

A MAGNA CARTA FOR ALL WOMEN

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I. Introduction

This article is intended as an introduction to the fascinating world of women's human rights through one of the most important instruments women around the world have for the promotion and defense of our humanity. It is divided into three parts. The first part describes the nature and content of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) itself, followed by an introduction to the Committee that monitors the implementation of the Convention by those States that have ratified it. The third part introduces the Optional Protocol which is the complaints mechanism set up to give women the possibility to communicate to the CEDAW Committee those discriminatory acts which they believe violate their rights as set out in the Convention. Understanding the Convention together with these two mechanisms can make it the most important instrument for the realization of women's rights in every culture and region of the world. If the CEDAW Convention has not yet achieved this status, it is because too many women have not seen its potential. I sincerely hope that this article may move things in that direction.

II. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

On December 18, 1979, the CEDAW Convention was adopted through General Assembly Resolution 34/180. This came after only four years of drafting by the Commission on the Status of Women (CSW) and the Third Committee¹ of the United Nations General Assembly, but after years of considerable pressure from women's movements, particularly from those of Latin America. In this region, women had spent years lobbying for a regional convention on women's rights which has still not been drafted but they also lobbied CSW to take the initiative of creating a new convention.²

On July 17, 1980, in a special ceremony carried out during the Second World Conference on Women in Copenhagen, the Convention was signed by 64 States with two States ratifying it that day: Cuba and Guyana. Eighteen other States quickly ratified the

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¹ The Third Committee of the United Nations oversees social, humanitarian, and cultural issues.

² Facio, Alda, "La evolucion de los derechos humanos de las mujeres en la ONU", in press.

Convention. Following the successful ratification of 20 States, CEDAW entered into force on September 3, 1981.³

A unique legal, international, and human rights instrument, CEDAW unified the dispositions of other UN instruments in relation to the rights of women.⁴ It is known as the international Magna Carta of women's human rights because it is the first international instrument that explicitly and implicitly includes all of women's human rights and prohibits all forms of discrimination on the basis of sex or gender.⁵ It is commonly accepted that all international human rights instruments prohibit discrimination on the basis of sex and guarantee equality to all human beings, but this has not been sufficient for guaranteeing all women the protection of all our rights through the other instruments and their protection and monitoring mechanisms.

This is due to the fact that the other instruments prohibit discrimination with respect to the enjoyment of the rights they establish. However, the manner in which they establish human rights is androcentric. In other words, the rights set forth in these other instruments have been conceptualized from the reality of men's lives, while those of CEDAW take into account the lived experiences and needs of women. And even though not every human right is explicitly mentioned in the Convention, all women's human rights are included implicitly because discrimination towards any woman, understood as any act that violates any woman's human right, is prohibited in all spheres of life, including discrimination that is carried out on the basis of the intersection of sex/gender with class, ethnicity, abilities, sexual orientation, gender identity, age, or any other factor or condition.⁶

In other words, the other international instruments that guarantee equality, non-discrimination, or prohibit arbitrary distinctions on the basis of sex⁷ do not create rights for women that are designed specifically for our everyday reality. Instead they offer us the possibility of exercising, on the same terms as men, the rights that have been recognized for men. While most of these rights are inherent to the human condition and are therefore necessary for women as well, there are rights, or interpretations of these rights, that only we

³ Article 27(1) of CEDAW: The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

⁴ Although the Convention speaks of discrimination against women in the singular, the accumulated work of the Committee has clearly demonstrated that this refers to all women and that the Convention therefore requires the State that has ratified it to eliminate all of the various forms of discrimination that all women can suffer, whether on the basis of sex or the intersection of sex/gender with age, class, ethnicity, disability, etc.

⁵ Although the Convention does not refer to discrimination on the basis of gender but rather discrimination on the basis of sex, the text of Articles 2(f), 4 and 5 in particular as well as the holistic nature of the Convention's text and the work of the Committee demonstrate that this refers to discrimination that any woman can suffer on the basis of her sex, gender, sexual orientation or sexual identity, or the intersection of sex with other social or biological conditions.

⁶ Article 1 prohibits discrimination in "the political, economic, social, cultural, civil or any other field."

⁷ It is true that the CEDAW Convention, as all other conventions, only refers to sex-based discrimination, but as noted above, interpreting Article 1 together with Articles 2(f), 4 and 5(a) indicates that the Convention covers gender-based discrimination against women.

as women need, whether the reason is based on our sexual condition, gender, or more importantly the historic inequalities of power between men and women.⁸

Thus, CEDAW is the first human rights instrument that takes as its starting point this historic inequality. Even though gender and a gender perspective were not spoken of explicitly while CEDAW was being developed, it can be said that CEDAW is an instrument with a gender perspective. This instrument is important and necessary for many reasons, but in my opinion there are at least six that place CEDAW in a unique category.

1. It expands State responsibility.

Precisely because it has a gender perspective, CEDAW is the first international instrument that expands State responsibility to acts committed by private persons, corporations or non-state institutions or non-governmental organizations.⁹ This is very important because we know that discrimination against women and the violation of our human rights is not limited to acts committed directly by public officials at the State level.

Of course, women also suffer human rights violations through direct State action. Yet even in this regard it has been difficult to make States accept responsibility for their actions. For example, public officials use sexual violence to secure access to certain privileges, and the military employs it as a tactic to win wars. Until recently these acts were considered individual acts that were not attributable to the State. But according to the concept of State responsibility established by CEDAW, such acts are attributable to the State because the State, having ratified CEDAW, is obligated to ensure that such acts do not occur, at least not systematically or systemically.

Just as important as the above is that the notion of State responsibility established by CEDAW has served as a precedent for extending responsibility to other entities that are as powerful as or more powerful than States. This is especially important in a privatized and globalized world where governments and the rule of law are endangered and where transnational corporations sometimes have more power than many States.

2. It requires States to adopt concrete measures to eliminate discrimination against women.

Under international human rights law, States are obligated to respect, protect and fulfill all those rights under a convention that the State has ratified. Therefore, according to Article 2,¹⁰ States Parties must address all aspects of their legal obligation to respect, protect and

⁸ The classic example of this is the need to reinterpret the right to be free of torture. This right, when interpreted from the experience of women who have suffered domestic violence, is understood to include such violence.

⁹ Article 2(e) establishes that States are required to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”

¹⁰ Article 2 is central to the full implementation of the Convention since it identifies the nature of the general legal obligations of States Parties. The obligations enshrined in this article are linked with all other

fulfill women's right to equality and non-discrimination. The obligation to respect requires that States Parties eliminate laws, policies, regulations, programs, administrative procedures and institutional structures that directly or indirectly result in the unequal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States Parties protect women against discrimination by public or private actors and take steps directly aimed at eliminating customary and all other practices that harm women or perpetuate the notion of inferiority of the female sex, or reinforce stereotyped roles for men and women. The obligation to fulfill requires that States Parties take a wide variety of steps to ensure that women and men enjoy equal rights in, by and under the law as well as in their daily lives, including the adoption of temporary special measures in line with Article 4(1) of the Convention and General Recommendation No. 25 . This entails obligations of means or conduct and also obligations of results. The obligation of the State includes an obligation not to cause discrimination against women through acts or omissions because discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws.

As it was impossible to explicitly spell out all the necessary measures to eliminate discrimination against all women in all respects, over the years the CEDAW Committee has specified in its concluding comments and general recommendations what specific measures must be taken for cases that are presented in reports submitted by States. For example, in General Recommendation No. 21, the Committee extended the concrete measures that States should take in relation to marriage and family relations by establishing, inter alia, that laws or customs that do not consider the property accumulated during de facto unions as conjugal property should be repealed.¹¹

It is thus through recommendations that solutions are given to specific problems such as inequality between the legal treatment of conjugal property and the property of de facto unions. Although the issue is not specifically addressed in Article 16 of CEDAW, in light of Articles 1 and 2, it is understood that Article 16 requires the State to not only take measures to achieve equality between men and women with respect to our rights during marriage and upon dissolution, but also to guarantee the same rights to women living in de facto unions.

substantive provisions of the Convention, as States Parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level. This important article, as all other articles of this convention, should be read in the light of the definition of discrimination in Article 1 and in conjunction with Articles 3, 4, 5 and 24. In addition, the scope of the general obligations contained in Article 2 should also be construed in the light of the general recommendations, concluding observations, views and other statements issued by the CEDAW Committee, including the reports on the inquiry procedures and the decisions of individual cases.

¹¹ General Recommendation 21 (13th Session).

3. It permits temporary measures, “affirmative action” or “corrective measures”.

To achieve the goals of CEDAW and due to recognition of the historical imbalance of power in the enjoyment of human rights between men and women, as well as the fact that treating men and women exactly the same has not resulted in eliminating discrimination, Article 4 of CEDAW provides that States may take temporary special measures to accelerate the achievement of equality between the sexes without their being interpreted as discriminatory against men.

The reasoning behind the corrective measures in CEDAW is that the systemic nature of discrimination against women has made it impossible to eliminate such discrimination without corrective measures. Because of the historic and systemic unequal distribution of profit and power, an unequal provision of certain instruments is required. For CEDAW, the ultimate goal of corrective measures is to create a society where women receive equal respect, enjoy our human rights equally with men in all areas, and the historical imbalance of power between the sexes has been completely eliminated. For that reason the measures are transient and must be eliminated the moment when real equality between men and women has been achieved. To create this egalitarian society it is essential to understand that the starting point is asymmetrical. That is, men and women do not start with the same opportunities for socially constructed reasons. Therefore the application of neutral rules leads to unequal results. Not taking into account that our societies are hierarchical and that those with the most power are perceived as models for humanity ensures that those people who deviate from the model will be treated in a deficient manner.¹² And if we realize that the human model of our societies has traditionally been the man, we can understand that women are treated in deficient ways when our rights are structured in a neutral or identical way to those of men. That is why CEDAW acknowledges the need for affirmative action or corrective measures.

4. It acknowledges the role of culture and traditions in the maintenance of discrimination against women and requires States to eliminate stereotyped roles for men and women.

CEDAW recognizes the important role played by culture, tradition, religion, customs, and practices in restricting the rights of women. Therefore, States should take appropriate measures to eliminate stereotypes and practices relating to the roles of men and women that promote a concept of inferiority or superiority of one sex with respect to the other.

CEDAW also provides that the State must ensure that family education imparts the belief in the need to share equally in duties and in the raising of children, and that in all cases, parents should be guided by the interests of their children.

¹² See Rodríguez, Marcela, “Igualdad, Democracia y Acciones Positivas” in Facio and Fries, Ed. GENERO Y DERECHO, Ediciones Lom, Chile, 1999.

All of this means that the State must take measures to eliminate stereotypes and conceptions of inferiority of women in all fields. If the State does not do this, it is responsible for the discrimination that can occur against women as a result of these stereotypes, practices, customs and conceptions.

5. It defines discrimination and establishes the concept of substantive equality.

The contents of CEDAW revolve around three fundamental concepts or principles: equality between the sexes, non-discrimination against women in all its forms, and State responsibility for achieving equality and eliminating discrimination. Put another way, the goal or objective of CEDAW is the elimination of all forms of discrimination against women to achieve gender equality in all fields.

Article 1 defines what should be understood as discrimination:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

This definition is critically important for the following reasons:

- The definition becomes **the** legally accepted definition of discrimination. This means that judges and other public officials cannot create their own definition of what is discrimination against women. True, this definition automatically becomes part of national law after ratification only in monistic States, but even in dualistic States, judges and other officials must be guided by its principles even before the State has domesticated the Convention.
- It establishes that discrimination can disguise itself in various ways: as a distinction, an exclusion, or a restriction, which alerts us to a variety of discriminatory behaviors that can present themselves to women at times even in the form of a “right” or as a form of “protection” against male violence or domination.
- It determines that a discriminatory act is one that has the “effect” or “purpose” of violating the human rights of women. This means that not only those acts that have the intent (purpose) of discriminating, such as laws that establish that married women cannot own property, etc. are to be prohibited but also acts or omissions that may not have the intent to discriminate but **result** in (have the effect of) discrimination against women, such as laws that “protect” women by prohibiting them from carrying out hazardous work or working night shifts, etc. or when the State fails to make distinctions between men and women or between different women that **result** in the discrimination of all or certain groups of women. Also, the

definition prohibits not only discriminatory acts that have been committed, but also any attempts to discriminate.

- The definition states that the discriminatory act can have differing degrees, meaning that rights can be partially “impaired” or completely “voided.” Thus CEDAW prohibits the total negation of a right as well as the denial of certain aspects of a right. An example of the latter would be that women can be nationals of a country but they cannot pass on nationality to their children.
- The definition states that the discriminatory act can occur at the three different levels of a right’s existence: at the level of the recognition of the right, or at the level of enjoyment, or exercise of that right. The first level refers to the moment of creation of laws or policies that establish rights. The second refers to the needs that are satisfied with that right. The third, the active aspect of the right, implies that there should be a mechanism where the holder may report a violation of her right and obtain reparation for it. This means that CEDAW requires the State to: 1 – recognize the rights of women in domestic legislation, 2 – provide the material and spiritual conditions so women can enjoy our rights, and 3 – create the mechanisms to allow women to report violations and obtain reparation.
- It defines discrimination as an act that violates the principle of equality and the woman as a legal subject who is equal to man with respect to human dignity, establishing a concept of equality that is not androcentric but rather based on the protection of the human rights of women.
- It prohibits discrimination in all fields. The last phrase of the article, “or any other field,” clearly includes the private, family or religious spheres where so many of the violations of women’s human rights occur.
- It states that discrimination is prohibited “irrespective of our marital status” to emphasize that the Convention seeks to eliminate all forms of discrimination against women, including those that occur through marriage or because of marital status.

CEDAW, in seeking to eliminate de jure and de facto discrimination, aims to achieve not only de jure but de facto, real and substantive equality. The goal is social transformation – social change that goes beyond legislative change, although it includes such change. Moreover, de jure equality is conceived only as a means of achieving the practical realization of the principle of equality. It is important to note that even de jure equality does not always require identical treatment by law to both men and women. The problem with de jure equality has been that socially constructed differences or inequalities between men and women have been ignored. But even de jure equality takes into consideration biological

differences and therefore allows different treatment by the law, when situations are different.¹³

On the other hand, if one reads the Convention in light of the Nairobi Strategies,¹⁴ one can understand that the equality CEDAW seeks is not limited only to achieve gender equality but rather an equality that can eliminate other forms of social inequality. For that reason the solution to the problem of discrimination against women has to identify the causes and ensure that “[c]hanges in social and economic structures should be promoted which would make possible the full equality of women and our free access to all types of development as active agents and beneficiaries, without discrimination of any kind.”¹⁵ This means that the State is obliged to guarantee the enjoyment and exercise of women’s human rights, which means it must take special measures with certain groups of the most disadvantaged women.

In its “concluding comments” as well as in its General Recommendations, the CEDAW Committee has been deepening and expanding the meaning of gender equality to include sectors or groups of women who experience multiple forms of discrimination or who suffer from the intersection of multiple forms of discrimination. For example, in its concluding comments to the third periodic report of Venezuela, the Committee urged the country to achieve equality for all women by strengthening programs to eliminate poverty, which severely affects a large majority of women in Venezuela.¹⁶

6. It strengthens the concept of indivisibility of human rights.

Another achievement of this Convention is that it is a concrete example of the indivisibility of human rights, a principle that is often stated in the abstract but is rarely expressed in concrete terms. According to human rights discourse, all rights are indivisible and interdependent. It stresses that the promotion and enjoyment of certain fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms. However, the reality is that more importance has been given to civil and political rights versus economic, social, and cultural rights.

In CEDAW, all rights appear with equal prominence to establish in a single instrument, the economic, social, cultural, civil, political, and collective rights of groups of women, in addition to the right to development for all women. Moreover, it is said that CEDAW, in addition to being a legal document, is a guide for development because it suggests a program of action that, if met, would bring States and society in general to a higher level of

¹³ Sometimes *de jure* equality is identified with formal equality but I would argue that formal equality is the kind of equality that does not take into consideration any differences between two situations while *de jure* equality does take into consideration some differences, especially biological ones.

¹⁴ At the time the Nairobi Forward-looking Strategies for the Advancement of Women were understood as the plan of action to implement CEDAW, though now the Beijing Declaration and Platform for Action is more commonly referenced.

¹⁵ Paragraph 53 of the Nairobi Strategies.

¹⁶ See CEDAW/C/1997/L.1/Add.6.

development.¹⁷ This idea is found in the Preamble where equality of the sexes is justified as a social necessity that is essential for development.¹⁸

CEDAW is a powerful tool for promoting women's human rights. This Convention, seen in the light of the Committee's General Recommendations, the Nairobi Strategies, the Programs or Platforms of Action of Vienna, Cairo, Beijing, and Durban, some Economic and Social Council (ECOSOC) resolutions, and recommendations of other human rights committees, has proven to be an effective tool for those who are trying to create an international framework for women's human rights. At the same time, CEDAW is weak in that it is the treaty with the most substantive reservations raised by States Parties.

Some of these reservations affect core aspects of the concepts of equality between the sexes and discrimination against women that form the very basis of CEDAW. There are reservations that deprive women of certain States the guarantees of equality stipulated in CEDAW. There are other reservations that preserve the power of the States Parties to continue to discriminate in certain fields. Most often, these reservations relate to the family sphere, which is precisely where the rights of women are most commonly violated.¹⁹

The CEDAW Committee has repeatedly expressed its concern over the amount and extent of States' reservations. And although some States have withdrawn some of their reservations, others are still enforced that are incompatible with the objectives of the Convention. The problem is that CEDAW, even though it expressly states in Article 28(2) that "[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted," does not possess a mechanism for rejecting reservations formed by States that have already ratified the Convention. In my opinion, the Secretary General should reject these kinds of reservations, but such has not been the case to this day.

III. The CEDAW Committee

As with other UN human rights instruments,²⁰ Article 17 of the Convention establishes a committee composed of 23 experts who are elected by the Conference of States Parties every two years for four year terms. Experts are not government representatives from the

¹⁷ See Freeman, Marsha, "Women, Development and Justice, Using the International Convention on Women's Rights" in Kerr, Ed. *OURS BY RIGHT*, The North South Institute, Canada, 1993.

¹⁸ Understanding of course that development is not confined solely to economic development but also related to the balancing between the economic and social.

¹⁹ For example the reservation made by Morocco to Article 2 states "It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life."

²⁰ The other instruments in force as of November 2010 are: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture, the Convention on the Rights of the Child, the Convention on the Rights of Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities.

countries of which they are nationals, but rather people, mostly women, who are experts on the topics of the Convention.

In accordance with Article 18, States Parties should inform the Committee about measures their States have undertaken to achieve the goals of the Convention. One year after ratification, the State must submit its initial report. Subsequently it must submit periodic reports every four years.

The Committee considers these reports at sessions that used to be held once per year, lasting ten days, as provided in Article 20. In turn, the Committee presents an annual report to the General Assembly, through ECOSOC, on the development of its work. After a Committee proposal, the Conference of States Parties recommended to the General Assembly to approve an amendment to Article 20 to authorize the holding of a greater number of sessions as required. In this context, since 1993 the General Assembly authorized the Committee to meet provisionally for three weeks each year. Since 1997, the General Assembly has expanded its authorization to hold two or three annual sessions of three or more weeks each in order that the Committee may reduce the number of unexamined reports that have accumulated due to lack of time.

The Committee has issued reporting guidelines to assist States in preparing these reports. According to the guidelines, the initial report should provide a detailed and comprehensive description of the situation of women in that country at the moment of the document's submission. The purpose is to provide a benchmark against which further progress can be measured. Subsequent periodic reports are intended to update the previous report, detailing significant developments that have occurred over the past four years, identifying key trends and obstacles to CEDAW's full implementation.

Initial reports are presented by a representative of the country who can also make a supplementary presentation of materials not included in the report in order to update the Committee on what has transpired since the report was submitted months earlier. Through "constructive dialogue," as the Committee calls it, Committee members may ask the representative to clarify or expand any question concerning the report or the presentation itself.

Since 1990, periodic reports have been examined by a working group composed of five members. The working group prepares questions to guide the Committee when it examines the report. These questions are sent in advance to the Government to answer in writing before or when it submits its periodic report.

The reporting process is public and each year there has been increasing interest in these sessions by NGOs, both international and those from the countries that present their reports. The Committee has organized its work with the goal of maximizing the amount of information presented on each country. Thus, it has invited specialized UN agencies to submit reports for consideration. Further, every year UNIFEM, UNICEF, UNDP,

UNESCO, FAO, ILO, UNFPA, etc. submit reports with respect to their areas of focus in relation to women of the world or about the country submitting its report.

A few years ago, the Committee decided to invite NGOs to provide general and specific information on the situation of the countries whose reports were being examined, both through informal sessions as well as reports prepared by national NGOs with the help of international organizations such as IWRAP-Asia Pacific.²¹ Recently, the Committee has also decided to ask States to report on one or two areas of concern which it calls follow up reports. The Committee has also asked States to prepare exceptional reports due to special circumstances faced by women in a country that is not due to report at the time of the special circumstances.

The rendering of the reports by the government representative has enabled the Committee to develop what it calls a “constructive dialogue” with them. This is done at a session open to the public where Committee members pose questions and comments to the government representatives. These sessions can be very enlightening to some government representatives who before then had not thought that they were not complying with the Convention. The Committee’s review of national reports is not intended to be a confrontational or adversarial process. Great efforts are made to engage in dialogue. For that reason the Committee never accuses a State of violating CEDAW, though it does point out deficiencies during the question and answer session.

At the conclusion of these constructive dialogues, the Committee reviews the information received in response to their questions to the State Party, as well as information provided during the dialogue by the representatives of that government, UN agencies, national human rights institutions, and national and international NGOs. The Committee undertakes this review during a private meeting. It also decides which of the concluding comments and observations should be submitted to the State, which will later be included in the Committee’s annual report to the General Assembly.

From its analysis of the information from the constructive dialogues and various reports, the Committee issues its General Recommendations. To date, these General Recommendations have not referred to specific States but are addressed to all States Parties to indicate what specific measures can be taken to comply with their obligations under the Convention.

The first general recommendations issued by the CEDAW Committee are brief and general in nature. However, at its tenth session the Committee decided that it would make recommendations on specific articles of the Convention or on issues that were not explicitly covered by it. For instance, in 1992 the Committee addressed the issue of violence against women through General Recommendation No. 19, which defines such violence as a form of discrimination against women that is thus prohibited by CEDAW. Other important

²¹ To find out more about the CEDAW Convention or Committee and how to participate in shadow reporting go to IWRAP Asia Pacific’s website at <http://www.iwraw-ap.org/index.htm>.

general recommendations followed. In 1994, the Committee developed General Recommendation No. 21 on equality in marriage and family relations, in 1997, No. 23 on political and public life, in 1999, No. 24 on women and health; General Recommendation No. 25 on temporary special measures was adopted in 2004, No. 26 on migrant women in 2008 and in late 2010 two new recommendations were adopted, No. 27 on older women and No. 28 on the core obligations of States Parties under Article 2. All of these general recommendations have made the Convention a real living document able to address not only the new forms of discrimination that appear as older forms are eliminated but all those forms of discrimination which were not considered as such in the past.

IV. Optional Protocol to the CEDAW Convention

In 1991, ten years after CEDAW entered into force, as part of the recommendations of a meeting of experts convened by the Division for the Advancement of Women, the UN Secretary-General was requested to consider the possibility of creating a mechanism that would allow victims of violations of CEDAW to send communications to the CEDAW Committee. It was a right that victims already had with respect to violations of the Convention on the Elimination of All Forms of Racial Discrimination or victims of violations of civil or political rights or torture in the UN human rights system. Thus began a long journey towards the creation of a formal instrument separate from CEDAW that would introduce a procedure for the receipt of communications and possibly an investigation procedure in accordance with the rules of CEDAW.

One must remember that there was considerable mobilization on the part of women towards this development at the World Conference on Human Rights in Vienna and at the World Conference on Population and Development in Cairo. At both conferences, governments agreed to ask the UN General Assembly to initiate the negotiation of such a mechanism. In July 1995, ECOSOC decided that such a mechanism could be contained in a voluntary or optional protocol to CEDAW. The World Conference on Women held in Beijing reiterated the call to support a protocol, and in 1996 negotiations began in a working group that met until the Commission on the Status of Women (CSW) approved the Protocol in 1999. The Protocol opened for signature that year on December 10. On December 22, 2000, it entered into force three months after its tenth ratification, as required by Article 16 of the Protocol.²²

But why was this optional protocol necessary if more than 160 countries had ratified CEDAW which legally established the obligation to eliminate discrimination based on sex/gender on the part of States? There are several reasons:

- Existing international mechanisms for the implementation of CEDAW were inadequate or insufficient.

²² Article 16(1) The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession. (2) For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

- While all other UN human rights instruments prohibit discrimination based on sex, thus enabling individual victims of such discrimination to send their submissions to committees that have the capacity to receive them, these committees do not necessarily have the expertise to truly understand individual cases or the extensive violations of women's human rights. Before the entry into force of the Optional Protocol, there was no possibility for the review of such cases by an independent expert body to incorporate in the analysis a gender focus and perspective of women's human rights.
- An Optional Protocol would promote a more effective implementation of CEDAW through the expansion of its interpretation and the practical application of the Convention.
- The Protocol would allow for redress in the cases of individual communications. The possibility of international recourse is particularly significant for women because, in general, national laws do not protect women against violations of basic rights, such as gender discrimination in the labor market or family law.
- The Optional Protocol would create greater public awareness of international guarantees of women's human rights and draw greater attention to CEDAW on the part of individuals, groups, and women's non-governmental organizations.
- The Protocol would contribute to the integration of women's human rights in UN human rights programs to create appropriate legal doctrine. Other UN human rights organizations could build on the CEDAW Optional Protocol to conduct a deeper analysis of the nature and scope of specific aspects of gender discrimination.
- An Optional Protocol would put CEDAW on an equal footing with other international treaties that have communications procedures.

As is apparent, there were many reasons that led to the adoption of the Optional Protocol. These same reasons should lead to universal ratification of this important instrument. If there are so many reasons for an Optional Protocol and if almost all States morally obligated themselves to ratifying it after having adopted the Platforms of Action of Vienna, Cairo and Beijing as well as the Protocol itself, why is there still resistance to ratifying it in certain countries?²³ To understand this resistance, we must remember that a protocol to CEDAW was considered unnecessary for many years because it was assumed that simply declaring equality between men and women would result in the elimination of discriminatory practices and gender violence that has been exerted systematically and historically against women because of our gender. It was after many protests and much negotiation that an understanding was reached that the guarantees of equality and non-discrimination do not create concrete rights for women that take into account our daily

²³ As of November 2010, 100 States Parties to CEDAW have now ratified the Optional Protocol.

realities, although they do offer women the opportunity to exercise, on an equal footing with men, universally recognized rights inherent to the human condition that men and women share.

As has already been mentioned, the Protocol entered into force on December 22, 2000, after ratification by the tenth State Party to the Convention. Upon ratifying the Optional Protocol, a State recognizes the competence of the CEDAW Committee to receive and consider applications from individual women or groups within its jurisdiction.²⁴ Importantly, this Protocol does not provide any new rights, meaning that it does not recognize any rights that are not covered by CEDAW. Some ill-intentioned people have initiated a rumor that the Protocol is an instrument that requires ratifying States to legalize abortion and homosexuality to scare off those people who are against full recognition of sexual rights and reproductive rights as human rights. This is not true. The Protocol does not require States to legalize abortion or homosexual relationships. Moreover, it does not require States to recognize a substantive right, whether it be new or old. What the Optional Protocol does is provide two procedures for the Committee to assist States to comply with the obligations they assumed by ratifying CEDAW. However, it is important to know that sexual rights and reproductive rights are already recognized in other international human rights instruments, including CEDAW.

The two procedures contained in the Optional Protocol are the following:

1- A communications procedure that allows individual women or groups of women to submit to the Committee claims of violations of the rights protected by the Convention. The Protocol establishes that to permit individual communications for analysis by the Committee, communications must fulfill a number of requirements, including that the complainants have exhausted domestic remedies.

2- The Protocol also creates an inquiry procedure that allows the Committee to investigate situations of grave or systematic violations of women's rights.²⁵ In any case, States must be party to the Convention and Protocol. Article 10 of the Protocol includes a provision that allows States to declare, when ratifying or acceding, that they do not accept the inquiry procedure. This opt-out clause was introduced because Article 17 of the Protocol explicitly states that the introduction of reservations to its terms is not permitted.

V. Conclusion

Because it is possible for women to be in situations where even if they are treated exactly like men they may experience discrimination as defined by the CEDAW Convention, and

²⁴ As of November 2010 the Committee had decided 14 cases and made one inquiry. To read the decisions go to <http://www2.ohchr.org/english/law/jurisprudence.htm>.

²⁵ To see the Report on Mexico produced by the Committee under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, go to http://www2.ohchr.org/english/bodies/cedaw/inquiry_procedure.htm.

because women have specific needs in relation to our sexual condition that are created by discriminatory gender structures, a convention was necessary that not only ensured equality and prohibited discrimination but also recognized rights and outlined concrete steps to realize them. Once UN States Parties understood this, they adopted CEDAW and with time nearly all States have ratified it.²⁶

However, despite the fact that CEDAW is over 30 years old, the diversity and extent of discrimination against women is still not universally understood. Many continue to believe that formal equality and the elimination of explicitly sexist laws satisfies the objectives of CEDAW. Use of the Optional Protocol by those women who feel discriminated against will allow for a better understanding of the multiple forms that discrimination can take. Shadow reporting by more women around the world will also increase understanding. This can only bring benefits to States as well as civil society as a whole.

That an Optional Protocol was needed does not deny the important achievements that occurred before its adoption. CEDAW has been ratified by and partially implemented in all Latin American States, which signifies a breakthrough, especially on the symbolic level. Achievements included the repeal of many laws that explicitly discriminated against women, as well as undoing the silence around the issue of violence against women. However, with these successes inevitably arose questions about how to make these advances result in concrete changes in the lives of all women and how to pass from the statement of principles to the adoption of mechanisms to ensure compliance with the commitments made by governments and to promote awareness throughout civil society that the need for the enjoyment of women's human rights is the responsibility of society as a whole.

As has been reiterated time and again by the different Chairwomen of the Committee, in her closing statement at the last session held in Geneva in October-November 2010, Ms. Zou Xiaoqiao, acting Chairperson of the Committee, said that the Committee members were very pleased by the high level of attendance of NGOs which once again made a significant contribution to the work of the Committee. She expressed her gratitude to the NGOs which had provided it with detailed information and encouraged them to deepen their advocacy for the promotion and protection of women's human rights and the implementation of the Convention.²⁷

In conclusion, with the ever increasing presence of women's NGOs at the CEDAW sessions in Geneva and New York and the slowly increasing use of the Optional Protocol by women in different parts of the world, with the more substantive General Recommendations to support the use of CEDAW nationally to defend women's rights in the courts and elsewhere, the CEDAW Convention has truly transformed itself into the Magna Carta for Women's Human Rights. It is now up to the women of the world to make it ours.

²⁶ As of November 2010, 186 States had ratified the Convention.

²⁷ See the full press release of the 47th Session of the CEDAW Committee at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?News>.
