

# CEDAW

## A Manual

Centre for Women's Research (CENWOR)

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## **Preface**

UNIFEM South Asia Regional Office has supported the Centre for Women's Research (CENWOR) in several activities connected with disseminating information on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This manual is part of this project. CENWOR is grateful for the support and encouragement given by UNIFEM South Asia for the publication and hopes that it will be a resource especially for judges, lawyers and law students in South Asia.

The publication contains a text which is accompanied by annexes for reference. Much of the material refers to Sri Lanka, but information from other countries especially in South Asia has been included. It is our belief that comparative materials can enrich our understanding of the implementation of CEDAW which sets universal standards of progress and achievement for all women.

CENWOR thanks Prof. Savitri Goonesekere, Emeritus Professor of Law, University of Colombo, Dinesha Samararatne, Lecturer, Faculty of Law, University of Colombo, and Anusha Wickramasuriya, Project Officer, Centre for Women's Research for their contribution to the production of this manual. CENWOR also wishes to thank Vathany Narendran of the Centre for Women's Research for assistance with the documentation.

**CENWOR**

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# **The UN Convention on the Elimination of All Forms of Discrimination against Women**

## **Introduction**

The Convention on the Elimination of All Forms of Discrimination against Women, popularly known as CEDAW was adopted by the United Nations (UN) in 1979 and entered into force in 1981. To date, it has been ratified or acceded to by 182 countries and has almost reached the status of a Convention that has been acknowledged by all countries in the world as a legally binding treaty. Ratification is the term used when countries that were initial State Parties to the negotiation of a treaty agree to be bound by its provisions. Accession refers to other State Parties who later agree to be bound by it. Ratification and Accession have the same legal effect. The term ratification will therefore be used, as a general term.

International policy documents of importance, such as the Beijing Platform for Action adopted at the Fourth World Conference on Women held in Beijing in 1995, called upon all countries to ratify this treaty. Sri Lanka was one of the first countries in South Asia to ratify CEDAW, soon after it came into force in 1981. Many other countries, including India and Pakistan ratified CEDAW either just before, or after the Fourth World Conference in Beijing. Indeed the Beijing Platform for Action, and subsequent global initiatives in regard to women's rights connected with the Beijing process contributed to the wide ratification of the CEDAW treaty. CEDAW has now been ratified by all countries in the SAARC Region.

## **Box I**

### **Ratifications**

<b>Bhutan</b>	–	31 <sup>st</sup> August 1981
<b>Sri Lanka</b>	–	5 <sup>th</sup> October 1981
<b>Bangladesh</b>	–	6 <sup>th</sup> November 1984
<b>Nepal</b>	–	22 <sup>nd</sup> April 1991
<b>Maldives</b>	–	1 <sup>st</sup> July 1993
<b>India</b>	–	9 <sup>th</sup> July 1993
<b>Pakistan</b>	–	12 <sup>th</sup> March 1996

Countries adopt different procedures for ratification. In Sri Lanka ratification is an act of the executive. There is no legal requirement to obtain Parliament's approval for ratification of treaties.

## **Box II**

### **Constitutional Provisions on Treaties**

<b>Sri Lanka</b>	–	Article 27(15)
<b>Nepal</b>	–	Article 126
<b>Fiji</b>	–	Article 43
<b>India</b>	–	Article 51

*See Annex I*

## The Implications of Ratification

### *Incorporation*

Some countries in the South Asia Region such as Nepal have a Treaty Act (1990) that adopts a **monist** approach to international law, recognising that a treaty is incorporated into the domestic legal system, when the country becomes a State Party to the instrument. However most other countries including India, Sri Lanka, Pakistan and Bangladesh follow the **dualist** approach of the English Common law. This means that they require national incorporation of the treaty or its provisions into the domestic legal system. In these dualist legal systems, treaties cannot be used in legal interpretation without such local incorporation. Incorporation can be either by specific constitutional provisions, specific legislation i.e. acts of parliament, or through policy documents.

For a long time courts in Common law countries followed a strict dualist approach, and refused to use the provisions of treaties in their interpretations unless treaties had been incorporated into domestic law. We shall observe later in the section on **CEDAW and the Courts**, that this view has been replaced in recent years with a trend in the courts to apply treaty provisions in their interpretations of local Constitutions, legislation and other non-statutory laws. Today, domestic courts have thus become another source of treaty incorporation and a catalyst for holding States accountable to uphold the obligations undertaken under international law, by ratifying treaties. In the process international law has become part of domestic law, even in countries with dualist legal systems, where governments have **not** introduced specific measures to incorporate treaty provisions.

Ratification clearly imposes an obligation on the State to incorporate a treaty and its provisions in domestic law. This obligation is based on Article 4 of the Vienna Convention on the Law of Treaties, which reflects a general principle of customary international law that a treaty binds all

parties and must be implemented in good faith. This idea is expressed in the latin phrase ‘pacta sunt servanda.’ However, there is no legal sanction for failure to do so. This is why the domestic incorporation of treaty provisions in the local courts becomes especially important.

### **Box III**

#### **Examples of Treaty Incorporation in Sri Lanka**

<b>Legislation</b>	Torture Act 1994 (Torture Convention 1984) Maintenance Act 1999 (Convention on the Rights of the Child (CRC) 1989) Convention for the Suppression of Terrorist Financing Act 2005 (International Convention on the Suppression of Terrorist Financing 1999)
<b>Policy Documents</b>	Women’s Charter 1993 (incorporating CEDAW 1979) Children’s Charter 1992 (incorporating the CRC 1989)

#### ***Entry of Reservations to Treaty Obligations***

Ratification is sometimes combined by the entry of reservations or declarations qualifying the obligations imposed by the treaty. Reservations seek to exclude treaty provisions. Declarations seek to clarify that treaty provisions will be interpreted subject to the conditions specified in the Declaration. Reservations are often entered because of diversity in family law due to the application of personal laws based on religion and ethnicity. India for instance has entered a declaration on the application of Article 16 of CEDAW on family relations, in the context of its personal laws. Other countries have entered reservations on various articles. Sri Lanka and Nepal have ratified without reservations or declarations.

Ratifications with reservations and declarations tend to dilute the universal norms of CEDAW and entrench diversity of standards. When the CEDAW Committee considers country reports (see next section) they usually call upon countries to withdraw reservations and declarations. Bangladesh has withdrawn a reservation after ratification. Countries who do not do so, are asked by the Committee to explain the reasons for continuing to keep the reservation or declaration. This is an incentive to review these reservations and declarations. They are also requested to try to harmonise CEDAW by eliminating the diversity in religious and ethnic personal laws that apply to only some women in the country.

### **Box IV and Box V**

#### **Reservations and Declarations**

#### **Reservations**

- Bangladesh - Articles 2, 13(a), 16(1) (c) and (f)
- India - Article 29(1)
- Maldives - Articles 7(a) and 16
- Pakistan - Article 29 (1)

#### **Declarations**

- India - Articles 5(a), 16(1) and 16(2)
- Pakistan - “subject to Constitution”

*See Annex II*



## 1. **Withdrawal of Bangladesh Reservation**

On 23 July 1997, the Government of Bangladesh notified the Secretary-General that it had decided to withdraw the reservation relating to Articles 13 (a) and 16 (1) (c) and (f) made upon accession.

## 2. **Concluding Comments on Declarations –**

India (1999), Paragraphs 60 and 61

The Committee observed that the Government of India retained its Declarations and urged the government to withdraw the Declarations and work with women's groups in reviewing and reforming personal laws.

The Supreme Court of India in **John Vallamattom's Case** (AIR SC 2003 2902) and the **Mudgal Case** (1995) 3 SCC 635 has reiterated the need to frame a Uniform Civil Code as per Article 44 of the Constitution, which will help in removing the contradictions based on a diversity of standards.

The Committee called upon the government to follow this article and Supreme Court decisions and enact a Uniform Civil Code.

## 3. **Concluding Comments on Reports**

Maldives (2001) Paragraph 141 and Sri Lanka (2002) Paragraph 275 refer to using comparative jurisprudence to harmonise personal or religious law with CEDAW.

## **Reporting to the CEDAW Committee**

One of the methods of obtaining accountability of State Parties to implement the Convention is the system of international monitoring by which a State Party's progress is evaluated regularly. The core obligation of a State Party under CEDAW, is therefore to report regularly on progress achieved in implementing treaty commitments, to the treaty

monitoring body known as the CEDAW Committee. This monitoring treaty body has been established under Article 17 of the CEDAW Convention. The CEDAW Committee has 23 experts who serve in their personal capacity, rather than as government officials. They are elected by State Parties to the treaty for a four year term every two years, and must be nominated by a State Party to be eligible for election. Once elected, however they serve in their personal capacity and have a right and duty to be independent experts as envisaged by the treaty. Members of the Committee are not required or expected to articulate the views of the government that nominated them.

CEDAW Committee members who serve an initial term of four years, may be re-nominated, and if re-elected serve for further terms. There is no limit on the number of terms they can serve on the Committee. However under the system of election adopted, a certain number of members leave the Committee every two years, and are either re-elected or replaced by new members. This ensures continuity between elections, as some members will still be serving their four year term, when new members join the Committee.

It is sometimes said that the process of nomination and re-election after re-nomination by a State Party undermines the role and responsibility of CEDAW members as independent experts. However the institutional arrangements do not hamper the capacity of members to be independent experts, if they themselves fulfill their professional responsibilities under the treaty. The CEDAW Committee has had, to date, two experts from Sri Lanka, and one expert from Bangladesh. The Bangladesh member has also served as Chairperson of the Committee – a position that rotates among CEDAW experts of the different regions, Europe, Asia, Africa and Latin America. The current Chairperson is the expert from the Philippines.

The CEDAW Committee holds its sessions in New York, and receives and examines progress reports submitted by the State Party. Article 18 requires the initial reports to be submitted within one year of ratification,

and subsequently every 4 years. The first report is called an initial report. Subsequent reports are called periodic reports and may be combined, with the Committee's consent. The Committee may also request an exceptional report, between the reporting cycle. It has very rarely requested such an exceptional report, and has done so once on the basis of systematic and widespread violation of the human rights of women during the ethnic conflict in the former Yugoslavia. It has been argued that the Committee should use this power more effectively to scrutinise government action when there are widespread human rights abuses against women, within ratifying countries.

The reporting record of many countries including in South Asia has not been good. Some countries have not even submitted their initial report on time, and periodic reporting has been delayed. Consequently the process of reporting to the CEDAW Committee has been criticised, as an effective monitoring procedure. Countries have often failed to initiate changes in conformity with their obligations, or report progress. However, since 1995, when the Fourth World Conference in Beijing was held, there has been regular follow up on progress in achieving the standards of the policy document created by the conference, known as the Beijing Platform for Action. This policy document, as we have already observed, reinforced CEDAW, and helped to catalyse wider ratification of this legal instrument that is part of international law.

In the years after 1995 the CEDAW Committee has acquired greater visibility. It has reviewed its procedures and guidelines for reporting, so as to encourage countries to come before the Committee and present regular progress reports on CEDAW implementation.

United Nations agencies, in particular UNIFEM, have also provided technical support to countries to produce their reports. UNIFEM's regional office in South Asia has since 1999, held regular meetings that have brought together government Ministers of Women's Affairs, bureaucrats, women's groups, civil society organisations, and academics to evaluate country progress on CEDAW, and share experience on

reporting. CEDAW Committee members have also participated in this process. These meetings have also resulted in the production of documents and research studies that are a rich resource in evaluating progress in the region. This has contributed to greater peer interaction and evaluation among countries, and the productive sharing of comparative experience. The meetings have promoted interest in the reporting process, and also stimulated initiatives to “bring CEDAW home” within the countries.

## **Box VI**

### **UNIFEM and CEDAW: Some Regional Initiatives**

- 1997** - IWRAP Asia Pacific and UNIFEM, New York – “Global to Local” training workshops for NGOs during CEDAW sessions
- 1999** - South Asia regional meeting
- 2000** - Presentations on CEDAW at the Third South Asia Ministerial Conference “Commemorating Beijing” held in Bandos Island, Maldives
- 2002** - South Asia Consultation held in Sri Lanka
- 2003** - Presentations on CEDAW at the Fourth South Asia Ministerial Conference “Commemorating Beijing” held in Paro, Bhutan
- 2004** - Regional meeting for Women’s Ministries held in Jaipur
- 2005** - Presentations on CEDAW at the Fifth South Asia Ministerial Conference held in Islamabad
- 2006** - Supported network partners to organise a week long training of trainers workshop

*See Annex III*

The CEDAW Committee has reviewed and revised its procedures on reporting in an effort to strengthen CEDAW monitoring. It has also published new reporting guidelines. The CEDAW Committee has publicised the reporting record of countries, so that a poor record has become more visible. As of now all countries in South Asia have reported to the Committee. Sri Lanka submitted its 3<sup>rd</sup> and 4<sup>th</sup> periodic reports in 2002, and is due to submit the 5<sup>th</sup> and 6<sup>th</sup> reports in 2006.

The approach of the Committee to reporting, is to scrutinise the reports, engage in what is described as a ‘constructive dialogue’ with the delegation of the government presenting reports, and pronounce Concluding Comments on the reports. Detailed questions are posed to the government delegations. The constructive dialogue becomes productive when there is expertise on delegations to respond to these questions. In the last few years the Committee has improved the quality of the constructive dialogue by regulating the conduct of the session with specific guidelines, and limiting the time for responses and oral presentations.

The initial report of a country must be comprehensive. However, later (periodic) reports are expected to be very focused and respond to the Concluding Comments of the Committee on the last report or reports. A Pre-sessional working group of the Committee usually identifies the issues on which they would like information in the oral presentation of periodic reports. The report must then address these issues in the constructive dialogue with the Committee. **Progress is monitored in terms of what the Committee said in its Concluding Comments on a previous report** though new issues will inevitably be raised, and new information should be included in periodic reports. An examination of recent Concluding Comments which the Committee pronounces after examining reports shows how specific and focused they are.

## Box VII

### Reporting Guidelines of the CEDAW Committee

#### **New Reporting Guidelines for States Parties, 2003**

Refer website: [www.un.org/womenwatch/daw/cedaw/reporting.htm](http://www.un.org/womenwatch/daw/cedaw/reporting.htm)

#### **The new reporting guidelines replace previously existing guidelines.**

The new rules stipulate *inter alia* that a report should include:

- References to the articles of the Convention and the General Recommendations of the Committee where relevant
- The periodic report should be structured according to the articles of the Convention
- Factual and descriptive explanations on implementation and effectiveness of measures adopted
- Reference to the implementation of the areas of concern identified at the Beijing Conference

Additional guidelines are found in Part XIV, Rules 48 - 54 of New Rules of Procedure of the CEDAW Committee.

Refer website: [www.un.org/womenwatch/daw/cedaw/cedawreport-a5638-RulesOfProcedure.htm](http://www.un.org/womenwatch/daw/cedaw/cedawreport-a5638-RulesOfProcedure.htm)

### **Concluding Comments of the Committee**

From 1994 the Committee has been pronouncing country specific Concluding Comments at the end of the sessions at which reports are considered.

One of the members of the Committee is designated by the Committee, at each session, to be a ‘country rapporteur.’ The ‘country rapporteur’ provides the Committee with background information and facilitates the drafting of the Concluding Comments. Concluding Comments are

intended to review the success in implementation gaps and areas for further development. In recent years these Concluding Comments are placed on the website of the UN Division for the Advancement of Women based in New York, which services the Committee.

## **Box VIII**

### **Website of Division for the Advancement of Women New York (DAW) and other relevant Websites**

#### **UN Websites**

Division for the Advancement of Women: <http://www.un.org/womenwatch/daw/>

United Nations: [www.un.org](http://www.un.org)

#### **Convention on the Elimination of Discrimination against Women (CEDAW):**

<http://www.un.org/womenwatch/daw/cedaw/>

#### **Optional Protocol:**

<http://www.un.org/womenwatch/daw/cedaw/protocol/>

#### **Reporting Guidelines:**

<http://www.un.org/womenwatch/daw/cedaw/reporting.htm#guidelines>

#### **General Recommendations:**

<http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>

#### **Other Websites**

Bora Laskin Law Library:

Women's Human Rights Resource Programme:

[www.law-lib.utoronto.ca/diana/](http://www.law-lib.utoronto.ca/diana/)

The Concluding Comments are therefore a public document, accessible to the government, citizens, national, regional and international civil society, organisations including women's groups and international agencies. Despite this, unfortunately there is still very little use of these important Concluding Comments in CEDAW implementation within countries and in local monitoring. They are not yet adequately addressed in developing National Plans as well as in the work of civil society organisations, women's groups and international agencies and financial institutions monitoring progress on gender issues.

## **General Recommendations of the CEDAW Committee**

General Recommendations represent the jurisprudence on CEDAW developed by the Committee since they are adopted by the Committee as interpretation of the treaty provisions, and issues connected with effective implementation. To date the Committee has drafted 25 General Recommendations. The last two Recommendations interpret Article 12 (on women's health) and Article 4 (on temporary special measures). Recommendation 19 on Violence against Women is perhaps the best known of these General Recommendations, and provided a foundation for the UN Declaration on Violence against Women adopted by the United Nations in 1992.

The Recommendation on Violence against Women represented the experience of the Committee in the review of country reports. The problem of violence surfaced from information provided to the Committee by many countries. The Committee therefore drafted General Recommendation No.19 to capture this experience, and the need to recognise that gender based violence was an impediment to the implementation of the treaty. Though the Convention does not contain any specific article on the subject, the Committee has used several general articles such as Articles 2, 3 and 5, and specific articles such as Article 12 (health), Article 6 (exploitation in prostitution), Article 16

(family) and General Recommendation No. 19 to evaluate the situation on violence against women within countries and steps taken to address this problem. The CEDAW Committee has also adopted Recommendations on Reservations which have influenced the work of the Committee in its approach to the review and withdrawal of reservations by government, so as to strengthen their domestic capacity for initiating change and implementing the treaty.

### **Box IX**

#### **Important General Recommendations of the CEDAW Committee**

General Recommendation No.19, (Eleventh session, 1992),  
Violence against Women, UN Document A/47/38

General Recommendation No.20, (Eleventh session, 1992),  
Reservations to the Convention, UN Document A/47/38

General Recommendation No.23, (Sixteenth session, 1997),  
Women in Public Life, UN Doc. A/52/38/Rev.1

General Recommendation No.24, (Twentieth session, 1999),  
Article 12 (Women and Health), UN Document A/54/38/Rev.1

General Recommendation No.25, (Thirtieth session, 2004),  
Temporary Special Measures (Article 4 Paragraph 1), CEDAW/  
C/2004/I/WP.1/Rev.1, 30 Jan 2004

General Recommendations are not often given importance within countries. **They should be considered an important resource in developing National Plans and enacting legislation and other measures to integrate the CEDAW treaty into domestic law, policy and programmes.**

## **The Shadow Reports by NGOs**

The CEDAW Convention, unlike the more recent Convention on the Rights of the Child (CRC) does not have procedures for giving civil society groups access to the Committee during the reporting process. Under the Convention the Committee's interaction is with the State Party to the treaty which is responsible for implementation and reporting. However the CEDAW Committee, like other human rights treaty bodies has recognised the importance of the involvement and participation of civil society including women's groups in monitoring progress and supporting government initiatives to implement treaty obligations. It has in recent years developed a procedure by which it gives access to Non-Governmental Organisations (NGOs) and human rights groups to provide oral and written information to the Committee, when a State Party's report is being considered by the Committee.

### **Box X**

#### **NGO Access to Reporting Process**

Representatives of Non-Governmental Organisations may be invited by the Committee to make statements, provide information or documentation relevant to the Committee's activities, meetings or pre-sessional working groups.

Rule 47, New Rules of Procedure of the CEDAW Committee (A/56/38) (2003)

Refer website: [www.un.org/womenwatch/daw/cedaw/cedawreport-a5638-RulesOfProcedure.htm](http://www.un.org/womenwatch/daw/cedaw/cedawreport-a5638-RulesOfProcedure.htm)

The information is usually submitted in written form and described informally by the term ‘shadow report,’ to indicate that it is not an official government report. Members of the Committee can use the information obtained from these reports as ‘independent’ alternative sources of information, which can legitimately form the basis of their review of a country’s progress in implementing CEDAW. The quality of a shadow report is crucial, in order for the Committee to be able to question State Party delegations, and engage in a useful dialogue on a particular matter or issue.

In recent years both UN agencies and international and regional Non-Governmental Organisations have supported women’s groups to write shadow reports, and also attend the sessions of the CEDAW Committee, at which a report from their country is considered. UNIFEM has supported a regular programme called “Global to Local” partnering with International Women’s Rights Action Watch - Asia Pacific (IWRAP-AP), a regional women’s human rights organisation. This programme focuses on creating capacity to prepare shadow reports, make presentations to the Committee during a time specified by the Committee, and in explaining issues to individual experts on the Committee.

Over the years, the concept of the shadow report has gained acceptance amongst governments. There have been many instances where questions based on shadow reports have been directed to the country delegation. Concluding Comments by the Committee on interventions – e.g. legislation, policy initiatives have also been based on information in these shadow reports. Shadow reporting has therefore become a very important aspect of the CEDAW Committee’s work in monitoring progress on the performance of countries in implementing CEDAW.

Non-Governmental Organisations and women’s groups should use the CEDAW Committee’s Concluding Comments to hold governments accountable in achieving progress on CEDAW implementation. They should also acquire the knowledge and capacity to participate in the

shadow reporting process by networking with national and regional groups involved in shadow reporting.

## **CEDAW and The Beijing Platform for Action: Some Misconceptions**

The Beijing Platform for Action (BPFA) as mentioned earlier was adopted at the Fourth World Conference in Beijing. It is a definitive policy document on the standards set for realising gender equality and eliminating gender discrimination and denial of life chances of women.

Prior to the BPFA, UN World Conferences on women seeking to monitor progress were held regularly. Since the BPFA was considered to be a landmark policy document which set a clear agenda, progress on implementing this document has been monitored at five yearly global meetings after 1995, coinciding with the sessions of the intergovernmental body called the UN Commission on the Status of Women. Thus the follow up to the BPFA has been an outcome document of Beijing +5, and Resolutions at the Beijing +10 Review at the 49<sup>th</sup> Sessions of the UN Commission on the Status of Women in 2005, ten years after the Platform for Action was adopted by the Fourth World Conference on Women in Beijing.

There is sometimes a perception that the BPFA is the core international document for monitoring progress on realising gender equality. We have noted that the BPFA called for ratification of CEDAW by all countries, and this set in motion a process by which CEDAW has become one of the most widely ratified human rights treaties. For countries that have ratified CEDAW, therefore the definitive standards of international law are set by the **treaty** and thus **go beyond the BPFA**. The CEDAW Committee which monitors progress on the implementation of the treaty makes the linkage to the BPFA by requesting governments to explain how they have integrated the BPFA and subsequent follow up outcome documents related to the BPFA, and

linked it with their treaty obligations under CEDAW. CEDAW and the BPFA must therefore be considered as reinforcing each other. The BPFA cannot be ignored by ratifying parties. Similarly the BPFA cannot be considered the definitive and exclusive standard for monitoring progress on the women's rights agenda, so as to dilute the treaty obligations of State Parties to CEDAW.

In the last few years there has been a global environment in which the human rights project has been critiqued as too individualistic and undermining the positive communitarian values in society. Some persons and groups also misinterpret CEDAW as anti family. Anti-abortion lobbies and fundamentalist religious groups have attacked CEDAW and the work of the CEDAW Committee, claiming that it encourages abortion and supports the legalisation of sexual exploitation.

CEDAW, like other human rights treaties emphasises the importance of individual civil liberties as well as the right of access to core needs such as health and education as human rights. Recognition of individual rights is within the framework of respect for social institutions such as the family and the community in which an individual lives and works. The human rights project and CEDAW seek to ensure that institutions such as the family and community are supportive of individual well-being and are not manipulated so as to foster oppression and abuse of power by government or Non-State actors, the family and the community. The specific general articles of CEDAW (Articles 1 – 3), the article on health (Article 12), education (Article 11) and the family (Articles 5 and 16) indicate very clearly that elimination of discrimination against women becomes the responsibility of both the State and Non-State actors, and requires addressing the dynamics of an individual woman's interaction with other members both male and female in the family and community. CEDAW and human rights standards thus foster standards of conduct that ensure respect and concern for women as the foundation for the well-being of the family unit and community.

## **Box XI**

### **Some Important Articles in the Convention**

<b>General Standards</b>	–	Articles 1, 2 and 3
<b>Education</b>	–	Article 11
<b>Health</b>	–	Article 12
<b>Family</b>	–	Articles 5 and 16

*See Annex IV*

Article 6 of CEDAW clarifies that a State has the responsibility to protect women against exploitation in prostitution and trafficking. The CEDAW Committee has not, as it is suggested, advocated legalising prostitution. It is articulate in its condemnation of the exploitation of women in the sex trade by trafficking for prostitution within countries or across borders. It calls for interventions, laws and policies that will not penalise these women as criminals, but rather provide alternative employment opportunities and ensure their reintegration in their communities. This is sometimes misinterpreted as ‘legalising’ prostitution. Indeed national legislation on trafficking and regional interventions such as the SAARC Convention on Trafficking have been reinforced by the focus of the CEDAW Committee on this problem in reviewing the country reports.

## **BOX XII**

### **Some Concluding Comments on Trafficking in South Asia**

<b>India (2000)</b>	-	Paragraphs 76 and 77
<b>Nepal (1999)</b>	-	Paragraphs 149 and 150

*See Annex V*

Similarly the CEDAW Committee has not promoted abortion and the termination of pregnancy as a family planning measure. The Committee's Concluding Comments interpret the Article on health to indicate that States Parties must address the problem of illegal abortion, and provide services including access to information on family planning measures so as to prevent abortions. It has also advocated giving women the choice to terminate pregnancies caused by acts of violence such as rape and incest.

This approach is already reflected in the laws of many countries. For instance English law that provided the foundation for Penal Code provisions criminalising abortion in countries of the Sub Continent and Sri Lanka, now provides for termination of pregnancy in the event of rape or incest. India has since the 1970's permitted termination of pregnancy [Termination of Pregnancy Act (1971)]. Sri Lanka's Penal Code already permits termination of pregnancy if done in good faith, in the event of risk to the life of the mother. Termination of pregnancy, in situations where the woman is a victim of violence is not covered by a direct provision, though it may come within the defence that it is done in good faith to save the life of the mother. It is in this context that the CEDAW Committee dealt with the subject in a Concluding Comment on Sri Lanka Report 2002.

## **Box XIII**

### **Concluding Comments on Illegal Abortions**

#### **Concluding Comment on Sri Lanka (2002)**

Paragraph 30:

The Committee is concerned that abortion is allowed only when the mother's life is in danger and is strictly prohibited otherwise, even in extreme circumstances, which results in women resorting to illegal abortions.

Penal Code, Sri Lanka, Provisions on Abortion, Section 303:  
Whoever voluntarily causes a woman to miscarry is punishable with a fine or imprisonment up to three years or both if such miscarriage is not caused in good faith for the purpose of saving the life of the woman.

It is important that those who advocate a strict approach to making abortion illegal and punishing sex work do not undermine the validity of the human rights standards accepted by the UN in adopting the CEDAW treaty. While their views, like those of others are entitled to respect, they must not be allowed to dictate an agenda that contradicts core norms of international law as reflected in human rights treaties and national Constitutions and laws.

### **CEDAW Implementation**

The implementation of a treaty requires a range of measures that include legislation, policies, institutional arrangements, budgetary allocation and resources for delivery of services and programmes. Treaty implementation presupposes that individuals who are the beneficiaries of rights, the State and civil society organisations will be aware of the rights recognised, and the commitments on implementation. The

importance of these dimensions has been highlighted in the Concluding Comments of the CEDAW Committee.

## BOX XIV

### Some Concluding Comments on South Asian Reports

- (a) **Institutional Arrangements –**  
Sri Lanka (2002), Paragraphs 24 and 25  
India (2000), Paragraph 48
- (b) **Programmes and Delivery of Services –**  
India (2000), Paragraph 47  
Nepal (1999), Paragraphs 131 and 132
- (c) **Policies –**  
Sri Lanka (2002), Paragraphs 41 – 43  
Nepal (1999), Paragraph 133
- (d) **Creating Awareness of Rights, and Obligations of State, among Women and NGOs –**  
Nepal (1999), Paragraph 154

*See Annex VI*

All these are necessary interventions in implementing CEDAW. However, the CEDAW Committee's work also indicates that legal measures such as **Constitutional guarantees, legislation** to incorporate the treaty, **and positive legal interpretation** by Courts that help to integrate the treaty provisions into law, are as critical in creating an appropriate and effective environment and context for implementing the treaty.

## BOX XV

### Concluding Comments on Constitutional Provisions, Legislation and Court Decisions

- Nepal (1999)** - Paragraphs 138 and 139
- India (2000)** - Paragraphs 45 and 46; 66, 67 and 69
- Maldives (2001)** - Paragraphs 138 - 141
- Sri Lanka (2002)**- Paragraphs 22 – 24

*See Annex VII*

In a series of Judicial Colloquia held for judges of Commonwealth countries, Declarations were adopted clarifying the importance of domestic courts integrating international law in deciding cases that come before them. The Bangalore Declaration (1988) and the Victoria Falls Declaration on Women's Human Rights (1994) set down the core principles in this regard, and recognise the judiciary's responsibility to bring international human rights into domestic legal systems.

## BOX XVI

### Declarations of Commonwealth Judicial Colloquia

Extracts of

1. **Bangalore Principles on the Domestic Application of International Human Rights Norms** (1988), Paragraphs 7 and 8
2. **Victoria Falls Declaration** (1994), Paragraphs 11, 15 and 22

*See Annex VIII*

These Declarations recognise that Constitutional provisions and legislation in a country represent a very important aspect of treaty incorporation in domestic law when a legal system adopts a dualist approach to international law. However, they also emphasise that even in dualist legal systems, domestic courts can legitimately apply Constitutional provisions, legislation and the Common law in harmony with treaty standards and so incorporate treaty provisions through the process of judicial interpretation. As the Bangalore Declaration states, national courts must, as a recognised part of the judicial function, consider the obligations of a country under international law in judicial interpretation. Even in the absence of specific incorporation of a treaty in a domestic legal system by Constitutions and legislation, there is always room for interpretation, due to ambiguities or uncertainties in the content of national constitution, legislation, and Common law.

## **CEDAW Implementation in the Domestic Legal System**

The CEDAW Convention incorporates core concepts on equality in Articles 1, 2, and 4. Equality covers both de jure and de facto equality. Both State and Non-State actors have responsibilities in this regard, since the Convention addresses discrimination created by both intent, or effect and impact. Discrimination according to CEDAW includes both intended discrimination and unintended discrimination which results in or impacts to create a de facto situation of inequality and discrimination. Article 4 provides for affirmative action or temporary special measures to achieve what can be described as the above standard of **substantive equality or equality in result**.

The core norms of CEDAW can be incorporated in National Constitutions or general legislation on equality such as Equal Opportunities legislation. This type of legislation is especially important in countries where the Constitution covers the conduct of the State, but does not cover Non-State actors.

The Convention contains several other articles (Articles 5 – 16) which deal with the achievement of CEDAW standards in specific and defined areas. These are as important as the general articles.

***(a) Incorporation of CEDAW Norms in Constitutions***

The South African Constitution and the Nepal Constitution provide examples of Constitutions with specific provisions on treaty incorporation. The South African Constitution Article 28 also incorporates children’s rights which are based on CRC.

**BOX XVII**

**Constitutional Provisions on Treaty Incorporation**

**South Africa** - Article 231

**Nepal** - Article 126

*See Annex IX*

However even Constitutions that do not have provisions on treaty incorporation have provisions or chapters on fundamental rights which harmonise with international human rights treaties such as CEDAW. Thus Constitutions in South Asian countries have chapters on Fundamental Rights which articulate standards on gender equality that in effect incorporate some of the CEDAW standards, including affirmative action to address de facto inequalities and realise substantive equality.

## BOX XVIII

### Constitutional Provisions on Equality and Affirmative Action

**Sri Lanka** – Article 12

**Nepal** – Article 11

**Bangladesh** – Articles 27 and 28

Thirty seats have been reserved for women in the legislature by way of Constitutional amendment.

**Pakistan** – Article 25

**India** – Articles 14 and 15

The 81<sup>st</sup> amendment to the Constitution on reservation of one third of seats in the legislature has been pending since 1996. The 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution (1992) reserved one third of the seats in Local Government institutions (Panchyats) for women.

**Morocco** – Thirty seats have been reserved for women in Parliament from 2002

*See Annex X*

National Courts called upon to interpret these Constitutional provisions can therefore be guided by CEDAW provisions, and integrate them in local jurisprudence. Constitutional provisions on other rights such as freedom from torture or the rights to life also harmonise with standards of CEDAW on critical aspects such as violence against women and employment.

## BOX XIX

### Constitutional Provisions on Right to Freedom from Torture and Inhuman and Degrading Treatment

**Sri Lanka** – Article 11

**Bangladesh** – Article 35

**India** – Article 21

**Pakistan** – Article 14

**Nepal** – Article 14

*See Annex XI*

The judicial decisions of the appeal courts on rape described later, reveal how the torture articles in the Constitution has been interpreted to give redress in cases of rape in situations where the woman is in the custody of law enforcement authorities (custodial rape). The cases on sexual harassment that will be discussed later also demonstrate how the right to life harmonises with CEDAW norms on discrimination in the workplace.

## BOX XX

### Constitutional Provisions on the Right to Life

**India** – Article 21

**Pakistan** – Article 9

**Bangladesh** – Article 32

*See Annex XII*

Unfortunately there are very few cases that have specifically referred to international treaty obligations in interpreting these Constitutional provisions. This is largely due to the fact that international treaties including CEDAW are not used as they ought to be in legal arguments of Counsel in court cases. Judges too are not in general accustomed to referring to international treaty standards. However there is a growing body of jurisprudence indicating a greater willingness to use international law and treaty obligations. Section (C) will provide examples of judicial activism where CEDAW has been used in judicial interpretations in cases that have come before national courts.

***(b) Incorporation of CEDAW Standards by Specific Legislation and Policies***

In some countries parliament enacts legislation incorporating a treaty wholesale or in part, directly into domestic law. The Convention on the Rights of the Child has thus been incorporated wholesale into some countries. The Convention on Torture was incorporated into the Sri Lankan legal system by an Act of Parliament of 1994. Recent legislation enacted by the parliament in Sri Lanka has incorporated the Convention on the Suppression of Terrorist Financing. Sri Lanka has also incorporated provisions in the Hague Convention on International Child Abduction through specific legislation, the Civil Aspects of International Child Abduction Act 2002. The Women's Charter, a policy document adopted in 1993 incorporates most of the provisions of CEDAW. There is a proposal before Cabinet to make this policy statement a law, by incorporating it as part of a new Sri Lankan Women's Rights Act.

## BOX XXI

### Direct Treaty Incorporation by Legislation

- Sri Lanka** Torture Act (1994) – Convention on Torture (1984)  
Convention on the Suppression of Terrorism  
Financing Act (2005) – Convention on the  
Suppression of Terrorist Financing (1999)  
Civil Aspects of International Child Abduction Act  
(2001) – Hague Convention on Civil Aspects of  
International Child Abduction (1980)
- Uganda** Childrens Act (1996) – Convention on the Rights  
of the Child (1989)

*See also Box III*

The more common practice is to introduce legislation in specific areas, so as to conform with the standards set by treaties. There are many examples of such legislation.

The Maintenance Act 1999 in Sri Lanka seeks to bring the law on family support in harmony with CRC, but curiously does not mention CEDAW which sets important norms on family law in Article 16. Domestic Violence legislation in many countries including Sri Lanka has been introduced so as to harmonise with the standards of CEDAW and the UN Declaration on Violence against Women. Sri Lanka's Domestic Violence Act 2005, Penal Code Amendments on offences including rape and trafficking (1995) and Citizenship Amendment Act (2003) are examples of incorporation of CEDAW standards by legislation. India's Hindu Succession Amendment Act (2005) conferred equal rights of succession on women by enabling them to inherit ancestral property, and obtain related benefits such as residence, and transfer of property rights. Nepal's 11<sup>th</sup> Amendment to the Civil Code (2002) eliminated discrimination against unmarried women in inheritance laws,

also incorporated CEDAW standards. The Sri Lankan legislation on citizenship and domestic violence and the Nepal inheritance law reform can be considered a response to activism in the country by women's groups and gender advocates supported by the CEDAW Committee's Concluding Comments on the reports of these countries. The Indian reforms were largely due to a consistent campaign by women activists. However the urgent need for reform was also addressed in the CEDAW Committee's Concluding Comments on discrimination in personal laws. Reform of Fiji's Family Law in 2003 reflects the impact of the CEDAW Committee's Concluding Comments on Fiji's initial report to the Committee.

Diversity in personal laws based on ethnicity or religion is a feature of many legal systems in Asia. We have noted that this results in entry of reservations or declarations to Article 16 of the Convention. The Committee has referred to this dimension in Concluding Comments and requested the government to work with women's groups in harmonising these diverse personal laws with the standards of CEDAW. It has also encouraged countries with a shared legal tradition like Islamic law to use comparative experience in that tradition and work towards harmonising the personal law with CEDAW (see Boxes IV and V).

## BOX XXII

### Legislation in Specific Areas Incorporating CEDAW Standards

#### **Sri Lanka**

Maintenance Act (1999)

Domestic Violence Act (2005)

Citizenship Amendment Act (2003)

Penal Code Amendment Act (1995) on sexual offences including rape and trafficking

#### **India**

Hindu Succession Amendment Act (2005)

#### **Nepal**

11<sup>th</sup> Amendment to the Muluku Ain or Civil Code (2002)

#### **Fiji**

Family Law Act (2003)

Legislation that seeks to incorporate treaty standards often contain preambles or long titles that refer to the international instruments. Sri Lanka's Maintenance Act (1999), the Civil Aspects of International Child Abduction Act (2002) and the Torture Act (1994) contain preambles or long titles that refer to the respective international instruments. However the legal draftsman could not be persuaded to introduce a preamble referring to CEDAW and the UN Declaration on Violence against Women in the recently enacted Domestic Violence Act of 2005. The legal draftsman was under the impression that the Act did not have a direct bearing on the CEDAW Convention, and women's groups were not successful in lobbying for a change when the Act came to parliament. The introduction of a preamble that refers to the specific treaty is important because it reminds everyone, including lawyers and judges of the importance of interpreting the provisions of the legislation so as to harmonise with the treaty.

We have noted that South Asian Constitutions provide for affirmative action or temporary special measures to achieve gender equality. These provisions have sometimes been acted upon, or further amendments introduced to reserve seats or quotas for women in local government bodies (India and Nepal), or in nominated seats to parliament (Pakistan). Bangladesh's policies on free education for girls up to Grade 8 is such a measure. However in general there is little legislation that has been introduced to address systemic discrimination against women. Examples of Constitutional provisions or affirmative action are given in box XVIII and the annexes referred to there.

### ***(c) CEDAW Implementation and the Courts***

International treaty standards are sometimes considered ineffective in ensuring the implementation of the human rights of people, and making governments and Non-State actors accountable, because these standards are not supported with adequate mechanisms of enforcement. In this context, it is useful to understand the growing body of jurisprudence in national courts that interpret international treaties in such a manner as to provide for effective local enforcement.

There are Superior Courts in Commonwealth countries that have referred to the Bangalore Principles and other Declarations developed by Commonwealth judges at Judicial Colloquia, and adopted a proactive approach to incorporation of treaty standards into domestic law. Some of this jurisprudence relates to the CEDAW treaty itself. In addition, complaints procedures have been incorporated into international treaties so as to provide for the consideration of individual complaints initiated by citizens against the State. Such complaints procedures can also help to strengthen State accountability for harmonising international treaties, and also impact to create judicial awareness on the need to harmonise these norms in the domestic jurisdiction.

### *CEDAW Incorporation through Judicial Activism*

The Bangalore Principles refer to “traditional legal training which has tended to ignore the international dimension (so that) judges and lawyers are unaware” of jurisprudence on international human rights norms. The document recognises that judges and lawyers in countries have a special contribution to make in the administration of justice by integrating standards of international law and fostering respect for fundamental human rights.

In recent years there have been many Sri Lankan decisions in the appeal court where lawyers have cited international treaty standards in interpreting Sri Lanka’s Constitutional provisions on torture, freedom of speech and unlawful detention. Environmental interest protection cases in Sri Lanka have also cited international standards.

### **BOX XXIII**

#### **Some Sri Lankan Cases that have applied International Treaty Standards**

##### **Torture**

**Sriyani Silva v Iddamalgoda** 2003 2 Sri LR 63

**Pararasagaram Balasekaram v OIC, JOOSP Army Camp Vavuniya** SC (FR) 547/98, SCM 3/5/2000

**Lal and Rane Fernando v OIC Seeduwa Police** 2005 1 Sri LR 40

##### **Freedom of Speech**

**Abeysekera v Rubasinghe** (2000) 2 Sri LR 314

##### **Unlawful Detention**

**Weerawansa v Attorney General** SC (FR) 730/96 SCM 3/8/2000

##### **Environmental Law**

**Bulankulama v Secretary, Ministry of Industrial Development** (2000) 3 Sri LR 243 (**Eppawala Case**)

The Sri Lankan Courts have thus come a long way from the time when Sansoni C. J. in **Leelawathie v Minister of Defence and External Affairs** stated that international standards, though entitled to respect, are not part of national law. However upto date no case has cited the CEDAW or the CRC, though opportunities have been presented for doing so. For instance the **Supreme Court's Determination on the Anti Conversion Bill** (2004) provided an opportunity for the court to consider a provision imposing a higher penalty for conversion of women. CEDAW was cited by Counsel challenging the Bill, but the Supreme Court did not consider CEDAW or express a view on this provision. Similarly the Supreme Court judgment in the Determination on the Tsunami Bill (2005) refers to the Declaration on the Rights of the Child (1926) in relation to provisions in the Bill, when it could have referred to the CRC, which is the binding treaty in international law that Sri Lanka has ratified. In **Ashokan v Ashokan**, the Court of Appeal gave a decision in harmony with CEDAW Article 9 on the woman's right to a separate domicile, (a legal regime that would determine her right to obtain a divorce on the basis of her own permanent residence). Counsel for the married woman in the **Ashokan Case** challenged the discriminatory impact of a very early Privy Council decision delivered during the colonial period, holding that a married woman's domicile was dependent on her husband, and cited CEDAW in the arguments. However, the judgment did not cite or use the CEDAW treaty in arriving at a decision that in fact conformed with the CEDAW Article 9.

Several unreported Sri Lankan cases challenged discriminatory regulations on visas successfully in the Supreme Court. The Supreme Court decided that the Constitutional guarantee on equality had been infringed by these regulations. Discriminatory provisions in the Citizenship Act 1948 that were repealed by the amendment to this Act introduced in 2003, have been referred to under legislative incorporation of CEDAW norms. The visa cases and the CEDAW Committee's review of the Sri Lanka report in 2002 were in fact a catalyst for this

important change in the legislation that gave women equal rights in the area of citizenship.

## BOX XXIV

### Sri Lankan Cases Challenging Discriminatory Laws on Visas and Women's Domicile

**D'Souza v AG** (1997), unreported

**Fisher v Controller of Immigration** (1999), unreported

**Ashokan v Ashokan** (1994) 1 Sri LR 413

In neighbouring countries in Asia and the Pacific by contrast, CEDAW has been cited, and has had an impact on the judicial decisions of national courts. In Pakistan, in **Humaira Mahmood v Khokhar and Others** (1999) Jilani J in the Lahore High Court cited CEDAW and used it to reinforce an interpretation of Islamic law on the illegality of forced marriages. In the leading case of **Vishaka v State of Rajasthan** (1997) the Supreme Court of India interpreted the Constitutional provision on the right to life and equality to hold that sexual harassment in the workplace violated these guarantees. CEDAW and the UN Declaration on Violence against Women were cited by the Supreme Court and used to support this interpretation. The same approach was followed in the more recent case of **Apparel Exports Promotion Council v Chopra** (2000). CEDAW was also used in recognising the parental status of the mother in interpreting provisions of the Indian Guardianship Act in **Gita Hariharan v Reserve Bank of India** (1999).

We have noted that a Treaty Act (1990) in Nepal makes treaties applicable in national law from the time of ratification. Women lawyers have in recent years argued and won cases of discrimination against women on the basis of CEDAW provisions that they claim reinforce

and develop further the rights confirmed by the Nepalese Constitution. In **FWLD v Nepal**, CEDAW was cited successfully in a case where lawyers challenged the exemption of a husband from prosecution for rape. The Supreme Court recognised that marital rape was a form of violence against women that should be brought within the Criminal law, in conformity with Nepal's commitments as a State Party to CEDAW and the country's own Constitutional provision on equality. In **Meera Dhungana v Government of Nepal** (1993) inheritance laws were also challenged successfully on the ground of discrimination against women, contrary to CEDAW. The government of Nepal later amended the Country Code or Muluki Ain so as to eliminate some of the discriminatory provisions on discrimination and confer equal rights in land to women. In **Meera Gurung v Minister of Immigration** a decision in conformity with CEDAW Article 9 was pronounced in a case that challenged discriminatory visa laws in Nepal.

## BOX XXV

### Cases Incorporating CEDAW Standards in South Asia

**Humaira v Malik Moazzam Ghayas Khokhar & Ors** (1999)  
2 CHRLD 273

**Vishaka v State of Rajasthan** (AIR 1997 Supreme Court 3011)

**Apparel Export Promotion Council v A.K. Chopra** (AIR 1999 Supreme Court 625)

**Githa Hariharan v Reserve Bank of India** (AIR 1999 Supreme Court 1149)

**Meera Dhungana v Ministry of Law and Justice** (Nepal Law Journal (1994) 462-468)

**Meera Gurung v Department of Immigration** (Nepal Law Journal (1995) 68)

**FWLD v Government of Nepal** (43 Writ No.2824 4.3.1995)

Several cases from the courts in the Pacific which also follow a Common law tradition have integrated international treaty standards including CEDAW. There are many leading cases from African countries that have cited and used CEDAW in judicial interpretations that recognised women's rights to equality.

In the leading case of **Attorney General of Botswana v Unity Dow** (1991) Botswana's nationality law that prevented a woman married to a foreigner from passing her nationality to her children was struck down by the court as a violation of the Constitution and CEDAW Article 9. The argument that customary law permitted this and provided a rationale for the discrimination was rejected by the court. Customary laws on inheritance to land that were in conflict with the Constitution and CEDAW were also challenged successfully in the Tanzanian case of **Ephraim v Pastory** (1990) by the High Court of Tanzania. Similarly in **Mojekwu v Ejikeme**, the Nigerian Court of Appeal struck down a discriminatory customary law, using arguments based on CEDAW. In Fiji the rule on corroboration in rape cases was successfully challenged on the basis of CEDAW in **Balelala v State**, while rape was considered an infringement of a woman's human rights under the Constitution and CEDAW in **State v Bechu**.

## BOX XXVI

### Some Leading Cases from Africa and the Pacific

#### Incorporating CEDAW

**Attorney General of Botswana v Unity Dow** BLR 231. 1991

**Ephraim v Pastory**, High Court, Tanzania, 22.2.1990.

**Mojekwu & Ors v Ejikeme & Ors** (2000) 5 NWLR 402

**Balelala v State** Court of Appeal Fiji Cr.App No. AAU0003  
8.11.2004

**State v Bechu** Cr. Case No.79/94 2.12.1999

It is therefore clear that the general norms of CEDAW and the CEDAW Committee's General Recommendation No.19 can be especially useful in helping to eliminate gender bias in the legal system that relates to violence against women. It has been noted that the CEDAW Convention does not contain a specific article on this subject, but the CEDAW Committee has used the general articles, as well as Articles 5 and 16 to adopt a General Recommendation No. 19 on Violence against Women. The Committee's jurisprudence in this document has been reinforced by the UN Declaration on Violence against Women (1993).

## **BOX XXVII**

### **UN Declaration on the Elimination of Violence against Women**

#### **Declaration on the Elimination of Violence against Women General Assembly Resolution 48/104 of 20 December 1993**

1. Broad definition of violence to mean - physical, sexual and psychological violence taking place within the family or the community or perpetrated/condoned by the State.
2. States cannot rely on custom, tradition or religious consideration to avoid their obligations to protect women from violence.
3. Wide range of responsibilities cast on the State – including the duty to develop comprehensive preventive approaches, establish a national plan of action and the duty to establish an international network of co-operation.
4. Liability of the State for conduct of both State and Non-State actors, covering violence in the public and private spheres.

The law on court procedures and practice, has many principles that prevent women obtaining justice in criminal cases that come to court. The consent of the victim is a crucial aspect of a rape case, since the

prosecution must prove beyond reasonable doubt that the accused committed the sexual act without the victim's consent. A woman victim must therefore face aggressive cross examination on this issue. Various discriminatory rules of evidence like independent evidence to corroborate the victim's testimony make it even more difficult to obtain a conviction for rape. In a situation of custodial rape where the woman is placed under the power or authority of the alleged rapist, absence of consent becomes impossible to prove, according to these laws which place the burden of proof on the prosecution that intercourse was without consent.

### BOX XXVIII

#### **Analysis of Gender Bias in Law on Sexual Offences in Sri Lanka and Other South Asian Countries**

Aggressive cross-examination

Discriminatory rules of evidence

Difficulty of proving absence of consent

See Goonesekere, Savitri W. E. and Guneratne, Camena (1998). *Women, Sexual Violence and the Legal Process in Sri Lanka: A Study on Rape*. Colombo: CENWOR.

Goonesekere, Savitri (ed.) (2004). *Violence, Law and Women's Rights in South Asia*. New Delhi: Sage Publications.

Judicial decisions in several jurisdictions have highlighted these limitations. In India, in **Tukaram v State of Maharashtra (Mathura Rape Case)** (1979), a 16 year old girl alleged rape in police custody. The accused was acquitted on the argument that she had consented to intercourse. The controversy surrounding this case and agitation by women's groups for reform resulted in changes to the Indian law on evidence and

procedure in rape cases involving custodial situations. In these cases it is the defence that must prove that sex was with the consent of the woman who alleges rape. In a similar case **R v Ewanchuk** in Canada, the Supreme Court cited CEDAW on equal access to justice and held that when rape is alleged in custodial situations, the burden of proving consent by the woman should be placed on the alleged rapist in order to ensure that the victim had a fair trial. Placing the burden of proof on the prosecution to establish that the victim had not consented was considered unfair, in a situation of custodial rape, and in conflict with the norms of gender equality in CEDAW. Canadian law on procedure, and the Indian law as amended after the **Mathura Case** allow a shift of burden of proof to the defence, in cases of custodial rape.

The absence of such legislation prevented this argument being made in Sri Lanka in the case of **Kamal Addaraaratchi v The State** (2000) where the victim alleged rape in a hotel room in what can be described as a custodial situation. The prosecution failed to prove that intercourse was without consent, and the accused was acquitted. Cases referred to earlier decided by the Courts in Fiji have also challenged gender bias in the law on sexual offences.

## BOX XXIX

### Rape Cases that Challenge Gender Bias

**R v Ewanchuk** (1999) 1 S.C.R. 330 Supreme Court (Canada)  
**Balelala v State** (Court of Appeal Fiji) Cr. App. No.AAU003  
8.11.2004

Compare: **Tukaram v State of Maharashtra** AIR 1979 SC  
185 (India)  
**Kamal Addaraaratchi v The State**  
(Sri Lanka) 2000 3 Sri LR 393

In 1995, Sri Lanka's Penal Code was amended significantly. These reforms were influenced by CEDAW, General Recommendation No. 19, and the UN Declaration on Violence against Women.

Sri Lanka's Penal Code was amended further in 1998 in a hitherto unnoticed provision. This provision creates an offence of statutory rape when rape is alleged in custodial situations. Consent of the woman cannot be raised as a defence.

### **BOX XXX**

#### **Sri Lanka Penal Code Amendment on Custodial Rape (1998)**

A man is said to commit "rape" who has sexual intercourse with a woman . . . with her consent, while she was in lawful or unlawful detention or when her consent has been obtained, by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt.

#### **Penal Code, Section 363(b) as amended in 1998**

Thus today, a Sri Lankan court would not be free to consider the issue of consent in a case where rape takes place in a custodial situation. The law as set out in the **Kamal Addaraaratchi Case** can no longer operate to prevent a conviction for rape on the ground that absence of the woman's consent to sexual intercourse was not proved by the prosecution. Sri Lankan law has thus been brought in harmony with CEDAW, and the developments in India and in Canada through a legislative amendment. In the current law, absence of consent cannot be raised at all if there is rape in a custodial situation that comes within the 1998 amendment. In that sense Sri Lankan law now has a concept of statutory custodial rape.

In addition Sri Lankan jurisprudence on fundamental rights has developed in harmony with the norms of CEDAW and the provisions of international criminal law even though treaty standards of CEDAW have **not** been used directly to reinforce or develop constitutional norms on gender equality.

In the **Velu Arasa Devi (Maradana Check Point Rape) Case** (2001) and **Yogalingam Vijitha v Wijesekere** (2001), rape and sexual abuse in police custody were considered state abuse of authority, which amounted to torture and inhuman degrading treatment in violation of Article 11 of the Constitution. The Torture Convention and the Constitutional provision on torture rather than CEDAW influenced interpretations in the Supreme Court. However the decisions are also in harmony with CEDAW General Recommendation No.19, and the UN Declaration on Violence against Women. These cases have enriched the Sri Lankan and regional jurisprudence on gender equality and violence against women.

## **BOX XXXI**

### **Sri Lankan Cases on Rape as Torture**

**Velu Arasa Devi v Prematileka and Others** SC (FR) 401/2001

**Yogalingam Vijitha v Wijesekere** SC Appl. FR 186/2001

**Constitution Article 11** Fundamental Right to Freedom from Torture and Cruel Inhuman Degrading Treatment or Punishment

The jurisprudence that has emerged in the last few years on integration of international human rights standards, including CEDAW, indicate how important it is for courts to incorporate treaty standards in domestic law through interpretation. It is clear from this jurisprudence that judicial activism on gender equality can help to ensure equal access to justice for women even when there is no specific reference in judgments to the treaty norms. However when courts use treaty standards ratified by the country, they fulfill their duty to enforce constitutional guarantees, and facilitate the harmonisation of local laws with international law. Court cases also provide visibility for the much needed harmonisation of local laws in line with a country's treaty obligations. Case law can become an important impetus to legislative change and law reforms in line with international human rights standards including CEDAW, promoting greater accountability on the part of the State.

Parliaments are often tardy in acting on their treaty commitments and harmonising their laws with a treaty. A good example of the problem thus created was highlighted in the **Sepala Ekkannayake hijacking case** where the government of Sri Lanka found itself in a situation where it had failed to enact anti hijacking legislation after becoming a State Party to the International Convention against Hijacking, which it had ratified. Hijacking was therefore not a crime at the time when Sepala Ekkannayake hijacked the aircraft. The government's efforts to introduce legislation after the event was challenged as retrospective criminal legislation that infringed the Constitution. It was only by relying on international customary law on hijacking as a crime that the Supreme Court was able to uphold the validity of the legislation. In an environment where political will is often lacking to harmonise law with treaties, the courts can play a critical role in **"bringing treaties home"** to the legal system.

## BOX XXXII

### Implications of Not Harmonising Domestic Law with Treaties

**Attorney General v Ekkanayake** (1987) 1 Sri LR 107

#### Public Interest Litigation

The practice of Human Rights Commissions and Non-Governmental Organisations, intervening in litigation and providing amicus briefs to Courts is used in some countries to highlight the importance of Courts interpreting national laws in harmony with treaties that have been ratified by a country. In **Grootboom v Oostenburg Municipality** for instance the Human Rights Commission of South Africa and a Non-Governmental Organisation submitted an amicus brief in a right to shelter case. The Constitutional Court used the International Covenant on Economic Social and Cultural Rights to interpret a provision in the South African Constitution on the right to shelter. In India, a Non-Governmental Organisation brought an action in the Supreme Court on the right of the public to protection from vehicle pollution of the environment as “public interest” litigation. The Supreme Court of India pronounced a judgement which required the government to take certain action and allowed the Non-Governmental Organisation to monitor and report to the court on progress. The **Vishaka Case** in India on sexual harassment, and the Nepalese cases cited earlier are examples of public interest litigation (Box XXV).

The current procedures in Sri Lanka do not allow for amicus briefs or public interest litigation. However individuals representing organisations have moved the Supreme Court on other public issues of concern, as affected persons in fundamental rights litigation. Gender activists and women’s groups have not so far filed cases on gender discrimination, in similar actions. This is an area where there is room for capacity building, so as to encourage litigation by women’s groups and gender advocates committed to progress on women’s issues.

The cases that integrate international law demonstrate how international human rights norms link to and reinforce constitutional values so as to develop a body of jurisprudence on rights that can impact to deliver justice. As the Indian Supreme Court said in **Apparel Exports Promotion Council v A. K. Chopra** “international instruments cast an obligation on the (State) to gender sensitise its laws, and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.”

### BOX XXXIII

#### Public Interest Litigation: Some Leading Cases

**South Africa Grootboom v Oostenburg Municipality** 2000  
(3) BCLR 277(C)  
– Right to Shelter

**India Vishaka v State of Rajasthan** AIR 1997  
Supreme Court 3011  
– Right to Life

**Saheli Women’s Resource Centre v  
Commissioner of Police Delhi** AIR 1990  
Supreme Court 513 – acts of violence against  
women and police inaction

**Nepal FWLD v Government of Nepal** 43 Writ No.  
2824 4.3.1995 – marital rape

### International Complaints Procedures as an Enforcement Strategy

Sometimes an international treaty provides for an individual complaints procedure. Thus for instance the International Covenant on Civil and Political Rights (ICCPR) contains an Optional Protocol which provides for the victim of a violation who has exhausted local remedies including

through the courts, and claims not to have obtained relief, to bring a complaint of violation to the international tribunal created by such a procedure. Parties to litigation in Sri Lanka have addressed the Human Rights Committee of the International Covenant on Civil and Political Rights under the Optional Protocol to that Covenant, which Sri Lanka has ratified. The Human Rights Committee has on several of these cases directed the Government of Sri Lanka to give redress on the basis that the decision of the domestic court did not give relief for the violation. The issue of bringing the State before a local court to enforce such a decision in a torture case that came before the Human Rights Committee under the complaints procedure of the Optional Protocol was decided recently by a five judge bench of the Supreme Court of Sri Lanka. (vide discussion of case in Box XXXVII)

### **BOX XXXIV**

#### **Complaints filed before the Human Rights Committee Geneva under the Optional Protocol to ICCPR**

**Sarma Case** Communication No. 950/2000: Sri Lanka  
31/07/2003 (CCPR/C/78/D/950/2000)

**Jayalath Jayawardene Case** Communication No. 916/  
2000:Sri Lanka 26/07/2002 (CCPR/C/75/D/916/2000)

**Victor Ivan Case** Communication No. 909/2000: Sri Lanka  
26/08/2004 (CCPR/C/81/D/909/2000)

**Singarasa Case** Communication No. 1033/2001(CCPR/C/81/  
D/1033/2001)

**Tony Fernando Case** Communication No. 1189/2003: Sri Lanka  
31/03/2005

**Lalith Rajapakse Case** Communication No. 1250/2004

In December 2000 an individual complaints procedure and an inquiry procedure under CEDAW came into force, with the adoption of the Optional Protocol to CEDAW.

## **The Optional Protocol to CEDAW**

The Optional Protocol (OP) to CEDAW was adopted by the UN in 1999. It entered into force in December 2000.

This instrument now provides a stronger mechanism to enforce the rights guaranteed to women by CEDAW. It gives the CEDAW Treaty Body (the CEDAW Committee) the authority to:

- (i) entertain individual complaints of violations where local remedies have been exhausted, and there has been no relief and redress; and
- (ii) inquire on its own into systematic and grave violations of women's human rights under CEDAW, including where there are large scale perpetrations of acts of violence against women.

**BOX XXXV**  
**Optional Protocol**

**No. of ratifications**

State Parties: 79 as of 5 June 2006

**South Asian countries that have ratified to date:**

Bangladesh

Maldives

Nepal

Sri Lanka

1. Text of Optional Protocol – See Appendix II
2. See *Our Rights are Not Optional: A Resource Guide*. IWRAP – Asia Pacific (2005). Kuala Lumpur

The CEDAW Committee has considered some complaints under the Optional Protocol to CEDAW.

### ***Individual Complaints***

The Optional Protocol has a novel feature, in permitting individual complaints to be communicated to the CEDAW Committee by or on behalf of women whose rights have been infringed. The consent of the victim is necessary, but consent may be dispensed with on special justifications accepted by the CEDAW Committee. The author of the complaint however cannot be anonymous and must make the complaint in writing.

This procedure has given wide legal standing to women’s groups to address the CEDAW Committee directly on infringement of women’s human rights.

The Committee has the authority to declare a communication inadmissible. A complaint that is ill founded and does not provide adequate information may therefore be rejected. These limitations ensure that complaints are filed to redress legitimate grievances and not just to embarrass or harass a State Party.

The Committee investigates a complaint that is considered admissible, and pronounces its views and recommendations. The OP requires that the State gives due consideration to these views and recommendations as an important international complaints procedure. There is provision for follow up on progress in implementing the Committee's views and recommendations.

### ***Inquiries***

The Inquiry procedure is distinct and unlike the communication procedure is optional for State Parties ratifying the OP, who can indicate that they do not accept it. Details on this procedure are found in the text of the OP.

The CEDAW Committee in its Concluding Comments on reports requests parties to ratify the Optional Protocol to CEDAW so as to reflect their commitment to implement the treaty, and enforce it as a living instrument that impacts on eliminating discrimination against women. To date however only 79 countries that have ratified CEDAW have ratified the Optional Protocol. In South Asia, Bangladesh ratified the Optional Protocol even before it came into force in 2000, soon after it was adopted by the United Nations in 1999. Sri Lanka ratified the Optional Protocol in 2003.

## BOX XXXVI

### **Communications**

#### **B.J. v Germany**, Communication No. 1/2003

It was claimed that the laws governing separation and divorce in Germany were discriminatory. The Committee was of the view that the author had not reasonably exhausted domestic remedies.

#### **A.T. v Hungary**, Communication No. 2/2003

A Hungarian woman complained that she was a victim of domestic violence and that Hungary had failed to provide adequate protection against this violence. The Committee decided that she had not received effective protection from the State, violating CEDAW Articles 2, 5 and 16.

#### **Rahime Kayhan v Turkey**, Communication No. 8/2005

A Turkish teacher alleged that she was dismissed from work on account of wearing a head scarf to work, and that her freedom of choice and religion was violated. The Committee rejected the complaint as available domestic remedies had not been exhausted.

### **Inquiry Procedure**

#### **Report on Mexico**

Findings and recommendations on murder and abduction of more than 300 women in and around Ciudad Juarez, CEDAW/C/2005/OP.8/Mexico, 27<sup>th</sup> January 2005

The international complaints procedure under the OP is particularly important for incorporating CEDAW, as it provides another level of scrutiny, and can encourage courts to deliver judgments in harmony with international law and treaty commitments. If governments default on their obligations to give effect to views expressed by a treaty body on a complaint, the complaints procedure and its effectiveness is

undermined. The decision of the Supreme Court of Sri Lanka in the very recently decided **Singarasa Case** (2006) has raised the important issue of the responsibility of national courts in that situation. Can the courts rely on dualism to suggest that they are helpless in the face of the government's inaction, or can they review their own judgement in the light of views pronounced in the international complaints procedure?

In this case, a Divisional Bench with the Chief Justice presiding decided that the judiciary in Sri Lanka was supreme and that the executive had no power to ratify an Optional Protocol to a treaty that permitted a complaint to an international body, since this amounted to an infringement of the judicial power and the sovereignty of the People under the Constitution of Sri Lanka. This interpretation of dualism and the decision of the Supreme Court has been considered per incuriam in comments on the case. The case creates a precedent that conflicts with the national and regional trend supporting judicial activism in applying treaty standards in national legal systems. It will undoubtedly attract comment by the Human Rights Committee and the CEDAW Committee when they examine the country reports of Sri Lanka on implementing treaty obligations under international law which considers that Courts too are bound by treaty law. That is the basis on which the Bangalore and Victoria Falls Declarations of Commonwealth Judicial Colloquia have placed a responsibility on national courts in dualist jurisdictions to apply international law through judicial interpretation.

### **Box XXXVII**

#### **The Singarasa Case**

**Nallaratnam Singarasa v Attorney General** SC Spl (LA)  
182/99 15.09.2006

Comments on the Case

*See Annex XIII*

## Constitutional Provisions on Treaties

### Sri Lanka

#### Article 27(15)

**The State** shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall endeavour to **foster respect for international law and treaty obligations** in dealings among nations.

### Nepal

#### Article 126

- (1) The ratification of, accession to, acceptance of or approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's Government is to become a party shall be as determined by law.
- (2) The laws to be made pursuant to clause (1) shall, inter alia, require that the ratification of, accession to, acceptance of or approval of treaties or agreements on the following subjects be done by a majority of two-thirds of the members present at a joint sitting of both Houses of Parliament: -
  - (a) peace and friendship;
  - (b) defence and strategic alliance;
  - (c) boundaries of the Kingdom of Nepal; and
  - (d) natural resources, and the distribution of their uses.

Provided that out of the treaties and agreements referred to in sub-clauses (a) and (d), if any treaty or agreement is of an ordinary nature, which does not affect the nation extensively, seriously, or in the long term, the ratification of, accession to, acceptance of or approval of such treaty or agreement may be done at a meeting of the House of Representatives by a simple majority of the members present.

- (3) After the commencement of this Constitution, unless a treaty or agreement is ratified, acceded to, accepted or approved in accordance with this Article, it shall not be binding on His Majesty's Government or the Kingdom of Nepal.
- (4) Notwithstanding anything contained in clauses (1) and (2), no treaty or agreement shall be concluded in [sic] detrimental to the territorial integrity of the Kingdom of Nepal.

## Fiji

### Article 43

- (1) The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
- (2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, **have regard to public international law** applicable to the protection of the rights set out in this Chapter.

# India

## Article 51

The State shall endeavour to -

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) **foster respect for international law and treaty obligations** in the dealings of organised people with one another; and
- (d) encourage settlement of international disputes by arbitration.

## Reservations and Declarations

### Bangladesh

#### Reservations:

“The Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of Articles 2, 13 (a) and 16 (1) (c) and (f) as they conflict with *Sharia* law based on Holy Quran and Sunna.”

### India

#### Reservation:

“With regard to Article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this Article.”

### Maldives

#### Reservations:

1. The Government of the Republic of Maldives expresses its reservation to Article 7 (a) of the Convention, to the extent that the provision contained in the said paragraph conflicts with the provision of Article 34 of the Constitution of the Republic of Maldives.
2. The Government of the Republic of Maldives reserves its right to apply Article 16 of the Convention concerning the equality of men and women in all matters relating to marriage

and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.”

## **Pakistan**

### **Reservation:**

“The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of Article 29 of the Convention.”

## **India**

### **Declarations:**

- i) With regard to Articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.
- ii) With regard to Article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.”

## **Pakistan**

### **Declaration:**

“The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”

## ANNEX III

### **UNIFEM and CEDAW: Some Regional Initiatives**

Committed to using a rights-based approach in its work, CEDAW became the heart of UNIFEM's programming in 1998. UNIFEM's CEDAW programme has followed the focus of the Convention on implementing CEDAW through partnerships between the State, civil society and NGOs. UNIFEM has given priority to building capacity of both governments and NGOs to implement and monitor progress. It has documented information and facilitated the sharing of expertise and information on realising women's rights under the Convention, evaluating successes and constraints.

UNIFEM's programmes have given priority to the following:

Annual "Global to Local" training workshops in collaboration with the International Women's Rights Action Watch - Asia Pacific (IWRAP-AP), conducted during the sessions of the CEDAW Committee.

Providing a platform, which brings together women's rights advocates and Government representatives from the region, to track progress on the Convention, share experiences on reporting to the CEDAW Committee, assisting upcoming Government reports to the Committee.

Producing numerous Convention related materials – including interpretive guides, translations of the Convention, videos, radio spots, collections of good practices and training materials – to support greater understanding of CEDAW's principles, its relevance in concrete terms to women's lives, and of how it can best be applied to achieve gender equality.

UNIFEM has enhanced the CEDAW Committee's work at the national as well as global levels, by providing support to the production of Shadow Reports, supporting the presence of women's NGOs at the Committee sessions, as well as a flow of alternative information to the Committee to assist in their assessment of State Party Reports.

UNIFEM has also worked to ensure that the Committee's expertise and authority are incorporated into initiatives at the national and regional levels, by facilitating the participation of Committee members in key roundtables, consultations and workshops.

## **UNIFEM and CEDAW in South Asia**

UNIFEM South Asia initiated its work on CEDAW as early as 1993. Since then it has consistently supported work on CEDAW in the region, with a view to both creating capacity to implement CEDAW and to monitor progress.

### **(1) Peer Learning**

It was through the UNIFEM initiative in South Asia, that for the first time, the process of sharing and learning on reporting and developing an implementation strategy on CEDAW came to be recognised by both governments and women's groups as an important activity. A transparent interactive mechanism was established where governments and the women's movement could jointly appraise progress on fulfilment of obligations under the Convention with the participation of CEDAW Committee members from the region.

#### **(a) *Interactive Meetings on CEDAW Implementation***

In 1999, a South Asia regional meeting was held to revisit the monitoring framework, review and assess baseline reports and discuss problems and lessons learnt. At this meeting the Governments of Sri Lanka and Nepal and women's groups from

the countries shared their experiences on preparation of reports as well as actual reporting with NGOs and women's groups and the Government of India. Three CEDAW Committee members shared their technical expertise on CEDAW implementation and monitoring.

Nepal and Maldives shared their experiences with the other SAARC countries at the 'Commemorating Beijing III' meeting held in Maldives **in September 2000**. Participating at the meeting, India and CEDAW Committee members from South Asia exchanged information on CEDAW reporting, monitoring and implementation.

In **September 2002** in collaboration with the Ministry of Women's Affairs, Government of Sri Lanka, a South Asia Consultation on CEDAW was organised with the participation of nodal State agencies, women's groups and gender activists. Four CEDAW Committee members shared their expertise on the CEDAW review and input process. International Women's Rights Action Watch – Asia Pacific, a regional organisation that builds capacity for the implementation of CEDAW, provided technical support at the Conference.

In **April 2004** UNIFEM organised a regional meeting for Women's Ministries in Jaipur. The meeting sought to create a learning opportunity for Governments on how to use the women's Convention and its reporting mechanisms. It focused on strategies to implement interventions as indicated in the Concluding Comments of the CEDAW Committee and the Optional Protocol, including the system of alternative NGO reports, towards securing gender equality and women's empowerment.

**(b) *Linking CEDAW Implementation with Progress Reviews of the Beijing Platform for Action***

A panel discussion on knowledge based advocacy on CEDAW was organised at the Fourth South Asia Ministerial Conference ‘Commemorating Beijing’ held at Paro, Bhutan **in 2003**.

In **May 2005** as part of the programme of the Fifth South Asia Ministerial Conference ‘Celebrating Beijing Plus Ten’ held in Islamabad, presentations on CEDAW were made.

**(2) Preparation of CEDAW Reports**

UNIFEM has extended support to Governments and NGOs in the preparation of their reports and also facilitated their participation to the CEDAW reporting in New York.

**(3) Research and Publications**

**In 2003-2004** UNIFEM supported three studies to review the linkages between religion, religious laws and local customary practices – India, Pakistan and Bangladesh.

**In 2004-2005** UNIFEM facilitated the development of new resource tools:

CEDAW: Restoring Rights to Women – the publication prepared by the NGO, Partners for Law in Development (India), is a resource to enhance and deepen understanding on CEDAW, its coverage and potential.

CEDAW Indicators for South Asia: An Initiative – Prepared by the Centre for Women’s Research (CENWOR), Sri Lanka – a strategy to monitor the situation so as to prevent violations and encourage proactive interventions to realise the obligations. The publication provides **qualitative and quantitative** indicators for monitoring.

#### **(4) Training**

In **September 2006** UNIFEM supported its network partners to organise a week long training of trainers workshop for 25 second rung trainers from 7 countries – Afghanistan, Bangladesh, Bhutan, India, Nepal, Maldives, Pakistan and Sri Lanka.

### Some Important Articles in the Convention

#### Article 1

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.

#### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

### **Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and

development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

## **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
  - (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work,

States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
  - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
  - (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
  - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this Article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

## **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this Article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

## Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## Some Concluding Comments on Trafficking in South Asia

### India (2000), Paragraphs 76 and 77

**Paragraph 76:** The Committee is concerned that women and girls are exploited in prostitution and inter-state and cross-border trafficking. It is also concerned that those women are exposed to HIV/AIDS and health risks and that existing legislation encourages mandatory testing and isolation.

**Paragraph 77:** The Committee calls upon the Government to review existing legislation on trafficking and forced prostitution and to strengthen law enforcement. It recommends the development of bilateral and inter-state controls and reintegration and advocacy programmes to prevent the exploitation of women and girls in forced prostitution and trafficking.

### Nepal (1999), Paragraphs 149 and 150

**Paragraph 149:** The Committee is concerned about the high incidence of prostitution and the increase in trafficking in women and girls, in particular for the purpose of prostitution. It expresses concern that girl children are taken across the border for the purpose of child marriage.

**Paragraph 150:** The Committee urges the Government to take effective steps to review existing legislative provisions on prostitution and trafficking in women and their compatibility with the Convention, and to ensure their full implementation and compliance. It also calls upon the Government to initiate regional and bilateral cooperation, taking into account subregional, regional and international agreements and standards on this issue. It urges the Government to review its criminal code, to punish persons who procure women for prostitution or for trafficking, to establish repatriation and rehabilitation programmes, and to support services for victims of trafficking.

## Some Concluding Comments on South Asian Reports

### Concluding Comments on Institutional Arrangements

#### Sri Lanka (2002), Paragraphs 24 and 25

**Paragraph 24:** While welcoming the efforts of the Government to strengthen the national machinery for women and to introduce gender mainstreaming, the Committee notes with concern that the legal, institutional and financial framework is still insufficient to implement the Convention.

**Paragraph 25:** The Committee urges the State party to give legal force to the Women's Charter, expedite the establishment of the National Commission on Women, strengthen the gender focal points in government ministries and ensure sufficient human and financial resources for the implementation of the National Plan of Action.

#### India (2000), Paragraph 48

**Paragraph 48:** The Committee commends the Government of India for establishing the National Commission for Women and state commissions for women with responsibility for developing action plans on gender and proposals for law reform.

## **Concluding Comments on Programmes and Delivery of Services**

### **India (2000), Paragraph 47**

**Paragraph 47:** The Committee commends the introduction of a range of policies and programmes by the Governments of India over the years to improve the situation of women. It notes with appreciation that those programmes have contributed to some extent to improving the quality of social indicators for women in various States of the Union. The Committee welcomes the proposal to formulate a new gender empowerment policy and the directives sent from the Prime Minister's office to mainstream gender issues and a rights approach to development at the national level.

### **Nepal (1999), Paragraphs 131 and 132**

**Paragraph 131:** The Committee commends the Government for the Basic Primary Education Programme, launched in 1992, which is directed at the improvement of women's and girls' education and contributes to the advancement of women's social status, as well as playing a key role in strategies for poverty alleviation.

**Paragraph 132:** The Committee welcomes the creation of the Women Development Division under the Ministry of Local Development to, *inter alia*, execute two central micro-credit programmes for women and to implement programmes on income generation and community development.

## **Concluding Comments on Policies**

### **Sri Lanka (2002), Paragraphs 41 - 43**

**Paragraph 41:** The Committee urges the Government to ensure the full and effective enforcement of the measures taken to protect

women migrant workers, including preventing the activities of illegal employment agencies and ensuring that insurance covers the disabled and jobless after they return to Sri Lanka.

**Paragraph 42:** Noting that the majority of women live in rural areas, the Committee is concerned about discrimination against women under the Land Development Ordinance. The Committee is also concerned that economic policies do not incorporate a gender perspective and do not take into account rural women's role as producers.

**Paragraph 43:** The Committee urges the Government to amend the Land Development Ordinance so that it is compatible with the Convention. The Committee also urges the Government to recognise rural women's contributions to the economy by collecting sex-disaggregated data on rural production and to ensure the incorporation of a gender perspective in all development programmes, with special attention to minority rural women.

### **Nepal (1999), Paragraph 133**

**Paragraph 133:** The Committee commends the Government of Nepal for the adoption of the ninth plan which places women's issues in the mainstream of development. It also welcomes Nepal's commitments to reviewing existing legislation and enacting appropriate laws in accordance with international instruments. The Committee also commends the national plan of action for gender equality and the empowerment of women formulated by the Ministry of Women and Social Welfare and endorsed by the ninth plan.

## **Concluding Comments on Creating Awareness of Rights, and Obligations of State, among Women and NGOs**

### **Nepal (1999), Paragraph 154**

**Paragraph 154:** The Committee recommends that the Government, in coordination with civil society, including women's groups and non-governmental organisations, initiate policies and programmes to eliminate discriminatory cultural attitudes towards women and girls. It recommends implementation of an extensive public awareness campaign in order to increase the understanding of gender issues and human rights of women amongst the people of Nepal.

## ANNEX VII

### **Concluding Comments on Constitutional Provisions, Legislation and Court Decisions**

#### **Nepal (1999), Paragraphs 138 and 139**

**Paragraph 138:** The Committee is concerned that the Government has not taken sufficient action to reflect the provisions of the Convention in domestic laws, or to amend prevailing discriminatory laws. The Committee is also concerned about the interpretation of discriminatory laws by the Supreme Court and the Court's view that if any laws do not conform with culture and tradition, society will be disrupted.

**Paragraph 139:** The Committee recommends that a definition of discrimination in compliance with Article 1 of the Convention be included in the relevant laws. The Committee also urges the Government to amend, as a matter of priority, discriminatory laws on property and inheritance, the laws on marriage, nationality and birth registration, the Bonus Act, and discriminatory criminal laws, including the new law on abortion.

#### **India (2000), Paragraphs 45 and 46; 66, 67 and 69**

**Paragraph 45:** The Committee recognises that India has guaranteed in its Constitution fundamental human rights that can be enforced by an application to the Supreme Court. The Committee commends in particular the recognition of a fundamental right to gender equality and non-discrimination and a specific enabling provision on affirmative action in the Constitution.

**Paragraph 46:** The Committee appreciates the contribution made by the Supreme Court of India in developing the concept of social action litigation and a jurisprudence integrating the Convention into domestic law by interpreting Constitutional provisions on gender equality and non-discrimination.

**Paragraph 66:** The Committee is concerned that the fundamental rights recognised in the Constitution can be enforced only against state actors and in the event of inaction on the part of the state. It also notes that the private sector, where a great number of women are employed, which is expanding in a period of transition to market economic policies, is not covered by Constitutional standards.

**Paragraph 67:** The Committee recommends that a sex discrimination act be introduced to make the standards of the Convention and the Constitution applicable to non-state action and inaction.

**Paragraph 69:** The Committee urges the Government to implement existing legislation prohibiting such practices as dowry, devadasi and caste-based discrimination. It calls upon the Government to strengthen law enforcement and introduce reforms proposed by the National Commission on Women and women activists in regard to the law on rape, sexual harassment and domestic violence.

## **Maldives (2001), Paragraphs 138 – 141**

**Paragraph 138:** The Committee urges the Government to improve law-enforcement measures, enact laws on domestic violence, including domestic violence and marital rape, in accordance with General Recommendation No. 19, on violence against women, and work with women's groups to obtain reliable data and provide relief to victims of violence. The Committee requests the Government to respond to this issue in national plans, based on the Beijing Platform for Action and the Commonwealth Plan of Action on Gender and Development. It calls

upon the Government to create public awareness on violence against women as an infringement of human rights that has grave social costs for the whole community.

**Paragraph 139:** The Committee expresses its concern that family laws discriminate against women and notes with concern the high divorce rates, which have an adverse impact on women and children.

**Paragraph 140:** The Committee urges the Government to enforce the new family law, which tries to address this problem, and to continue its efforts to reform all areas of family law so as to protect the human rights of women.

**Paragraph 141:** The Committee calls upon the Government to obtain information on comparative jurisprudence seeking to interpret Islamic law in harmony with international human rights standards and the Beijing Platform for Action.

## **Sri Lanka (2002), Paragraphs 22 -24**

**Paragraph 22:** The Committee is concerned that the constitutional provisions on fundamental rights do not create accountability for the activities of non-state actors or the private sector.

**Paragraph 23:** The Committee urges the State party to guarantee that the constitutional rights apply to non-state actors and the private sector.

**Paragraph 24:** While welcoming the efforts of the Government to strengthen the national machinery for women and to introduce gender mainstreaming, the Committee notes with concern that the legal, institutional and financial framework is still insufficient to implement the Convention.

## Declarations of Commonwealth Judicial Colloquia

### **Bangalore Principles on the Domestic Application of International Human Rights Norms (1988), Paragraphs 7 and 8**

**Paragraph 7:** It is within the proper nature of the judicial process and well-established judicial functions of national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

**Paragraph 8:** However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates breach of an international legal obligation which is undertaken by a country.

### **Victoria Falls Declaration (1994), Paragraphs 11, 15 and 22**

**Paragraph 11:** The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.

**Paragraph 15:** There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments, which particularly pertain to women.

**Paragraph 22:** Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.

## **Constitutional Provisions on Treaty Incorporation**

### **South Africa**

#### **Article 231**

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

# Nepal

## Article 126

- (1) The ratification of, accession to, acceptance of or approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's Government is to become a party shall be as determined by law.
- (2) The laws to be made pursuant to clause (1) shall, inter alia, require that the ratification of, accession to, acceptance of or approval of treaties or agreements on the following subjects be done by a majority of two-thirds of the members present at a joint sitting of both Houses of Parliament:
  - (a) peace and friendship;
  - (b) defence and strategic alliance;
  - (c) boundaries of the Kingdom of Nepal; and
  - (d) natural resources, and the distribution of their uses.

Provided that out of the treaties and agreements referred to in sub-clauses (a) and (d), if any treaty or agreement is of an ordinary nature, which does not affect the nation extensively, seriously, or in the long term, the ratification of, accession to, acceptance of or approval of such treaty or agreement may be done at a meeting of the House of Representatives by a simple majority of the members present.

## Constitutional Provisions on Equality and Affirmative Action<sup>1</sup>

### Sri Lanka

#### Right to Equality

##### Article 12

- (1) All persons are equal before the law and are entitled to the equal protection of the law.
- (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds:

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:

Provided further that it shall be lawful to require a person to have sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

- (3) No person shall, on the grounds of race, religion, language, caste, sex or any one such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public

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<sup>1</sup> Affirmative Action provisions are given in bold.

restaurants, hotels, places of public entertainment and places of public worship of his own religion.

- (4) **Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.**

## Nepal

### Right to Equality

#### Article 11

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion (dharma), race (varya), sex (li\_ga), caste (jât), tribe (jâti) or ideological conviction (vaicârik) or any of these.
- (3) The State shall not discriminate among citizens on grounds of religion, race, sex, caste, tribe, or ideological conviction or any of these.

**Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.**

- (4) No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law.

- (5) No discrimination in regard to remuneration shall be made between men and women for the same work.

## **Bangladesh**

### **Right to Equality**

#### **Article 27**

All citizens are equal before law and are entitled to equal protection of law.

#### **Article 28**

- (1) The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth.
- (2) Women shall have equal rights with men in all spheres of the State and of public life.
- (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
- (4) **Nothing in this Article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.**

## **Pakistan**

### **Right to Equality**

#### **Article 25**

- (1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex alone.
- (3) **Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.**

## **India**

### **Right to Equality**

#### **Article 14**

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

#### **Article 15**

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
  - (a) access to shops, public restaurants, hotels and places of public entertainment; or

- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
- (3) **Nothing in this Article shall prevent the State from making any special provision for women and children.**
- (4) **Nothing in this Article or in clause (2) or Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.**

## **Constitutional Provisions on Right to Freedom from Torture and Inhuman and Degrading Treatment**

### **Sri Lanka**

#### **Article 11**

No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### **Bangladesh**

#### **Article 35**

- (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.
- (6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

### **India**

#### **Article 21**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

## **Pakistan**

### **Article 14**

- (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.
- (2) No person shall be subjected to torture for the purpose of extracting evidence.

## **Nepal**

### **Article 14**

- (4) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law.

## **Constitutional Provisions on the Right to Life**

### **India**

#### **Article 21**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

### **Pakistan**

#### **Article 9**

No person shall be deprived of life or liberty save in accordance with law.

### **Bangladesh**

#### **Article 32**

No person shall be deprived of life or personal liberty save in accordance with law.

## The Singarasa Case

### A Brief Comment

The recent judgment of the Supreme Court seeking to invalidate Sri Lanka's accession to the Optional Protocol to the ICCPR has led to questions as to how this judgment came to be given. Yes, there was a case, and as Senior Counsel I would like to explain the circumstances in which it came before the Supreme Court.

An application was made to the Supreme Court in 2005 for the exercise of the Court's inherent power of revision of a conviction and sentence in 1995. This was after the views of the United Nations Human Rights Committee had been conveyed to the State, that Singarasa should be released or retried as his right to a fair trial had been breached. Singarasa had petitioned the UN Human Rights Committee by virtue of the right given to him by an international agreement or treaty entered into by the Sri Lankan State, namely the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The Supreme Court constituted a Divisional Bench of five judges to hear the application, and it became known as the '**Singarasa Case**'.

The legality or constitutionality of Sri Lanka's accession to the Optional Protocol to the ICCPR did not arise in this case, was not raised by Court and was never argued. Indeed the time given to make oral submissions was limited and an application on behalf of the petitioner for a further date of hearing was ignored.

The Supreme Court could have in passing in the judgment raised the question of the treaty ratification process and left it to be decided in a suitable case, after hearing the Attorney-General on behalf of the executive Head of State and the Minister of Foreign Affairs, who takes

the initiative and is responsible for registering the instrument of ratification or accession in the UN.

Singarasa's application to Court was *not* an application to *enforce* or *implement* the views expressed by the Human Rights Committee (HRC) of the UN on an individual's communication in terms of the Protocol. It is a matter of common knowledge that the views of the HRC are not decisions binding on national courts. All that Singarasa did was to ask for a revision or review of the decisions of the Supreme Court and other courts given earlier. This is possible in our law. The views expressed by the HRC were relied on solely to seek to persuade the Court to take a fresh look at the facts and the law in Singarasa's case. The Supreme Court was invited to reconsider the conviction and sentence of 50 years imprisonment (reduced in appeal to 35 years) in the light of the HRC's views as to the requirements of a fair trial, which is a right guaranteed in our Constitution. Unfortunately the Supreme Court has seen it only as an attempt to substitute for the decisions of our courts the views of the HRC and, without looking at the facts or the law on confessions to the police, pronounced on the constitutionality of the State's accession to the Optional Protocol in 1997. This also explains why the Court said the application was misconceived and without any legal base.

There could be no misunderstanding in the minds of Judges that the petitioner's substantive case was that there had been a grave miscarriage of justice in his conviction, and a number of reasons were given in the petition which were totally independent of the views of the HRC. There is no reference in the judgment to these other arguments and they have not been considered. As stated above time was not given for full argument even though judgment was delivered after many months.

In its views communicated to the State the HRC of the UN had recommended that the Prevention of Terrorism Act (PTA) provision, which cast on the accused the burden of proving that a confession made to the police was not voluntary, should be amended. Singarasa

had been convicted, after the confession was held admissible, for not leading any evidence to show that the alleged attacks on Army camps (which formed the basis of the charges) had not taken place or that he was not involved in them. It was a golden opportunity for the Supreme Court to have emerged as the true guarantor of the rights and freedoms of people by including in a judgement – even a judgement refusing the application – a recommendation to this effect.

Singarasa was a Tamil youth of 19 or 20 who had no schooling and spoke only Tamil. His conviction was solely on the basis of a confession which was denied by him at his trial. The evidence was that he made the confession in Tamil to a police officer who understood Tamil but could not write Tamil; his confession was translated into Sinhala and written down by the same police officer. At the end of Singarasa's statement the police officer read out to Singarasa in Tamil what he had written in Sinhala before taking his thumb impression on the record. This was all done in the presence of a senior police officer to whom a confession under the emergency regulations or the PTA had to be made. This officer understood only a little Tamil and the translation into Sinhala was also for his benefit. The Supreme Court could also have commented on the undesirability of a procedure that permitted a police officer to record a statement confessing to committing serious crimes, in Sinhala, when it was made in Tamil. Had the Supreme Court done only this we would have been disappointed but satisfied that the cry for justice by Singarasa, sentenced to prison for 35 years, had been heard. It is responses like this that have made the Supreme Court of India the highly respected body it is.

Nowhere in our Constitution is it said that the Supreme Court is Supreme; it is but another court exercising the judicial power of the People who are Sovereign. It is the People's right to say that the Supreme Court's pronouncement taking away a valuable right conferred on the People was *per incuriam* and in excess of the Court's jurisdiction. A treaty solemnly entered into by the State in the exercise of the executive

power and in terms of international law as reflected in the Vienna Convention on Treaties is not, it is submitted with respect, subject to judicial review. There is a procedure in the Protocol for a State Party to denounce the Protocol, but until this is done, the Protocol is in force in the country. It must not be forgotten that Sri Lanka's accession to the Optional Protocol of the International Covenant on Civil and Political Rights was one of the major accomplishments of the late Lakshman Kadirgamar during his distinguished career as Foreign Minister. Both Bench and Bar, at the unveiling of his portrait at the Law Library, paid tribute to Kadirgamar's eminence as a lawyer and to his outstanding contribution to the country as Foreign Minister.

RKW Goonesekere  
Sunday Times, Sri Lanka  
22<sup>nd</sup> October 2006

**Convention on the Elimination of All Forms of  
Discrimination against Women  
(CEDAW)**

***The States Parties to the present Convention,***

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialised agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the

participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasising that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realisation of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### **Article I**

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.

### **Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

## **Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

## **Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

## **Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

## **PART II**

### **Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.

### **Article 8**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.

### **Article 9**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

## PART III

### Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;

- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

## **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
  - (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
    - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
    - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
    - (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
    - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
  3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

## **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

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

## **PART IV**

### **Article 15**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to

exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

## **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## **PART V**

### **Article 17**

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of

the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two

members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.
9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

## **Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:
  - (a) Within one year after the entry into force for the State concerned;
  - (b) Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

## **Article 19**

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

## **Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

## **Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

## **Article 22**

The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

## **PART VI**

### **Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

### **Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

### **Article 25**

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### **Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

### **Article 27**

1. 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.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

### **Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

### **Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer

the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

### **Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed the present Convention.

## Appendix II

# Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women

**Adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day entry into force 22 December 2000**

### *The States Parties to the present Protocol,*

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

*Also noting* that the Universal Declaration of Human Rights Resolution 217 A (III), proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

*Recalling* that the International Covenants on Human Rights Resolution 2200 A (XXI), annex. and other international human rights instruments prohibit discrimination on the basis of sex,

*Also recalling* the Convention on the Elimination of All Forms of Discrimination against Women (“the Convention”), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

*Reaffirming* their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take

effective action to prevent violations of these rights and freedoms,

*Have agreed as follows:*

### **Article 1**

A State Party to the present Protocol (“State Party”) recognises the competence of the Committee on the Elimination of Discrimination against Women (“the Committee”) to receive and consider communications submitted in accordance with Article 2.

### **Article 2**

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 set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

### **Article 3**

Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

### **Article 4**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.
2. The Committee shall declare a communication inadmissible where:
  - (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

- (b) It is incompatible with the provisions of the Convention;
- (c) It is manifestly ill-founded or not sufficiently substantiated;
- (d) It is an abuse of the right to submit a communication;
- (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

## **Article 5**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

## **Article 6**

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

## **Article 7**

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under Article 18 of the Convention.

## **Article 8**

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable

information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

## **Article 9**

1. The Committee may invite the State Party concerned to include in its report under Article 18 of the Convention details of any measures taken in response to an inquiry conducted under Article 8 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in Article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

## **Article 10**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognise the competence of the Committee provided for in Articles 8 and 9.

2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

### **Article 11**

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

### **Article 12**

The Committee shall include in its annual report under Article 21 of the Convention a summary of its activities under the present Protocol.

### **Article 13**

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

### **Article 14**

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

### **Article 15**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### **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.

### **Article 17**

No reservations to the present Protocol shall be permitted.

### **Article 18**

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

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

### **Article 19**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 or any inquiry initiated under Article 8 before the effective date of denunciation.

### **Article 20**

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under Article 18;
- (c) Any denunciation under Article 19.

### **Article 21**

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

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