RIGHTS AND REMEDIES: THE DRAFTING OF AN OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Hon Justice Silvia Cartwright DBE *

Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[1] is one of a cluster of human rights Conventions (known variously as Conventions, Treaties, Covenants or Protocols) developed to prevent discrimination in highly focused areas such as race, torture, slavery and children. The process which began on 10 December 1948 with the adoption of the Universal Declaration of Human Rights, continued with the adoption of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR). Together these are known as the International Bill of Human Rights. As international treaties, all human rights instruments are legally binding on those States that ratify or accede to them. As a means of ensuring compliance, each United Nations Convention which is intended to eliminate a specific form of discrimination has a monitoring Committee. Ratifying States parties submit periodic reports to these Committees on progress made in implementing the Convention.

CEDAW has sixteen substantive articles which set out measures to be implemented by States parties to eliminate discrimination against women. Discrimination is broadly defined in Article 1 to include both direct and indirect discrimination. CEDAW encompasses a wide range of areas including the suppression of trafficking in women; prevention of exploitation of prostitution; steps to be taken to improve the participation of women in public and political life, and in education; steps to be taken to improve women's literacy, health care and status in the family; and steps to be taken to ensure their equality in the civil, political, economic, social and cultural life of the state. It is a feature of CEDAW that States parties must take measures to eliminate discrimination in both public and private life. A classic example of this is the States' obligation to discourage and criminalise violence against women in the home.[2]

The reporting process is a valuable one which allows dialogue between the ratifying State and the Committee of CEDAW (the Committee). It also highlights existing and emerging trends of discrimination against women, such as the many forms in which violence against women is practised in every part of the world, the increasingly adverse impact on women of economic reforms, the rise of HIV/Aids among heterosexual women, and the alarming increase in trafficking in

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* LLB, Hon LLD (Otago), one of Her Majesty's Judges.

1 Adopted and opened for signature, ratification and accession by GA resolution 34/180 of 18, December 1979. Entered into force with the twentieth instrument of ratification or accession on 3 September 1981.

2 General Recommendation No. 19 (11th session, 1992).

women, most recently in nations with emerging democracies. The process however has its limitations. Although as at March 1998 161 of the 185 member States of the United Nations had acceded to or ratified CEDAW, a proportion second only to the Convention on the Rights of the Child, the number of ratifications is misleading. A large number of States parties have not reported at all or there are serious delays in reporting to the Committee. Many States have entered reservations to key articles in CEDAW, often in the name of religious or traditional practices which are deemed by those States to be superior to universally accepted human rights, and which on occasions do not comply with the provisions of their own Constitutions.

There is no easy way to challenge a State party to remove its reservations. In article 28(2), CEDAW adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. Article 28 states:

> A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

However, CEDAW has no mechanism whereby on the objection of at least two thirds of its States parties a reservation shall be declared incompatible with the objects and purposes, or to inhibit the operation of the Convention.[3]

During the examination of reports the Committee will challenge the reporting States to remove reservations which it considers to be impermissible, as will some States at the time when the reservation is entered. But to date no State which has entered a reservation to article 2, which proscribes discrimination against women and sets out measures to be taken by States to eliminate it, has ever removed its reservation. Moreover, the inter-State settlement provision in article 29 of the Convention which allows States to enter into arbitration or to refer a dispute to the International Court of Justice, has rarely if ever been invoked and a number of States have in any event entered reservations to the article.

Mechanisms which Encourage Compliance with the Human Rights Conventions

There are a number of mechanisms in the United Nations system designed to encourage compliance with the human rights treaties. These however are rarely used, lack political independence or are weak. Individual treaties have communications or complaints mechanisms designed to encourage compliance with the provisions of the particular Covenant or Convention. Those on Race and Torture have inbuilt provisions. The Convention on the Elimination of All Forms of Racial Discrimination enables its Committee to receive and consider communications from "individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State party of any of the rights set forth in [the] Convention..."[4] The Committee monitoring the Torture

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3 Compare with The Convention on the Elimination of Racial Discrimination, article 20(2).

4 Article 14(1) International Convention on the Elimination of All Forms of Racial Discrimination.

Convention, on the receipt of reliable information, may conduct an Inquiry into systematic torture being practised in a State's territory.[5] By means of its First Optional Protocol, the Human Rights Committee which monitors compliance with the ICCPR may receive and consider communications from individuals claiming to be victims of violations of any of the rights in the Covenant. CEDAW however, has no similar provisions. Although the provisions in other human rights Conventions might provide relief to women suffering from human rights violations, they are limited by the focus of the particular Convention or Covenant, can lack the strength of general support, cannot provide the necessary degree of expertise in women's human rights issues and cannot provide a means by which full compliance with the provisions of CEDAW can be achieved.

Consequently, CEDAW's high ratification rate must be measured against the ease with which States enter and maintain impermissible reservations, and against its lack of an effective enforcement mechanism. It may even be the case that its approval rating reflects its general impotence rather than an acknowledgment that it contains universally accepted human rights.

An Optional Protocol to CEDAW

The Committee has long urged on States parties the need for a procedure which allows individual women in ratifying States to communicate with it directly. The combined effect of ineffectual charter-based mechanisms, the large number of reservations to CEDAW and the knowledge of the suffering of millions of women whose States have ratified CEDAW has also resulted in a call mounting in urgency from concerned States parties and from a broad range of non-governmental organisations (NGO's). Within the confines of a short paper it is not possible to describe the widespread and egregious nature of discrimination suffered by women in every nation which has ratified CEDAW and presumably therefore within those which have not. Nor is it the purpose of this paper to review in detail the history of the drafting of the Optional Protocol to CEDAW, a history which is well documented down to 1996.[6] I intend instead to set out from my viewpoint the on-going political process towards the formulation and adoption of an Optional Protocol to CEDAW and to highlight some of the issues that have emerged. The account is a highly personal one, but my experience thus far is undoubtedly unusual, if not unique and for that reason I propose to record it.

The Committee of CEDAW

In order to monitor progress made by States parties in the implementation of CEDAW, Article 17 establishes a committee of 23 experts of "high moral standing and competence in the field covered by the Convention". These experts are

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[5] Article 20 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[6] Byrnes & Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?" (1996) 21 Brooklyn Journal of International Law 679. See also Martha Roche, "The Proposed Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women" (1998) 3 Human Rights Law and Practice 268.

elected by the States parties from among their nationals and serve in a personal capacity. When electing experts to the Committee, States parties are obliged to give consideration to equitable geographical distribution and to the representation of different forms of civilisation and principal legal systems. For the purposes of CEDAW, New Zealand is part of the Western Europe grouping of member States of the United Nations. Frequently, Canada, Australia and New Zealand have cooperated closely to ensure that one of their nationals is elected to appropriate UN treaty bodies. With the support of Canada and Australia, my nomination by New Zealand in 1992 led to my election to the Committee for a first four year term beginning in 1993.

Documents are frequently drafted in English and then translated into the other official languages. While many of the other experts serving on the Committee are English speakers, I was, and remain one of the few for whom English is a first language. My background in the law and my English language skills ensured that I rapidly undertook a good deal of the drafting work for the Committee. This was particularly the case when, pursuant to article 21, the Committee elaborated suggestions and general recommendations based the on examination of States parties' reports.

During my initial period as an expert member of the Committee I came into frequent contact with three representatives of NGO's all of whom have played a pivotal role in the process of developing an Optional Protocol to CEDAW. In 1994 Donna Sullivan, then director of the International Human Rights Law Group Women in the Law Project, with the Maastricht Centre for Human Rights, at the University of Limburg, Netherlands convened an expert group meeting to draft an Optional Protocol to CEDAW (the Maastricht meeting).[7] Andrew Byrnes from the Faculty of Law at the University of Hong Kong, and Jane Connors, then teaching at the Department of Law, School of Oriental & African Studies, University of London and now Chief of the Women's Rights Unit, Division for the Advancement of Women, at United Nations headquarters, were instrumental in drafting the instrument which was adopted at the expert group meeting. My working relationship with these three human rights experts led naturally to an invitation to participate in the Maastricht meeting.

The Maastricht Meeting

The mounting pressure for the development of an Optional Protocol which would enable women to complain direct to the Committee had reached a head a year earlier during the World Conference on Human Rights, held in Vienna in 1993. During that conference NGO's succeeded in emphasising the importance of such a mechanism, and ensured that the Vienna Declaration and Programme of Action included a statement that:

> New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the Human Rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of

[7] Financial assistance was provided by the Australian and Dutch governments and the European Human Rights Foundation.

introducing the right to petition through the preparation of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

At its next meeting the Committee suggested that the Commission on the Status of Women (CSW) request the Economic and Social Council (ECOSOC) to convene an expert group during 1994 to prepare a draft Optional Protocol. The CSW deferred taking this step, no doubt because of the pressure of work preparing for the Fourth World Conference on Women which was held in Beijing, China in 1995. Concern at these delays prompted the convening of the Maastricht Expert Group Meeting. This meeting brought together experts from the Committee of CEDAW, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as well as experts from regional Human Rights committees and those with expertise in the field of international human rights and the human rights of women in particular. The draft that emerged from that meeting purported to draw on the experience of other like instruments, updated and adapted as appropriate for particular human rights issues affecting women.

The CEDAW Response

The Committee had given me the responsibility of preparing for its session to be held in January 1995, a report on the feasibility of an Optional Protocol. During that session, my report, which annexed a copy of the Maastricht draft, stimulated lively interest and discussion. A working group of the Committee was established to review the proposal for an Optional Protocol and was chaired by Emna Aouij, a French-speaking Tunisian lawyer, now politician. With my guidance and explanations, the working group spent a significant period working through the draft, article by article, and debating the issues which arose.

During that session of CEDAW, in both the working group and the plenary session, there was lengthy debate amongst the experts. The Committee recognised the danger in automatically adopting the Maastricht draft, assuming that the member States of the United Nations would wish to have the primary influence on the production of such an instrument. I was therefore given the additional task of summarising the principles that the Committee considered should be included in an Optional Protocol to CEDAW. Some commentators have noted that these principles bear a remarkable resemblance to the Maastricht draft itself. That summary of principles was ultimately adopted by the Committee as suggestion number 7.[8]

Ms Lin Shangzhen from China was particularly anxious to ensure that the Committee did not make a proposal which lacked principle or pushed the boundaries of other similar instruments. With a colleague, Kongit Sinegiorgis from Ethiopia, Ms Lin and I spent several hours working carefully through the proposed principles. Other expert members (Ms Sato from Japan and Ms Hartono from Indonesia) were also reluctant to endorse the proposal for an Optional Protocol, but ultimately only Ms Hartono recorded her dissent.

[8] Report of the Committee on the Elimination of Discrimination against Women, UN DOC A/50/38 (1995).

Perhaps the most significant support for the drafting of an Optional Protocol however came from the Declaration and Platform of Action adopted by the member States which attended the Fourth World Conference on Women held in Beijing in September 1995. The Beijing Declaration urged States parties to:

> Support the process initiated by the Commission on the Status of Women with a view to elaborating a draft [optional protocol] that would enter into force as soon as possible.

During the remainder of that year there were some further developments which led inevitably to the establishment of a working group of the CSW whose task would be to elaborate an Optional Protocol to the Convention. First, on the basis of the Committee's suggestion No. 7, the CSW in its 1995 meeting asked the Secretary-General to invite governments, inter-governmental organisations and NGO's:

> 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.

It was intended that these comments would be considered in the CSW's 1996 session. These requests were endorsed by ECOSOC and in August that year the Secretary General of the United Nations circulated the ECOSOC resolution.

The Drafting Process

The CSW, which was established by ECOSOC resolution, meets annually in March. Its function is to prepare reports to ECOSOC on matters concerning the promotion of women's rights in the political, economic, social and educational fields, and to make recommendations to the UN Council on problems requiring immediate attention in the field of women's rights. It presently comprises 45 members elected from the member States of the United Nations, across an equitable geographic distribution.

As a rule the Chair of CEDAW attends the CSW meeting and will usually be invited to address it. In 1996, the first year during which the proposed Optional Protocol was seriously debated by member States, Dr Ivanka Corti the then Chair of the Committee attended. By the end of that session and, according to her account, only following fierce debate, the CSW agreed to begin the process of elaborating an Optional Protocol. While the CSW, as other UN organs, works to achieve consensus it was patently obvious that this decision was not easy to achieve. Dr Corti was obliged to answer many questions and to defend the Committee's wish to have available to it the same mechanisms as other treaty bodies had enjoyed for some time. The CSW resolved to establish a working group, the membership of which was not limited to delegations from elected States, to sit in parallel with the usual CSW session, to begin in March 1997.

The Committee was invited to provide a resource person from its members to assist the CSW in the formulation of the instrument. My role within the

Committee had by now resulted in a rapidly developing knowledge and understanding of the issues surrounding the development of an Optional Protocol and I was therefore the most logical person to be invited to attend the meetings of the working group to the CSW as resource person.[9]

During the ensuing year I was provided with the material generated by the CSW and had a number of meetings with the Chair of the working group, Aloisia Wôrgetter a young Austrian diplomat. Ms Wôrgetter became a force to be reckoned with. With the support of the Austrian government she spent a great deal of time engaging her formidable diplomatic skills lobbying States to support the drafting of a strong Protocol. It had been hoped that a member State would produce and defend a draft Protocol which would form the basis for the working group's deliberations. When this did not eventuate, Ms Wôrgetter circulated a Chairperson's draft which contained the principles in suggestion No. 7 modified somewhat as the result of her negotiations. This draft became the document which the working group debated and discussed during its two week session held in March 1997.

In March 1997 a complete first reading of the draft was accomplished. Although there were certain areas where consensus emerged, by and large, the most difficult issues remained unresolved. Introductory statements were made by the Secretary-General's Under Secretary on Women's Affairs, by the Chair and by me on behalf of the Committee. Delegations each then engaged in a round of statements during which they explained their own State's attitude to the drafting of the document. There was a general agreement that the process of drafting the document itself should move ahead and thus surprisingly little time was spent on general discussion. During that session Elizabeth Evatt,[10] formerly a member and Chairperson of CEDAW, and now a member of the Human Rights Committee, addressed delegates on relevant issues arising from her experience as one of the experts who administers the First Optional Protocol to the ICCPR.

The working group reconvened in March 1998 at the United Nations headquarters in New York. The new High Commissioner for Human Rights and former President of Ireland, Mary Robinson, attended the CSW meeting and made a speech strongly supporting the elaboration of an Optional Protocol. Her support was demonstrated by the arrangement that was made for two experts from the Office of the High Commissioner on Human Rights to be present to advise on technical aspects of the work and practice of the human rights treaty bodies which administer similar procedures. I had the great privilege of meeting Mrs Robinson during the 1993 suffrage year celebrations in New Zealand and again at a human rights symposium hosted by the Japanese government in January 1998 during which we discussed the proposals for an Optional Protocol to CEDAW. Further discussions between us were planned during the March meeting of the CSW, but unfortunately did not eventuate. It is likely that she will continue to take a close interest in developments and from her senior position in the United Nations system and in the human rights area in particular, to show leadership and support for the adoption of a Protocol to CEDAW. Professor

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9 ECOSOC decision 1997/227.

10 Former Chief Justice of the Family Court of Australia and President of the Australian Law Reform Commission.

Cecilia Nedina, a national of Chile and a member of the Human Rights Committee also attended the meeting of the working group. Professor Nedina had attended the Maastricht meeting and was familiar with the issues under discussion. She gave valuable guidance on the Human Rights Committee's work considering communications under the First Optional Protocol to the ICCPR.

The process of developing the Optional Protocol is still under way. It is therefore neither appropriate nor wise to identify specific attitudes within particular States. However States from Latin America and from Africa were generally supportive of the Optional Protocol and in both years urged adoption of a forward looking and flexible instrument which drew on the sixteen years of experience gained monitoring compliance with CEDAW since its adoption. Nations in the Western European group varied somewhat in their approach. The Nordic countries were generally very supportive, while, at least in the first year, New Zealand remained neutral. By 1998 the New Zealand Government had decided to take a more positive approach to the drafting of an Optional Protocol and sent a strong delegation from Wellington to assist in the process. Notwithstanding this presence, the New Zealand delegation did not take a leading role in the deliberations as it has done in other United Nations forums. Although its move from neutrality to positive involvement is very welcome, it is disappointing that New Zealand made the (albeit honest) announcement that it had yet to determine whether, on adoption of an Optional Protocol, New Zealand would ratify it.

Another very strong delegation from the Western Group was led by a senior woman politician who was attending her first United Nations meeting. For the first few days she demonstrated a puzzling antipathy towards me. It became apparent that she considered that I was personally responsible for CEDAW's rather critical concluding comments on her State's last report to the Committee. Later, no doubt after she understood that I was only one of 23 experts on the Committee and obliged to maintain an independent stance to all States parties, the thaw began. One major European member State whose leading delegate in both years was an extremely intelligent and experienced diplomat and lawyer, changed from a position of wary neutrality to positive support between the 1997 and 1998 sessions, no doubt as the result of further study on the topic in the intervening year. A change of government may also have been influential.

The States which consistently challenged the drafting of a strong Optional Protocol made an unlikely assortment of bedfellows: from Asia, from Northern Africa, from North America and from parts of Europe. A solid core of diplomats from UN Missions with clear instructions from the capitals of their States attended both meetings and demonstrated a deep knowledge of international law and of the workings of other Optional Protocols or complaints mechanisms to human rights treaties. In many cases however, particularly where nations are generally supportive of the development of a Protocol, it was obvious that capitals had not provided detailed instructions but were content to allow their representatives to listen to the argument and to support the best possible draft.In at least one case the delegation was headed by an academic international lawyer who, although clearly experienced in diplomacy, was not a career diplomat. It was interesting to note that the delegate from the Holy See, which has observer status and rights to speak, but no 'voting' rights, followed the entire meeting, late nights

and all. During a period of informal negotiations I had an interesting discussion with him concerning what he described as the Vatican's deep interest in women's human rights. I did not however learn whether or not it supported the Optional Protocol.

Many representatives of NGO's from different parts of the world attended the meeting but because of the unwillingness of some delegations to permit them to participate in the debate and because of the pressure of time they were able to speak only during the meeting in 1997 and then only at the conclusion of the debate on a particular issue. Nonetheless, both in 1997 and 1998, they were highly organised and lobbied hard and effectively during and between sessions. Influential international NGO's brought representatives from organisations in many parts of the world partly to learn the process of lobbying and partly for their expertise in various issues affecting the human rights of women. Briefings were held primarily during lunch breaks, sometimes by the Division for the Advancement of Women,[11] but often by the NGO's themselves. It was often necessary for me to participate in those meetings or to meet before and after sessions with individual representatives to discuss emerging strategic points. Andrew Byrnes and Donna Sullivan, key players at the Maastricht meeting, were both present throughout the 1998 session. Professor Byrnes was in fact a member of the Australian delegation. Jane Connors, now a senior member of the Division for the Advancement of Women, was a member of the Secretariat at both meetings. She gave legal advice and analysis of the provisions of similar instruments under the other human rights treaties for the benefit of all delegations participating.

Both the 1997 and 1998 meetings were conducted on an informal basis. As a result no formal ongoing summary of the deliberations was recorded, but after each session a Chairperson's summary setting out the arguments for and against the adoption of each article was produced. When text was agreed upon it was adopted *ad referendum*. Where alternative proposals were submitted they became part of the bracketed text. Each article was debated sequentially with the objective of reaching consensus on a complete text at which point brackets could be removed and the text could be adopted. On at least two occasions during the 1998 session, the Chair moved the meeting from the large conference room to a smaller setting in which she hoped to facilitate dialogue. These rooms were far less pleasant to work in and the underlying motive seemed more likely to be to create pressure to move more quickly. Twice during that session late meetings were convened. On those days, the programme became: 10.00 am to 1.00 pm, 3.00 pm to 6.00 pm, and 6.30pm to 9.30pm.

There were many topics at both meetings which were the subject of intensive debate. These included standing, whether an Inquiry Procedure should be included in the Protocol and whether reservations to the Protocol should be permitted. I shall expand on two: standing and reservations.

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[11] Part of the Department of Economic and Social Affairs of the United Nations, and the Secretariat for the Committee.

Standing

CEDAW proscribes violations of women's human rights whether perpetrated in public or in private life. In the latter case the State has an obligation to ensure that mechanisms are in place to preclude human rights violations committed privately. A classic example is the obligation on a State to ensure that its police arrest, and its Courts prosecute perpetrators of violence against women in the family.[12]

It is well recognised that, unlike victims of other human rights violations such as torture, women require particular protection from those who would normally be expected to offer that protection, namely their own families and communities. Moreover, women in all societies have less access to the financial resources needed to bring communications, and in poorer societies are far more likely than men to be illiterate. Standing is therefore of critical importance under the Optional Protocol. In the Maastricht draft, Article 2 provided:

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

The possibility that NGO's or other groups, whether within or outside the nation's borders, may be permitted to bring communications on behalf of an individual or group is deeply troubling to many States parties, and as a matter of logic it must be acknowledged that unless a State knows the identity of the person who claims to have had her rights violated it cannot protect that person or offer reparation. From that starting point a number of States argued that the woman must always be identified and cannot be a member of a group which might provide the umbrella of anonymity.

It is obvious that a State cannot always make good a human rights violation if it does not know the identity of the person affected. Nonetheless it is critical for many millions of women to have a mechanism whereby their concerns can be addressed anonymously. The violation will often not be perpetrated by the State itself, but may be tolerated by it. For example, under the guise of tradition, religion or culture a woman's rights, health or bodily integrity may be at risk. To publish the identity of many of these women will inevitably result in further egregious violations of their rights and could endanger their lives and health. While anonymity may prevent a State from directly protecting a particular woman, there is nonetheless the possibility of advantage to other women in a similar

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[12] General Recommendation 19.

position. An examination of the communication or complaint could well result in changes to policy and legislation and in the provision of mechanisms to protect women who suffer from the same type of violation.

By the same token, insistence on communications being receivable only from those who are within the jurisdiction of the State complained against will not protect the millions of women who are refugees or who have been trafficked, usually for the purposes of the sex industry, and who live and work often without official recognition within the borders of another country. In many instances organisations which would have the resources to bring the complaints on behalf of individual women or groups of women will be unable to operate within the jurisdiction of a particular State. Frequently international organisations such as Amnesty International, church or women lawyers groups, or other human rights organisations will be willing to bring a communication on behalf of those who cannot do so themselves. Without the protection and assistance offered by the measures proposed in the Maastricht draft, the benefits promised by an Optional Protocol to CEDAW will be limited to those women who have the financial and personal resources to bring a complaint, to those who are literate, and to those who live in an operating democracy. The woman in a poor nation, who is oppressed by the State itself, by the traditions of that society or by her own family or community will have little chance of ensuring for herself her State's full compliance with CEDAW under an Optional Protocol.

The working group acknowledged the validity of these factors which make it essential to allow complaints to be brought by groups or on behalf of women. Nonetheless, by the end of the working group meeting in March 1988, Article 2 had become:

> [Communications may be submitted by][or on behalf of] individuals or groups [of individuals] under the jurisdiction of a State party claiming to be victims of a violation of any of the [rights] [provisions] set forth in the Convention [through an act or failure to act] by that State party.
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> Alternative 1. [Communications may be submitted by an individual or groups of individuals or on their behalf, by [their designated representatives] subject to the jurisdiction of a State party, claiming to be victims of violations of any of the rights set forth in the Convention.]

In spite of ongoing lobbying to remove the brackets around "or on behalf of", the battle over standing was not won in 1998.

Reservations

At general international law reservations to treaties are permitted. However, States drafting an instrument may prohibit the entry of reservations if they consider that course to be appropriate. Other human rights treaty bodies have discussed the issue of reservations to an Optional Protocol.[13] Drawing on the experience of those bodies, the drafters of the Optional Protocol to CEDAW

[13] Human Rights Committee General Comment 24 (52) UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).

included provisions which reduce or completely negate the need for reservations to it. For example, in article 4 of the draft there are admissibility criteria which include provisions requiring the exhaustion of domestic remedies, and a prohibition on the consideration of a communication which has been examined by the Committee, or under another procedure of international investigation or settlement.

At the request of the Chair, I discussed the existing problem posed by the large number and substantive nature of reservations to CEDAW, the limited means by which the Committee could challenge these reservations or encourage their removal, and the obstacle that they posed to full compliance with the CEDAW. By analogy, I indicated that the Committee greatly feared that if reservations were permitted to the Optional Protocol, a similar problem would arise. Moreover, the instrument was a brief one, was optional for ratification by States parties and contained only two major parts: a Communications and an Inquiry Procedure. If a State, pursuant to the draft article 11 *bis* (a provision I also oppose) could opt out of the Inquiry procedure then there was no need to permit reservations.

Nonetheless one State which has not itself ratified CEDAW and is therefore unlikely in the foreseeable future to ratify an Optional Protocol to it, made a major statement arguing that reservations ought to be permitted to the Protocol. The reaction to the statement was curious, at least for an outsider to the system. Probably two thirds of the States parties represented at that part of the meeting stressed that as it was after all *optional*, no State party to CEDAW was under any obligation to ratify it. These States urged inclusion of an article that prohibited reservations. The debate clearly persuaded many of the wavering States. This left a small and unlikely group of allies.

It was interesting to observe the difficulties facing those delegations which opposed the inclusion of an article prohibiting reservations to the Optional Protocol. Some of those delegations would not as a rule support the delegation which had made such strong objection to a no reservations article. Most did not wish to be associated politically with the main speaker or indeed even with each other. Those delegations which wanted the ability to enter reservations by and large were very unlikely to ratify the Protocol. Some were sufficiently subtle to avoid making any statement at all, leaving the most vociferous opposers to carry the opprobrium of the majority. Within 24 hours the minority supporting the right to enter reservations was isolated and obliged to acknowledge that. Nonetheless they insisted that the brackets around the text be retained to use as a bargaining chip, particularly for the ongoing discussions on standing.

The Resource Person

My role as resource person was undefined, and for me, unpredictable. First, I had never participated in any political meeting of the United Nations. Secondly, it was unclear just what the member States would ask of me. I interpreted my role as a resource person as independent of the political debate. Nonetheless, I was present as an expert member of the Committee of CEDAW which strongly supported the elaboration and adoption of an Optional Protocol. As it transpired, it was not always possible to remain completely objective. The mere fact that the

Committee had been asked to provide one of its expert members to assist in the process indicated that something less than total neutrality was anticipated. Delegations who were sceptical of the ability of a Committee comprising women to monitor an Optional Protocol watched me carefully, and it became clear to me that I was to look and sound magisterial to avoid any unfortunate impression that the Committee comprised a group of wild eyed radicals.

Immediately before the meeting of the working group established to elaborate an Optional Protocol to CEDAW began, I was briefed by the Chairperson on the status of her negotiations. I sat on the podium alongside the members of the Secretariat drawn from the Division for the Advancement of Women. This was at the request of the Chairperson, and with the support of the delegations attending the working group so that I could be at hand to assist in any appropriate way. This assistance often took the form of a question put to me by the Chair to explain the need for a particular article or, from my experience as one of those who had examined a large number of States parties reports under CEDAW, to describe the type of complaint or communication that might be made under the proposed Optional Protocol.

From this vantage point, for each of the two week sessions in March 1997 and 1998 I was able to observe the discussions, liaisons and the lobbying and listen to the interventions made in seven or eight different languages and translated simultaneously. The experience of observing diplomacy in action was unique for me. Delegations from each State's Mission to the United Nations comprised professional diplomats, sometimes assisted by experts in international law, human rights or women's issues. During the 1998 session, three delegations were led by expert members of CEDAW who also held senior advisory positions in their own countries. At least one of the delegations represented a State which had not ratified CEDAW. At any one time, some 50 or 60 States would be represented by delegations of one or more members. The resulting exercise was something akin to a vast select committee deliberating on proposed legislation.

The sights and sounds of a United Nations meeting of this type are hard to describe. The many languages and traditional forms of dress create an exotic atmosphere for an isolated New Zealander. Many representatives of NGO's dressed in national dress (including an inevitable group from North America wearing clothing decreed by the latest guru). The skills of diplomacy were also an absorbing topic for me. Diplomats who argued cogently and persuasively against the Protocol, told me privately that their personal views are quite different. Lions lay down with lambs as delegates from nations recently at war with each other chatted and sipped coffee together.

Often during the process of the negotiations and debate I would be asked from the floor to make a comment. I considered it part of my role to be available to assist or explain issues to any delegation who asked and to provide the same service to NGO's. I was rarely asked for advice or assistance by those delegations who were opposed to the Optional Protocol. However, a senior member of the Mission to the United Nations which had so intensely argued for the right to enter reservations to the Optional Protocol, asked for my views on a number of issues, both at a lunch hosted by the New Zealand Mission to the United Nations and at one of the late night sessions. By and large NGO's saw me as a friend and ally.

As the debate became more intense those who supported an Optional Protocol would ask a "friendly" question, knowing that my response would be supportive of their stance. By contrast a number of questions were calculated to cause me difficulties. Some delegations clearly and, given my ambivalent role, rightly suspected that there might be a different answer if I were speaking as a Judge rather than as an expert member of CEDAW. I was asked for instance, to give an example of when it might be appropriate for a reservation to be entered to the Protocol. Realising that I was being drawn into a very delicate area I asked for some time overnight to consider the request, explaining that the text had changed so much during the course of the day that I wished to be sure that I had given a viable example. The immediate rejoinder was: "the delegation certainly understands and sympathises if Ms Cartwright is unable to reconcile her role as an expert member of CEDAW with her role as a Judge of the High Court of New Zealand."

Article 5 enables the Committee to request a State party to take such interim measures as may be necessary to avoid irreparable harm pending determination of a communication. One delegation asked for an example of an occasion when the Committee might request interim measures to be taken. Later I thought of a perfectly good and relatively neutral example whereby a State could be asked on an interim basis to stop a traditional or tribal Court making rulings which contravened a State's own constitution giving equality to women. On the spot however, I was unable to think of one which would offend no sensitivities. The examples which immediately sprang to mind were drawn from the examination of many States parties' reports to CEDAW. They related to female genital mutilation, the sexual violation of women prisoners by their guards, or son preference developed through selective abortion or murder of new born female babies, and were all identifiable as examples from particular areas of the world. I therefore said that: "I would draw on my experience as a Judge" and gave the example of an interim custody order in a family dispute, or an interim injunction in a civil dispute. Almost immediately the delegation which had put the question noted that I had acknowledged having no experience of interim measures which might be required to protect women's human rights - a rather startling distortion of what I had actually said.

The Conclusion of the 1998 Meeting

Later this year the United Nations will celebrate the 50th anniversary of the Universal Declaration of Human Rights. It is also the 5th anniversary of the Vienna Conference on Human Rights. Led by the Chairperson of the working group, an enormous effort was made to adopt a draft of the Optional Protocol to CEDAW by consensus to commemorate this important year in the United Nations system. Had that been achieved the CSW and ECOSOC would have passed resolutions supporting the adoption of an Optional Protocol. These resolutions would then have been debated during the meeting of the General Assembly to be held at the end of 1998. Those States and NGO's supporting its adoption considered that this would be a concrete and fitting commemoration of the importance of human rights in the UN system.

The Chairperson had spent many months lobbying and negotiating to achieve

a consensus text which might be adopted by the General Assembly on the fiftieth anniversary of the Universal Declaration of Human Rights. Nonetheless, while many observers considered that it was possible to complete a draft, by ordinary UN standards this would be lightning-like speed.

As the March meeting drew to its close younger diplomats who had been the mainstay of delegations throughout the 1997 and 1998 meetings began to disappear from the conference room. They were replaced by senior and highly skilled diplomats, often heads of Missions. At this point interventions suddenly became much more dangerous. During one very obstructive intervention by a newly arrived Head of Mission those on the podium watched with great amusement as a young Asian delegate with a great interest in the particular subject matter under discussion propelled a portly colleague of the Head of Mission across the conference room floor in a last minute attempt to get him to change his mind. Tempers became frayed and a heated intervention on the absence of translation of part of the written text into one of the official languages arose.

In order to have the CSW adopt a consensus draft it would have been necessary for the working group to have reached agreement by Wednesday night, 11 March so that the document could be translated and then adopted by the CSW on Friday 13 March. Working late on the Wednesday night in "informal informals" conducted in side rooms, in corridors and around the edges of the huge conference rooms, and without the benefit of simultaneous translation, it became apparent that there was serious disagreement. Article 2 remained one of the major sticking points. Already a compromise had been reached whereby the term "groups of individuals" was to be included over my expressed concern that this might be interpreted as groups of *identifiable* individuals. It was thought however, that if the phrase "on behalf of" could be retained then the Committee would have a degree of flexibility in applying the article more broadly. By about 9.00 pm some delegations were prepared either to retain the "no reservations" article in return for deleting "on behalf of", or *vice versa*.

Those delegations which supported the draft of a strong and principled Protocol were not prepared to compromise any further and to the anguish of the Chairperson refused to continue to discuss any further possibilities. By Thursday morning opinion had hardened further. It was finally agreed that there would be no further debate until the next working group meeting was arranged. Although an inter-sessional meeting was suggested for the middle of 1998 this has not proved possible, and the next meeting will now be held again in parallel with the CSW session in March 1999. I will undoubtedly again be requested to attend as a resource person.

It is difficult for me to predict the final outcome. The procedures under the ICCPR and the Torture and Race Conventions were drafted at a time when the member States of the United Nations were fresh from the horrors of the second world war and its aftermath. They were anxious to have a system which would educate nations about the critical importance of the observance of human rights for all, and which would provide mechanisms to encourage compliance with the treaties adopted over that period.

The Optional Protocol to CEDAW faces a number of obstacles. Its drafting has largely been the result of concerted efforts by NGO's and a few friendly States. Women's human rights remain a subject which is approached warily by many member States. Others, particularly from the developed nations, see the potential for their nationals to further embarrass them on the world stage by using the Protocol in the same manner that the other instruments have been used. Still others are concerned that at a time when United Nations resources are stretched, the cost of implementing the Protocol will be too great. A number of States are unable completely to disguise their contempt at the prospect that they may be called to account by a Committee of women, no matter how highly qualified, for failures to comply with the Convention that they have ratified.

There are few new developments in the field of human rights. Other Convention Committees are attempting to have communications mechanisms established, but, at least in the case of the prestigious International Covenant on Economic, Social and Cultural Rights, the process seems stalled. A newly adopted Convention[14] has yet to enter into force, as it lacks a sufficient number of ratifications or accessions. Delegations presenting their reports to CEDAW explain that they will give more attention to the issues of human rights for women when their economies improve, or alternatively, that as their economies are so buoyant, women are well able to look after themselves. In this environment it is extraordinary that a new instrument which will encourage compliance with CEDAW has already reached the stage that it has. The momentum produced by the Vienna Conference on Human Rights, the Fourth World Conference on Women in Beijing and the coming commemoration of the Fiftieth Anniversary of the Universal Declaration on Human Rights have all played an invaluable role. But when the celebrations are over and the symbolism of adopting a concrete measure which will enhance women's human rights fades, that momentum may well slow. On the other hand, experienced United Nations observers suggest that there is a possibility of a change of government in at least one major member State. If that occurs, then that State, with a liberal position on the Protocol may be influential. Perhaps all is not lost.

Only the CSW meetings in 1999, and possibly 2000 will tell. After that my term on CEDAW ends, and I will watch from a safer, if less stimulating distance.

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[14] The International Convention on the Protection of All Migrant Workers and Members of Their Families.