for example, that a complaint is made that a State Party to both the First Optional Protocol and the optional protocol to the Women's Convention has, by failing to legislate against sexual harassment against women in the workplace, not given effect to its obligations under articles 2(1) and 7 of the ICCPR. If this complaint were to be routed to the Human Rights Committee

246. See NOWAK, *supra* note 73, at 695-702.

247. See *Id.* at 695-96.

248. European Convention on Human Rights, *supra* note 54, art. 27(1)(b), 213 U.N.T.S. at 238-39.

249. Torture Convention, *supra* note 49, art. 21(5)(a), at 199.

250. See *infra* appendix (for article 3(3)(b) of the Maastricht draft).

and it held that the obligation of the State Party under articles 2(1) and 7 of the ICCPR did not mandate the enactment of legislation against sexual harassment in employment, could the matter then come before CEDAW under articles 2 and 11 of the Women's Convention, if the proposed formulation were adopted? It may be argued that the matter is substantially the same and has been considered on the merits, even though the two Committees might take different views of whether there is a violation of the arguably similar obligations under their respective treaties. Further consideration may need to be given to adopting the first approach of the First Optional Protocol to the ICCPR. Where a complaint was on all fours with an earlier complaint already considered by another body, CEDAW would still be entitled to reject it.

9. Need for an Urgent Action Procedure²⁵¹

Article 5 of the draft protocol provides explicit power for the Committee to request the state to take interim measures pending the adoption of its final views on a complaint.²⁵² The provision is also intended to permit the Committee (or one or more of its members) to take action as a matter of urgency where immediate action is required to prevent irreparable harm to the complainant.²⁵³ The Human Rights Committee has provided for this essential power in its rules of procedure. Such a power is even more important for CEDAW in view of the fact it meets less regularly than the Human Rights Committee. Article 5(2) obliges States Parties to take all necessary steps to comply with such a request.

10. The Possibility of Settlement

Article 6(3) of the draft Optional Protocol,²⁵⁴ like the European and American Conventions on Human Rights,²⁵⁵ pro-

251. See generally ZWART, *supra* note 155, at 14-16, 34-37; Theo Van Boven, *Facing Urgent Human Rights Cases: Legal and Diplomatic Action*, in 3 THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE, *supra* note 83, at 61.

252. See *infra* appendix (for article 5 of the Maastricht draft).

253. On the importance of ensuring that appropriate action can be taken between sessions in the context of the Human Rights Committee, see Tardu, *supra* note 152, ¶¶ 133-141.

254. See *infra* appendix (for article 6(3) of the Maastricht draft).

255. See generally Alexandre Kiss, *Conciliation*, in THE EUROPEAN SYSTEM FOR

vides for the possibility of a settlement between the complainant and the State Party on the basis of the rights and obligations set forth in the Convention. During its discussion of the proposed protocol, CEDAW, sympathetic to concerns about the appropriateness of creating a complaints procedure which would be both quasi-judicial and adversarial, emphasized its confidential nature, and its constructive, conciliatory, and mediatory aspects.²⁵⁶

During the elaboration of the proposed protocol, it is likely that arguments about its inevitably adversarial nature will be made. Proponents of these views are likely to maintain that the creation of an adversarial approach will adversely affect the constructive dialogue and atmosphere of cooperation necessary for the implementation of the Convention and will, accordingly, hamper or obstruct the realization of its goals.

Such concerns have not, however, been considered sufficiently weighty to prevent the adoption of complaint procedures under other international human rights treaties. If they are given undue weight in the development of an optional protocol to the Women's Convention, they will, again, reflect an attitude that discrimination against women is a second-rate concern of the international community. Although complaint procedures are in no way a panacea, they have had considerable impact. Conversely, the impact of the cooperative approach through reporting, while valuable, has been of limited effect. The Maastricht draft seeks to strike a compromise, retaining both the adversarial elements of a complaint process and the conciliatory aspects of settlement.

11. Fact-Finding Procedures and Evidentiary Matters

Article 7 confers on the Committee broad powers to collect information and to conduct its fact finding and other functions as it sees fit.²⁵⁷ In this respect, the Maastricht draft diverges

THE PROTECTION OF HUMAN RIGHTS, *supra* note 78, at 703.

256. See Roberta Jacobson, *The Committee on the Elimination of Discrimination against Women*, in A CRITICAL APPRAISAL, *supra* note 2, at 444, 449; Oeser, *supra* note 20, at 53; *supra* notes 12-14 and accompanying text (regarding the concerns raised at drafting of the 674th Meeting of the Commission on the Status of Women); see also *ESCRC Analytical Paper*, *supra* note 1, ¶ 43 (raising similar concerns about the drafting of an optional protocol to the Economic Covenant).

257. See *infra* appendix (for article 7 of the Maastricht draft).

from the First Optional Protocol, which confines the Human Rights Committee to consideration only of written materials provided to it by the author and the State Party concerned.²⁵⁸ Article 7 does not limit the sources of information on which the Committee may draw. Consequently, it may look to reports from specialized agencies, reports of special rapporteurs of the Commission on Human Rights, to NGO material, and other relevant documents. Under article 7(1), however, the Committee is required to provide copies of this material to both the author and the State Party in order that they may respond to it. Moreover, the draft article gives the Committee a general power to regulate its own procedures: this could include oral hearings, on-site visits (with the consent of the State Party concerned),²⁵⁹ or the appointment of an independent expert to assist it in its fact-finding tasks. Thus, Article 7 is intended to ensure a wide range of powers to the Committee so that it can perform its functions in the most effective manner possible.

12. The Status of a Decision by the Committee

With regard to decisions rendered by treaty bodies under existing individual complaint procedures, the generally accepted view is that these decisions are not, as a formal matter, legally binding on the State Party concerned, nor are they a legally binding interpretation of the treaty vis-à-vis other States Parties.²⁶⁰ The consequence of this is that a State Par-

258. Commentators have argued that the limitation in the ICCPR Optional Protocol to a written procedure is unsatisfactory. MCGOLDRICK, *supra* note 49; Christian Tomuschat, *Evolving Procedural Rules: The U.N.-Human Rights Committee's First Two Years of Dealing with Individual Communications*, 1 HUM. RTS. L.J. 249, 254 (1980). On fact-finding procedures under the European Convention, see Kersten Rogge, *Fact-finding*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 78, at 677.

259. The Inter-American Commission, the European Commission of Human Rights and the ILO have capacity for on-site visits. The experience of these bodies suggests such investigations are of assistance to human rights organs in their determinations. See INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS (B.G. Ramcharan ed., 1982). The exercise of such a power in the case of CEDAW would have significant resource implications. Robert E. Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46 (1980).

260. See, e.g., GRAEFATH, *supra* note 61, at 167-68; NOWAK, *supra* note 73, at 710. However, Messrs. Pocar and Müllerson have argued that a combination of article 5(4) of the Optional Protocol and article 2(3) of the ICCPR have the effect of obliging States to abide by the views of the Human Rights Committee. See

ty is not bound, as a matter of international law, to give effect to recommendations of the relevant committee merely by virtue of the committee's pronouncement in a case.

Although the Maastricht draft does not provide in terms that the views adopted by the Committee are legally binding, even on the State Party concerned, it nevertheless moves a step beyond existing procedures. Article 8 of the draft optional protocol provides that, where the Committee has found a State Party has failed to give effect to its obligations under the Convention, it may recommend that the State Party take specific steps to remedy that failure.²⁶¹ The State Party is under an explicit obligation to take those steps, as well as to inform the Committee of the steps it has taken.²⁶²

Article 8 envisages that the Committee will possess broad power to recommend to the State Party whatever measures it considers appropriate to the particular case before it. As under the First Optional Protocol, these measures could range from the payment of damages or the provision of some other form of reparation, the review or repeal of offending laws, the release of a person from prison or the adoption of other measures to ensure that future violations of the Convention will be prevented.²⁶³ The explicit obligation to give effect to the recommendations of the Committee is likely to give some states pause for thought because of concern about the type of recommendations the Committee might make, and the extent to which this may be perceived to impinge inappropriately on the judgment of national authorities, particularly where complex issues of fact and policy are concerned. In this respect, the Committee will need to be somewhat cautious and avoid—except in the clearest cases—specifying in too great detail the exact steps which states should take to abide by the provisions of the optional protocol.²⁶⁴

Fausto Pocar, *Legal Value of the Human Rights Committee's Views*, 1991-92 CAN. HUM. RTS. Y.B. 119; Müllerson, *supra* note 59, at 27-36. However, this argument appears circular; article 2(3) can be relevant only if there is a binding interpretation by the Committee pursuant to the Optional Protocol.

261. See *infra* appendix (for article 8 of the Maastricht draft).

262. A similar provision appears in the Alston draft and the Utrecht draft of an optional protocol to the International Covenant on Economic, Social and Cultural Rights. See *supra* note 39 for the Alston and Utrecht drafts.

263. ZWART, *supra* note 155, at 19-21.

264. Article VIII(2) of the *Utrecht Draft Protocol*, *supra* note 39, at 236, which

13. Follow-Up Power

Experience under the existing procedures suggest that it would be useful to give the Committee the power to follow up its decisions.²⁶⁵ For example, the First Optional Protocol to the ICCPR does not explicitly make provision for any action by the Human Rights Committee after it has adopted its "views" and communicated them to the State Party and the complainant. As a practical matter, it is sometimes necessary to follow up decisions, particularly in the case of states which are reluctant or slow to give effect to the views expressed by the Human Rights Committee. Although the Human Rights Committee has sought to follow up on its decisions,²⁶⁶ in the absence of any formal power to do so it has been rather more tentative in its actions than it might otherwise have been.²⁶⁷ The Committee has described the absence of an explicit provision in the First Optional Protocol on enforcement as "a major shortcoming in the implementation machinery established by the Covenant."²⁶⁸

The record of States Parties in responding to the Human Rights Committee's invitation to report on action taken in response to its conclusions appears mixed.²⁶⁹ This is so even though in 1991 the Committee's guidelines for the preparation of periodic reports were amended to add:

When a State Party to the Covenant is also a party to the Optional Protocol, and if in the period under review in the Report the Committee has issued views finding that the State Party has violated provisions of the Covenant, the report

diverges from article 8 of the Maastricht and Alston drafts in this respect, provides that the State Party "shall give due regard to any suggestions or recommendations made by the Committee," rather than obliging the State Party to implement them ("shall implement"). See also Rimmer, *supra* note 38, §§ 32-33, who proposes requiring States Parties to use their "best efforts" to remedy any violations, giving "due consideration to the Committee's recommendations."

265. Markus G. Schmidt, *Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform*, 41 INT'L & COMP. L.Q. 645, 649-51 (1992).

266. NOWAK, *supra* note 73, at 711-12.

267. See MCGOLDRICK, *supra* note 49, ¶¶ 4.41-43.

268. *Follow-Up on Views Adopted Under the Optional Protocol to the International Covenant on Civil and Political Rights*, World Conf. on Hum. Rts., Agenda Item 12(c), ¶ 2, U.N. Doc. A/CONF.157/TBB/3 (1993), reprinted in 1 INT'L HUM. RTS. REP. 345, 345 (1994).

269. *Id.* ¶¶ 3, 10.

should include a section explaining what action has been taken relating to the communication concerned. In particular, the State Party should indicate what remedy it has afforded the author of the communication whose rights the Committee found to have been violated.²⁷⁰

The Committee also designated one of its members as a Special Rapporteur for the Follow-Up of Views.²⁷¹

Given the experience of the Human Rights Committee, an explicit power to follow up decisions seems desirable.²⁷² Draft article 9 explicitly provides for such a procedure.²⁷³ It requires that a state take all steps necessary to remedy any violation of the Convention found by CEDAW and report to it within three months of the steps it has taken to remedy that violation. Article 9(1) empowers the Committee to request that the State Party appear before it to discuss the steps taken and to continue any discussions with the State Party until the Committee is satisfied that the steps are adequate. This procedure is similar to that adopted by the ILO Committee on Freedom of Association.

14. Procedural Obligations of States Parties with Respect to Complaints Under the Optional Protocol

Draft article 2(2) obliges States Parties to the Protocol not to hinder in any way the effective exercise of the right of communication and also obliges states to take all steps necessary to prevent any other person from interfering with or victimizing any person for exercising this right of communication.²⁷⁴ Moreover, States Parties must assist the Committee in its examination of communications lodged under the Optional Protocol. This provision sets out in more detail the duty of cooperation which appears in other instruments and also adds

270. See paragraph 15 of U.N. Doc. CCPR/C/5/Rev.1 (1991), which is now contained in paragraph 17 of the revised guidelines of the Committee. *Report of the Human Rights Committee: Revised Guidelines Regarding the Form and Contents of Reports from States Parties*, U.N. GAOR, 50th Sess., Supp. No. 40, Annex VII, at 140, U.N. Doc. A/50/40 (1995) [hereinafter *Revised Guidelines*].

271. *Revised Guidelines*, *supra* note 270, ¶ 3. On the experience of the Committee to date, see further *id.* ¶¶ 544-65.

272. *Contra* Rimmer, *supra* note 38, § 34.

273. See *infra* appendix (for article 9 of the Maastricht draft).

274. See *infra* appendix (for article 2(2) of the Maastricht Draft).

a specific duty to protect a complainant against victimization, not just by the state itself, but also by private individuals.²⁷⁵

B. Inquiry by the Committee on its own Motion (Part II of the Draft Optional Protocol)

The second procedure included in the Maastricht draft optional protocol empowers the Committee to embark on an investigation into a situation in a State Party to the Convention if it has received reliable information that indicates systematic or serious violations of the Convention within the State Party. The justification for a procedure of this type has already been discussed, both in principle and as a supplement to an individual complaints procedure.

The model for the procedure included in the draft protocol is article 20 of the Torture Convention, which draws on other models such as the Resolution 1503 procedure and ILO inquiry procedures. Article 20 of the Torture Convention provides the Committee against Torture with the power to initiate a confidential examination of the situation in a country where "the Committee receives reliable information which appears to it to contain well-founded indications that torture is being system-

275. See also *infra* appendix for article 14 of Maastricht draft which sets out an obligation to make known the provisions of the protocol and the Committee's work under it. Compare Chapter IV, article 2(f) of the Draft Declaration on the Right and Responsibility of Individuals, Organs and Groups of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which guarantees "[u]nhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights in accordance with applicable international instruments and procedures." *Drafting of a Declaration on the Right and Responsibility of Individuals, Organs and Groups of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Report of the Working Group on its Tenth Session*, Comm'n on Hum. Rts., 51st Sess., Agenda Item 23, at 46, U.N. Doc. E/CN.4/1995/93 (1995). Article 3(a) of Chapter IV obliges states to "[t]ake all necessary steps to ensure the protection by the competent authorities of everyone . . . against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination or any other arbitrary action as a consequence of their legitimate exercise of the rights" referred to in the Declaration. *Id.* Other international and regional bodies have also taken steps to provide protection for those participating in their proceedings. See *Co-operation with Representatives of United Nations Human Rights Bodies: Note by the Secretary General*, Comm'n on Hum. Rts., 47th Sess., Agenda Item 11, ¶¶ 21-23, U.N. Doc. E/CN.4/1991/24 (1991) (steps taken by ILO in relation to Commission of Inquiry under article 26 of the ILO Constitution, as well as procedures adopted in relation to proceedings under the European and American Conventions on Human Rights).

atically practised in the territory of a State Party.²⁷⁶ The examination is intended to proceed with the cooperation of the State Party, but the Committee against Torture may proceed in the absence of that cooperation. While the examination is confidential, the Committee against Torture may publish a summary report of its findings once the inquiry is completed.

The procedure proposed in Part II of the draft follows a similar sequence. The sources of material on which the Committee might base a conclusion that the threshold for an inquiry had been reached could include—but would not be limited to—material provided by a State Party, specialized agencies, NGOs, or reports of United Nations bodies or functionaries.

An important issue is the threshold that should be applied before the Committee can initiate the procedure. As the procedure is intended to address systematic violations of the Convention, generally something more than a complaint about an individual case would be required, although such a complaint might in certain circumstances show the existence of a pattern.²⁷⁷ The jurisdictional standard proposed for initiating the procedure is that there be “reliable information which appears to [the Committee] to indicate that there is a serious or systematic violation by a State Party of rights set forth in the Convention, or a serious or systematic failure by a State Party to give effect to its obligations under the Convention.”²⁷⁸ This formulation, while fairly general, gives the Committee the opportunity to interpret the standard in the context of specific cases.²⁷⁹

One objection to the inquiry procedure may be that it is little different from the pre-arrest communications procedure of the Commission on the Status of Women and that the role of

276. Torture Convention, *supra* note 49, art. 20, at 199.

277. It may turn out that particular cases (e.g., *sati* or stoning) would qualify to initiate the inquiry procedure, since individual cases may indicate the existence or likelihood of a pattern of violations. The purpose of the procedure is at least in part preventive and the jurisdictional criterion should be interpreted so as to advance this function where feasible.

278. See *infra* appendix (for article 11(1) of the Maastricht draft).

279. Some guidance may be obtained from the formulation contained in the UNESCO Decision, which refers to violations, “resulting either from a policy contrary to human rights, applied *de jure* or *de facto* by a State, or from an accumulation of individual cases forming a consistent pattern” UNESCO Decision, *supra* note 66, ¶ 10(b).

responding to systematic violations of the human rights of women is best left to the Commission. However, the Commission's communications procedure has failed to provide an avenue for responding to allegations of serious violations of women's rights, and this appears unlikely to change in the near future. Designed as a petition procedure to provide the Commission with information to assist in policy formulation, the Commission's procedure has produced relatively little in that respect, and does not provide an effective forum for focusing on serious violations in individual countries. Furthermore, the scrutiny of communications under the Commission's procedure is carried out by government representatives rather than by independent experts. Indeed, there is nothing to prevent a government which is the subject of a communication from serving as a member of the working group of the Commission which considers the communication. Practice has shown the importance of independent experts to objective and non-selective monitoring of human rights.

The inquiry procedure proposed may carry with it significant resource implications if the Committee were to initiate any number of investigations. It might also expose the Committee to charges of selectivity and political bias, although this may also be the case where individual communications are being considered. Nevertheless, in our view, this procedure could provide a useful supplement to an effective complaints procedure if judiciously employed.

The Maastricht draft also contains a number of adjectival or procedural provisions which do not appear in other equivalent instruments, although they may have subsequently been adopted in rules of procedure or as part of the practice of other treaty bodies. One important feature²⁸⁰ is an explicit obligation contained in draft article 14 which provides that States Parties undertake to make widely known, by appropriate and active means, the contents of the protocol, the procedures it establishes, any views and recommendations adopted by the Committee under Part I, and the results of any inquiry conducted under Part II.²⁸¹

280. A somewhat similar provision appears in article 42 of the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 182, U.N. Doc. A/44/49 (1989).

281. The Utrecht Draft Protocol contains a similar provision, modelled on arti-

Many matters relating to the manner in which the Committee should carry out its functions under the optional protocol are probably best left to regulation by the rules of procedure to be adopted by the Committee under the optional protocol. Accordingly, article 15 of the draft specifically empowers the Committee to make rules of procedure (the power applies to both the procedures contained in the draft protocol).²⁸² In addition to the general power to make rules conferred by article 15(1), article 15(2) specifies a number of specific matters on which the Committee may make rules. The purpose of mentioning these matters in the protocol itself is to make clear that the Committee does have power to take particular actions, such as adopting an urgent action procedure or regulating its fact-finding procedure and thus to avoid unproductive discussion of *ultra vires* considerations. While other bodies have made rules of procedure with respect to important procedural matters not expressly mentioned in their enabling instruments (presumably on the basis of an implied power to do so), clarifying the issue at the outset seems preferable. Article 19(1) of the Convention already provides a power for the Committee to make rules of procedure, but a specific power relating to the protocol nevertheless seems advisable.²⁸³

C. *Submission to Both Procedures*

The inclusion of more than one procedure in the draft optional protocol gives rise to the question of whether a state wishing to become a party to the protocol will be obliged to submit to both procedures and, if not, whether one of the procedures should be compulsory. Insofar as a protocol along the lines of the Maastricht draft is concerned, three options are available. First, a state must accept *both* procedures if it wishes to become a party to the optional protocol; second, a state could submit to only one of the procedures and could choose which of the two procedures it wished to accept; or third, a state would be required to accept one of the procedures to be specified in the protocol and would have an option as to wheth-

cles 2(2) and 14 of the Maastricht Draft. *Utrecht Draft Protocol*, *supra* note 39, art. II(2), at 234; see van Hoof, *supra* note 74, at 163-64.

282. See *infra* appendix (for article 15 of the Maastricht draft).

283. Women's Convention, *supra* note 3, art. 19(1), 1249 U.N.T.S. at 22.

er it submitted to the other.

The Maastricht draft proposes that a state wishing to become a party to the protocol must accept both the individual complaints procedure and the inquiry procedure. This approach was taken despite the fact that the draft before the Maastricht meeting suggested that of the three procedures it proposed (individual, inquiry, and interstate), only the individual complaints procedure would be compulsory. However, the draft provided that, if states did not want to be bound by the inquiry procedure, they would have to opt out. Some concern was expressed at the Maastricht meeting that states might be less willing to become parties to a protocol which included both a compulsory complaints procedure and an inquiry procedure rather than one which made the latter procedure optional. Ultimately, however, the view prevailed that states would not be deterred from accepting the protocol by the requirement that they submit to both procedures.

Nevertheless, states have shown themselves less willing to submit to the inquiry procedure under the Torture Convention than they are to accept the individual complaints procedure provided for under article 22 of that Convention.²⁸⁴ Experience with the Torture Convention suggests that providing states with the choice of opting out of an inquiry procedure may lead to a larger number of states accepting the individual complaints procedure.²⁸⁵ States may well be concerned about

284. Torture Convention, *supra* note 49, art. 22, at 200.

285. Under the Torture Convention, states becoming parties to the Convention may submit to an individual communication procedure, an interstate communications procedure, and to the investigative procedure established under article 20 of the Convention. *Id.* at 199. States must expressly declare that they accept the first two procedures in order to be bound by them, while states are considered to be bound by the article 20 procedure unless they expressly opt out of the procedure. The number of states bound by the article 20 procedure is much larger than the number which has accepted either the individual complaints procedure or the interstate procedure. As of January 1, 1996, of 107 States Parties, 101 had submitted to the article 20 procedure, 38 had submitted to the article 21 interstate procedure, and 36 had submitted to the article 22 individual complaint procedure. See *List of States Which have Signed, Ratified, or Acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1996/34 (1996); Facsimile Transmission from Alessio Bruni, Secretary of the Committee against Torture, in Geneva, Switzerland (Jan. 18, 1996) (on file with the *Brooklyn Journal of International Law*); see also Byrnes, *supra* note 72, at 530.

The draft before the Maastricht meeting, which proposed all three procedures, suggested that the individual complaints procedure should be compulsory,

the breadth of the Committee's jurisdiction under Part II of the Maastricht draft and wary about submitting to this jurisdiction. Accordingly, the draft may prove to be optimistic on this score, with the most likely outcome being elimination of the inquiry procedure entirely or the addition of a clause providing states with the option of not submitting to the inquiry procedure on an opt in or opt out basis. In any event, an individual complaints procedure is an indispensable part of an effective complaints mechanism and any protocol should therefore require that a state wishing to become party to such a protocol accept the individual complaints procedure.

D. Institutional Implications of the Adoption of a Petition Procedure Under the Convention

1. Overlapping/Duplicative Procedures

Concerns are likely to be expressed that the adoption of a petition procedure under the Women's Convention would lead to a large measure of substantive overlap with existing communications mechanisms, giving rise to inefficient and unnecessary duplication, administrative inconvenience, and possibly normative conflict. The procedures with which a communication procedure under the Convention may overlap include:

- 1) so far as an individual complaint procedure is concerned, individual complaints procedures with respect to discrimination on the basis of sex that exist under the Optional Protocol to the ICCPR, as well as relevant regional procedures; and
- 2) so far as an inquiry procedure is concerned, the procedure under Resolution 1503, the communications procedure of the Commission on the Status of Women, as well as some of the thematic mechanisms of the Commission on Human Rights, in particular the recently established Special Rapporteur on Violence against Women.

It should be noted that the possibility of overlaps between existing procedures and proposed procedures has existed in other contexts. In general, however, this has not led to a decision not to adopt a new complaints procedure. For example,

and that states should be required to opt out of the other two if they did not want to be bound by them.

although the Torture Convention contains substantive guarantees which are also covered by the ICCPR, this was considered an insufficient reason for not adopting an individual complaint procedure under the Torture Convention. Nor was the fact that other petition procedures such as the Resolution 1503 procedure covered torture, considered a reason for not adopting the inquiry procedure contained in article 20 of the Torture Convention.

There is some substantive overlap between the guarantees of the Convention and the non-discrimination guarantees of the ICCPR, especially articles 2, 3 and 26 of the ICCPR. However, although many States Parties to the ICCPR and the Optional Protocol are also States Parties to the Women's Convention, there are countries which are parties to the Convention but not the ICCPR and vice versa. The only overlap of real concern would exist in relation to a State Party to both conventions which has also accepted the competence of the Human Rights Committee under the Optional Protocol and of CEDAW under an optional protocol to the Women's Convention. In cases such as this, the important issues are to which procedure a complaint should be routed and on what basis,²⁸⁶ and whether a complaint which has been brought under one procedure may subsequently or simultaneously be brought under the other procedure.²⁸⁷

So far as the adoption of an inquiry procedure under the Optional Protocol is concerned, the only real problem with overlap and inefficient duplication might be the mandate of the Special Rapporteur on Violence against Women. This mandate authorizes the Special Rapporteur to seek and receive information on violence against women, its causes and consequences from governments to employ U.N. human rights mechanisms and other intergovernmental organizations, as well as NGOs, to recommend measures aimed at all levels to eliminate violence against women and its causes and to remedy its consequences, and to work closely with other bodies within the U.N. system so that human rights violations against women are regularly and systematically included in their reports and deliberations.²⁸⁸ That overlap would, of course, only occur

286. See *infra* note 300 and accompanying text.

287. See *supra* notes 245-50 and accompanying text.

288. See C.H.R. Res. 1994/45, *supra* note 24.

with respect to those members of the United Nations which had ratified the Women's Convention and accepted one or both of its complaint procedures. Moreover, the overlap would only exist in relation to communications concerning violence against women. In addition, the nature of the functions of the Committee and the Special Rapporteur are quite different. The Special Rapporteur does not engage in investigation or any form of "adjudication" of complaints or allegations as would the Committee.

A similar situation arose under the Torture Convention following the appointment by the Human Rights Commission of its Special Rapporteur on Torture whose mandate overlaps substantively with that of the Committee against Torture far more than that of the Special Rapporteur on Violence against Women overlaps with that of CEDAW. Despite some concern about overlap, the Special Rapporteur and the Committee have somewhat different and have been able to work constructively together without inefficient duplication.²⁸⁹ A similar *modus vivendi* can presumably be worked out between the Special Rapporteur on Violence against Women, whose substantive remit is narrower than the scope of the Convention, and CEDAW, and the apparent overlap should not stand in the way of adopting an optional protocol to the Convention.

2. Normative Conflicts

One consequence of having procedures which empower two or more different bodies to consider communications under their respective treaties is that each body may adopt different interpretations of similarly or identically worded guarantees. This possibility of conflicting or divergent interpretations already exists in the context of the general comments and general recommendations adopted by the various treaty bodies, as well as between the Human Rights Committee and the Committee against Torture, and the adoption of an optional protocol to the Women's Convention will inevitably contribute to this possibility. To date, although there have been differences of interpretation by the various treaty bodies, there have been no major conflicts of interpretation and it may well be that,

289. See Byrnes, *supra* note 72, at 542-46; Rodley, *supra* note 2, ¶¶ 44-51.

were a protocol to the Women's Convention to be adopted, normative conflict would be only a remote danger.²⁹⁰ On the other hand, Philip Alston has observed that "[i]n the longer term, it seems inevitable that instances of normative inconsistency will multiply and that significant problems will result."²⁹¹ Likewise, in his commentary on the Maastricht draft, Ben Rimmer argues that normative inconsistency, which he believes can only bring the U.N. human rights system into disrepute, is a real risk attendant on the adoption of a complaints procedure to the Women's Convention. Indeed, he believes that the risk of differential interpretation of identical or similar obligations between the Committee and the Human Rights Committee is greater than that which currently exists between the Human Rights Committee and the Committee against Torture because differences of approach are inevitable, with CEDAW Committee members, in principle, committed to the elimination of discrimination against women on the basis of sex, whereas a wide variety of beliefs may exist within the Human Rights Committee.²⁹²

The danger of normative inconsistency is not, however, a problem which will arise only as a result of the adoption of a complaints mechanism to the Women's Convention. Indeed, it is a problem which already exists within the human rights system. Resolution of this problem does not lie in the rejection of new proposals such as the proposed optional protocol, but rather in institutional and other reforms. Ensuring that all committees are aware of the normative developments in other committees is likely to be one effective way of limiting conflicting and divergent interpretations. This should ensure that the interpretations of each body are considered to be of equal validity. The effect of not adopting a complaints procedure under the Convention, in an effort to avoid possible normative inconsistency, would privilege further the dominant interpretive position of bodies which presently have complaints procedures.

290. Cf. Tardu, *supra* note 152, ¶¶ 74-75.

291. Philip Alston, *Study on Possible Long-Term Approaches to the Supervision of New Instruments on Human Rights*, ¶ 128, U.N. Doc. A/44/668 (1989). See also Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in 3 *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE*, *supra* note 83, at 219.

292. Rimmer, *supra* note 38, § 12.

These have been criticized for paying insufficient attention to gender issues and adopting androcentric interpretations. If the assumption that CEDAW would adopt different interpretations is correct, this may have the beneficial effect of redressing limitations in existing human rights jurisprudence.

E. The Need for Additional Resources for CEDAW

The adoption of an optional protocol to the Convention would necessarily mean that CEDAW would require more meeting time to carry out its additional functions. At present, article 20 of the Convention provides that CEDAW shall "normally" meet for a period of two weeks annually.²⁹³ As more states have become parties to the Convention and the number of reports to be reviewed has grown, the Committee has experienced difficulties in getting through the amount of work required in order to avoid falling behind in its consideration of reports. In recent years, the Committee has been granted an additional week's meeting time in order to help reduce its backlog, but this still has not been sufficient to accomplish that goal.²⁹⁴

Thus, there is no time in CEDAW's present schedule for the consideration of communications under the proposed optional protocol. Additional time, funds, and resources would need to be made available to the Committee. It is difficult to estimate the extent of the additional resources that would be required because it would depend on the number of ratifications, the number and complexity of complaints, and the procedures adopted by the Committee for the consideration of those complaints. However, it would probably require at the outset at least a week of additional plenary meeting time and the establishment of a pre- or -inter-sessional working group, in addition to the work that would need to be performed between the once yearly sessions.

While comparisons with the work of other bodies may not permit a reliable prediction to be made of the impact of a pro-

293. Women's Convention, *supra* note 3, art. 20, 1249 U.N.T.S. at 22.

294. The States Parties to the Convention have refused to amend article 22 of the Convention in order to provide that the Committee should have such time as is necessary for its meetings, preferring to require the Committee to apply on an *ad hoc* basis to the States Parties for additional meeting time. *Report of the Eighth Meeting of the States Parties*, U.N. Doc. CEDAW/SP/1995/2 (1995).

tocol on CEDAW's workload, it may be noted that the Committee against Torture spent a total of 42 meetings over its first 14 sessions on its work under article 20 of the Convention which commenced at its fourth session.²⁹⁵ During its thirteenth and fourteenth sessions, the Committee had before it 13 individual communications. However, the Human Rights Committee has received over 600 individual communications since 1976 when the First Optional Protocol entered into force,²⁹⁶ while CERD has received only a handful since the entry into force of article 14 of the Racial Discrimination Convention in 1982.²⁹⁷ Article 16 of the Maastricht draft seeks to address this matter by making clear the Committee's need for additional time if the protocol is adopted.²⁹⁸ The article provides that the Committee will meet for such period, being not less than three weeks annually, as is necessary to carry out its functions under the protocol.

Additional secretariat staff would also be needed once the optional protocol was operational in order to provide support for the Committee's activities. In this context, expert legal assistance would be required. There would be an increased need for inter-sessional support for members of the Committee entrusted with tasks between sessions of the Committee. Article 16 of the Maastricht draft stakes a claim for the additional support, which would have to come from the normal budget of the United Nations, by providing that the Secretary-General of the United Nations is to provide the Committee with the necessary staff and facilities for the performance of its functions under the protocol.

A related question is that of the expertise of the Committee and the legal and other support with which it is provided. While Committee members have qualifications in a range of disciplines—a factor which will no doubt assist in their evaluation of many aspects of complaints—it seems likely that there will be a great deal of technical legal work required in dealing

295. *Report of the Committee against Torture*, U.N. GAOR, 50th Sess., Supp. No. 40, ¶ 186, U.N. Doc. A/50/44 (1995).

296. *Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp. No. 40, Vol. I, ¶ 484, U.N. Doc. A/50/40 (1995) (636 communications registered as of July 1995).

297. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 50th Sess., Supp. No. 18, ¶¶ 673-74, U.N. Doc. A/50/18 (1995).

298. See *infra* appendix (for article 16 of the Maastricht draft).

with complaints under any protocol. At present, the secretariat servicing the Committee is not in a position to provide assistance of this sort on the scale required, and this would need to be remedied in one way or another were an optional protocol adopted.²⁹⁹ Article 16(2) of the Maastricht draft makes clear the need for such assistance and would require the Secretary-General to ensure that it is provided.

The addition of another procedure to deal with communications submitted to the United Nations raises the question of which body a communication should be routed to when there are a number of bodies which have jurisdiction. In many cases there may not be such a choice because the communication may concern a subject matter covered only by one treaty, or the State Party concerned may be a party to only one relevant procedure. However, in the case of the Women's Convention, there may be considerable overlap with other treaties, in particular the ICCPR.

This problem has arisen already within the United Nations. There are no formal guidelines for the routing of such communications and, if the author of the communication does not express a preference, then the secretariat routes the complaint to what it, on the basis of an informal preliminary evaluation³⁰⁰ taking into account the gravamen of the complaint, considers the most appropriate forum. For example, the secretariat may route complaints of torture to the Committee against Torture, or complaints of discrimination on the basis of national origin to CERD, if those avenues are available.

The author of a complaint would no doubt prefer to select the forum which offers the best chance for a successful outcome. This may be of more importance if divergent interpretations of similar guarantees develop among the different treaty bodies. For example, if a complaint were based on the failure of the State Party to enact legislation adequately protecting a person against discrimination by private persons, the complaint might be considered under either the ICCPR or the Convention. The obligations under the Convention with respect

299. There are presently proposals to shift the Committee's secretariat servicing to the Centre for Human Rights in Geneva. While this would make available to the Committee the required legal expertise in human rights matters, the Centre is itself severely understaffed.

300. See generally Schmidt, *supra* note 265, at 653-54.

to legislating against discrimination by private parties are more clearly stated than are applicable obligations under the ICCPR. Indeed, the scope of the obligations may well be broader than the obligations under the ICCPR. In such a case, it may be preferable for the complaint to be routed to CEDAW.

It would be possible to provide in the optional protocol that States Parties agree that complaints which fall within the protocol should be considered under it rather than under any other procedure. However, it seems preferable to leave this to be worked out by liaison between the various treaty bodies rather than by trying to deal with it by a rigid rule which might not in every case ensure that the complaint went to the most appropriate body.

VII. CONCLUSION

The decision whether or not to adopt an optional protocol to the Women's Convention, the content of any such instrument, and the scale of resources committed to implementing it, constitutes a litmus test for the depth of the international community's commitment to the effective realization of the human rights of women. While the proposed protocol gives rise to some legitimate legal and institutional concerns, we maintain that they can be allayed and should not stand in the way of the adoption of a protocol along the lines of the Maastricht draft. It is also likely that some of these objections will be put forward, not so much because of a deep concern about the issues they raise, but as a means of expressing a deeper opposition to measures which have the potential to strengthen the international mechanisms for enforcing the human rights of women.

Perhaps the most obvious point to stress is that provisions which give rise to similar legal concerns about justiciability are already subject to complaint procedures under U.N. human rights treaties and other U.N. instruments, as well as under regional and national human rights instruments. Similarly, many of the institutional concerns about overlapping competencies, the possibility of normative conflicts, and related issues have arisen in contexts other than the enforcement of the human rights of women, and have not been found to be insuperable obstacles in those contexts. To maintain that they

are so in relation to women's human rights would be unfortunate and would smack of the second-grade treatment that issues of women's human rights have received within the U.N. system in a number of respects. The adoption of a protocol to the Convention along the lines of the Maastricht draft would not merely reenact what already exists, but we should remember that advances in human rights thinking have always come about as the result of a willingness to innovate and be imaginative, on the solid base of what has gone before.

Appendix

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
AN OPTIONAL PROTOCOL TO THE CONVENTION ON THE
ELIMINATION OF ALL FORMS OF DISCRIMINATION
AGAINST WOMEN

organised by the

Women in the Law Project
International Human Rights Law Group

and the

Maastricht Centre for Human Rights

University of Limburg

Maastricht, Netherlands

29 September - 1 October 1994

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON
THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN

The States Parties to this Protocol,

Recognizing the desirability of creating a global environment in which the human rights of women will be realized, and the responsibility which all States share to achieve this goal,

Recalling that the Vienna Declaration and Programme for Action urged that the full and equal enjoyment by women of all human rights be a priority for governments and for the United Nations,

Recognizing further that serious violations of the human rights of women remain pervasive in all societies and cultures,

Recognizing further the importance of ensuring that women are aware of their rights under national and international law and the importance of overcoming the obstacles which impede their effective access to judicial procedures and other remedies,

Emphasizing the important role of the Committee on the Elimination of Discrimination Against Women in elaborating the scope and content of the Convention on the Elimination of All Forms of Discrimination Against Women,

Convinced of the importance of ensuring that women have access to effective international procedures for the en-

forcement of the rights and obligations set forth in the Convention,

Convinced that, in order further to achieve the purposes of the Convention, the Committee should have power to receive and examine communications, and the power to conduct inquiries where there are allegations of serious or systematic violations of rights set forth in the Convention or of a serious or systematic failure by a State Party to give effect to its obligations under the Convention,

Have agreed as follows:

PART I

COMMUNICATIONS PROCEDURE

Article 1

1. A State Party to the Convention that becomes a Party to this Protocol recognizes the competence of the Committee to receive and examine communications submitted in accordance with the provisions of this Protocol.

2. No communication shall be received by the Committee if it concerns a State Party to the Convention which is not a Part to this Protocol.

Article 2

1. An individual, group or organization:

(a) claiming to have suffered detriment as a result of a violation of any of the rights guaranteed in the Convention, or claiming to be directly affected by the failure on the part of a State Party to this Protocol to give effect to its obligations under the Convention; or

(b) claiming that a State Party has violated any of the rights set forth in the Convention or has failed to give effect to any of its obligations under the Convention with respect to a person or group of persons other than the author, and having in the opinion of the Committee a sufficient interest in the matter,

may submit a written communication to the Committee for its examination.

2. States Parties to this Protocol undertake not to hinder in any way the effective exercise of this right of communication and to take all steps necessary to prevent any person, group, organization or authority from interfering with the exercise of this right of communication or victimizing any person for exercising such right, and to assist the Committee in its examination of communications lodged under this Part.

Article 3

1. No communication shall be received by the Committee if it is anonymous.

2. The Committee shall declare a communication inadmissible if it:

(a) does not contain allegations which, if substantiated, would constitute a violation of rights guaranteed by the Convention or a failure by a State Party to give effect to its obligations under the Convention;

(b) relates to acts and omissions which occurred before the entry into force of this Protocol for the State Party concerned, unless those acts or omissions—

(i) constitute a continuing violation of the Convention or a continuing failure to give effect to the State's obligations under the Convention; or

(ii) have effects which continue beyond the entry into force of this Protocol and those effects themselves consti-

tute a violation of a right set forth in the Convention or a failure by the State Party concerned to give effect to its obligations under the Convention; or

(c) is an abuse of the right to submit a communication.

3. The Committee shall not declare a communication admissible unless it has ascertained:

(a) that all available domestic remedies have been exhausted, unless the Committee considers that the application of this requirement would be unreasonable; and

(b) that a communication submitted by or on behalf of the author which raises essentially the same issues of fact and law is not being examined under another procedure of international investigation or settlement. The Committee may, however, examine such a communication where the procedure of international investigation or settlement is unreasonably prolonged.

Article 4

1. The Committee may decline to continue to examine a communication if the author, after being given a reasonable opportunity to do so, fails to provide information which would sufficiently substantiate the allegations contained in the communication.

2. The Committee may recommence examination of a communication which it has declared inadmissible under article 3 if the circumstances which led to its decision have changed.

Article 5

1. At any time after the receipt of a communication, the Committee may request the State Party concerned to take such

interim measures as may be necessary to preserve the status quo or to avoid irreparable harm.

2. The State Party concerned shall take all necessary steps to comply with a request made by the Committee under paragraph 1.

3. Where the Committee exercises its power under paragraph 1, it shall inform the State Party concerned that its request does not imply a determination of the merits of the communication.

Article 6

1. Unless the Committee considers that a communication should be declared inadmissible without reference to the State Party concerned, the Committee shall confidentially bring any communication referred to it under this Protocol to the attention of the State Party concerned, but the identity of the author shall not be revealed without her or their express consent.

2. Within three months, the receiving State shall submit to the Committee explanations or statements and the remedy, if any, that may have been afforded by that State.

3. During its examination of a communication, the Committee shall place itself at the disposal of the parties concerned with a view to facilitating settlement of the matter on the basis of respect for the rights and obligations set forth in the Convention.

Article 7

1. The Committee shall consider communications received under this Protocol in the light of all information made available to it by or on behalf of the author and by the State Party concerned. The Committee may also take into account information obtained from other sources, provided that this information is transmitted to the author and State Party for comment.

2. The Committee may adopt such procedures as will enable it to ascertain the facts and to assess the extent to which the State Party concerned has fulfilled its obligations under the Convention.

3. As part of its examination of a communication, the Committee may, with the agreement of the State Party concerned, visit the territory of that State Party.

4. The Committee shall hold closed meetings when examining communications under this Part.

5. After examining a communication, the Committee shall adopt its views on the claims made in the communication and shall transmit these to the State Party and to the author, together with any recommendations it considers appropriate.

Article 8

1. Where the Committee is of the view that a State Party has failed to give effect to its obligations under the Convention, the Committee may recommend that the State Party take specific measures to remedy any violation or failure by the State to give effect to its obligations under the Convention and to prevent a recurrence of any such violation or failure.

2. The State Party shall take all steps necessary to remedy any violation of the rights set forth in the Convention or failure to fulfil its obligations under the Convention. The State Party shall implement any recommendations made by the Committee, and shall ensure that adequate reparation or other appropriate remedy is provided.

3. The State Party concerned shall, within three months of receiving notice of the decision of the Committee under paragraph 1, or such longer period as may be specified by the Committee, provide the Committee with details of the measures which it has taken in accordance with paragraph 2.

Article 9

1. The Committee may at any time invite a State Party to discuss with it the measures which the State Party has taken to give effect to the views or recommendations of the Committee. The Committee may continue discussions with the State Party concerned until the Committee is satisfied that appropriate steps have been taken to remedy any failure by the State Party to give effect to its obligations under the Convention.

2. The Committee may invite the State Party concerned to include in its reports under Article 18 of the Convention details of any measures taken in response to the Committee's views and recommendations.

3. The Committee shall include in its annual report an account of the substance of the communication and its examination of the matter, a summary of the explanations and statements of the State Party concerned, of its own views and recommendations, and the response of the State Party concerned to those views and recommendations.

Article 10

The Committee may delegate to one or more members of the Committee any of the powers conferred on it by this Part, other than the powers contained in articles 7(5) and 8(1) to adopt views and recommendations.

PART II

INQUIRY PROCEDURE

Article 11

1. If the Committee receives reliable information which appears to it to indicate that there is a serious or systematic

violation by a State Party of rights set forth in the Convention, or a serious or systematic failure by a State Party to give effect to its obligations under the Convention, the Committee shall invite that State Party to co-operate in the examination of the information and to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to conduct an inquiry and to report urgently to the Committee.

3. If an inquiry is conducted in accordance with paragraph 2 of this article, the Committee shall seek the cooperation of the State Party concerned. Such an inquiry may, with the agreement of the State Party, include a visit to its territory.

4.(a) After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings, together with any comments and recommendations, to the State Party concerned.

(b) The State Party shall, within three months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and the cooperation of the State Party shall be sought at all stages of the proceedings.

6. After taking into account any observations made by the State Party, the Committee may publish a report.

Article 12

1. The Committee may at any time invite a State Party to discuss with it the steps which the State Party has taken in response to a report adopted by the Committee under article 11. The Committee may continue such discussions with the State Party concerned until the Committee is satisfied that appropriate steps have been taken to remedy any violations of rights set forth in the Convention or any failure by the State Party to give effect to its obligations under the Convention.

2. The Committee may invite the State Party concerned to include in its reports under Article 18 of the Convention details of any measures taken in response to a report adopted by the Committee under Article 11.

Article 13

States Parties to this Protocol undertake to assist the Committee in its inquiries under this Part and to take all steps necessary to prevent any person, group, authority or organization from interfering with or victimizing any person providing information to or assisting the Committee in its inquiries under this Part.

PART III

FINAL PROVISIONS

Article 14

States parties undertake to make widely known, by appropriate and active means:

(a) the contents of this Protocol and the procedures established under it;

(b) any views and recommendations adopted by the Committee under Part I; and

(c) the report of the results of any inquiry conducted under Part II.

Article 15

1. The Committee may make rules of procedure prescribing the procedure to be followed when it is exercising the functions conferred on it by this Protocol.

2. Without limiting the generality of the power conferred by paragraph 1, the Committee may make rules of procedure with respect to:

(a) the measures which may be taken by or on behalf of the Committee in any matter of urgency;

(b) the gathering of information which the Committee may take into account when carrying out its functions under this Protocol;

(c) the procedures which the Committee may adopt when examining a communication under Part I or conducting an inquiry under Part II. These may include the taking of evidence in written or oral form; and

(d) the dissemination by States Parties of views and recommendations adopted by the Committee under Part I and reports of the results of any inquiry conducted under Part II.

Article 16

1. The Committee shall meet for such period, being not less than three weeks annually, as is necessary to carry out its functions under this Protocol.

2. The Secretary-General of the United Nations shall provide the Committee with the necessary staff and facilities for the performance of its functions under this Protocol, and in particular shall ensure that expert legal advice is available to the Committee for this purpose.

Article 17

1. This Protocol is open for signature by any State which has signed the Convention.

2. This Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 18

1. This Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the fifth instrument of ratification or instrument of accession.

2. For each State ratifying this Protocol or acceding to it after its entry into force, this Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 19

1. This Protocol will be binding upon each State Party in respect of all territories subject to its jurisdiction.

2. The provisions of this Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 20

No reservations to this Protocol shall be permitted.

Article 21

1. Any State Party to this Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to this Protocol with the request that they notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. If within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene such a conference under the auspices of the United Nations. Any amendment adopted by majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two thirds majority of the States Parties to this Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Protocol and any earlier amendment which they have accepted.

Article 22

1. Any State Party may denounce this Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Denunciations shall be without prejudice to the continued application of the provisions of this Protocol to any communication submitted under Part I or inquiry commenced under Part II before the effective date of denunciation.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 23

1. The Secretary-General of the United Nations shall inform all States referred to in article 25 of the Convention of:

(a) signatures, ratifications and accessions under this Protocol;

(b) the date of entry into force of this Protocol and the date of entry into force of any amendment under article 21; and

(c) denunciations under article 22.

Article 24

1. This Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States referred to in article 25 of the Convention.

