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American Bar Association Section of International Law and Practice and the Standing Committee on World Order under Law Reports to the House of Delegates - Elimination of Discrimination against Women

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I. *Environmental Law*

- I.1. **Environmental Justice.** Recognizes that the public participation provisions of local, state, territorial and federal environmental laws and international environmental agreements and treaties should recognize and express the principle that the public and all affected interests should be provided meaningful and effective involvement and should be expected to participate in consensus building efforts to ensure that government decision-making regarding the administration, regulation and enforcement of environmental laws is open, fair, efficient and credible. 2/95

J. *Homelessness and Poverty*

- J.1. **Comprehensive Measures to Address Homelessness.** Support the adoption of creative and comprehensive measures to address homelessness by eliminating illegal residential segregation, increasing availability of affordable transitional and permanent housing and improving the accessibility of such housing to employment, schools, transportation, and human services. 8/95.

II. Elimination of Discrimination Against Women

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association, in support of the Platform for Action adopted at the Fourth World Conference on Women in Beijing, China in September 1995:

- (a) reaffirms its support, originally declared by the House of Delegates in 1984, for the ratification by the United States of the Convention on the Elimination of All Forms of Discrimination Against Women, with the same reservations, understandings and declarations previously supported; and
- (b) expresses its support in principle for the development of an optional protocol to the Women's Convention providing for an individual right of petition.

REPORT

I. Introduction and Background

This Report is one of a three-part series developed as a result of the American Bar Association's participation in the Fourth World Conference on Women ("4WCW") in Beijing, China.

A. THE UNITED NATIONS FOURTH WORLD CONFERENCE ON WOMEN

The United Nations Fourth World Conference on Women (the "Conference" or the "4WCW") took place in Beijing, China from September 4-15, 1995. At the conclusion to the Conference, the delegates from the 187 attending governments issued a Declaration¹ (the "Beijing Declaration" or "Declaration") and committed themselves to the implementation of a Platform for Action (the "Platform" or "PfA") that identifies strategies and concrete steps to eliminate barriers to the full participation of women in twelve critical areas of concern described below.² The Declaration and the Platform represented the culmination of work over 20 years to secure the equality of women, beginning with the First World Conference on Women in Mexico City in 1975, and continuing through the Third World Conference on Women in Nairobi, Kenya in 1985.³

This Report, the second in a series of three reports and recommendations arising from the Conference,⁴ begins with an overview of the Platform for Action, and a description of the ABA's role in the Conference. It then discusses the Platform provisions which relate to the Convention on the Elimination of All Forms of Discrimination Against Women. After reviewing the Convention and its current status, it addresses why it is appropriate now for the ABA to reaffirm its support for U.S. ratification of the Convention and why the ABA should support in principle the development of an optional protocol to the Convention.

B. PURPOSE, FOCUS AND STRUCTURE OF THE PLATFORM FOR ACTION

The Platform for Action—a 200-plus page document—is the principal product of the Conference. Although agreed upon by governments, it is not a binding legal treaty in the normal sense of the term. Rather, it is an action document. By signing it, a government makes a political commitment to implement the action items in the Platform that are relevant to it. This commitment is reaffirmed by the express language of the accompanying Declaration.⁵

1. *Beijing Declaration of the Fourth World Conference on Women*, adopted September 15, 1995 [hereinafter "Declaration"].

2. Platform for Action, adopted September 15, 1995 [hereinafter "PfA"].

3. *The Nairobi Forward-Looking Strategies for the Advancement of Women*, adopted by the World Conference to Review and Appraise the Achievements of the U.N. Decade for Women: Equality, Development and Peace (Nairobi, Kenya, July 15-26, 1985), G.A. Res. 40/108 (December 13, 1985), U.N. Series No. E. 85, IV.10.

4. The others in this series are: (1) a Report and Recommendation on implementation of the Platform, focusing on law-related aspects ("Report No. 1"); and (2) a Report and Recommendation on implementation of the Platform by the United Nations ("Report No. 3").

5. In the Declaration, the participating governments state: "We hereby adopt and commit ourselves as Governments to implement the following Platform for Action, ensuring that a gender perspective is reflected in all our policies and programs. We urge the United Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well as non-governmental organizations, with full respect for their autonomy, and all sectors of civil society, in cooperation with Governments, to fully commit themselves and contribute to the implementation of this Platform for Action." Declaration, ¶ 38.

To understand the recommendations of this Report and Recommendations and its two companion Reports and Recommendations, it is important to understand how the Platform is structured.

The Platform for Action is comprised of six chapters: I. Mission Statement; II. Global Framework; III. The Critical Areas of Concern; IV. Strategic Objectives and Actions; V. Institutional Arrangements; and VI. Financial Arrangements.

As set forth in the Mission Statement, the Platform for Action "aims at accelerating the implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women and at removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making."⁶ Twelve areas are identified in the Platform for particular focus as the "critical areas of concern":

- The persistent and increasing burden of poverty on women
- Inequalities and inadequacies in and unequal access to education and training
- Inequalities and inadequacies in and unequal access to health care and related services
- Violence against women
- The effects of armed or other kinds of conflict on women, including those living under foreign occupation
- Inequality in economic structures and policies, in all forms of productive activities and in access to resources
- Inequality between men and women in the sharing of power and decision-making at all levels
- Insufficient mechanisms at all levels to promote the advancement of women
- Lack of respect for and inadequate promotion and protection of the human rights of women
- Stereotyping of women and inequality in women's access to and participation in all communications systems, especially in the media
- Gender inequalities in the management of natural resources and in the safeguarding of the environment
- Persistent discrimination against and violation of the rights of the girl child⁷

With respect to each of those twelve areas, Chapter IV of the Platform identifies a number of strategic objectives. (For a list of these objectives, see Report No. 1, Appendix A.) It then goes on to identify action items under each strategic objective. Some of the action items are directed towards governments, some towards international organizations, some towards non-governmental organizations ("NGOs"), and others toward some combination of the three.

The Platform calls upon countries which have not already done so to ratify the Convention on the Elimination of All Forms of Discrimination Against Women

6. PfA Ch. I, ¶ 1.

7. PfA Ch. III, ¶ 46.

("CEDAW" or the "Women's Convention").⁸ It calls upon states which have ratified the Women's Convention but made significant reservations to it to reconsider those reservations.⁹ Finally, the Platform calls for the development of an optional protocol to the Women's Convention which would provide for an individual right of petition to address a state's failure to implement the Convention.¹⁰ As described in more detail in the accompanying Report and Recommendation on the Women's Convention, the ABA should reaffirm its support, first established in 1984, for U.S. ratification of this Convention, subject to the reservations, understandings and declarations previously supported. It should also express its support in principle for the development of the optional protocol, to ensure that the Convention, once adopted, is effectively implemented.

C. THE ABA'S ROLE IN THE CONFERENCE

Pursuant to a resolution adopted last fall,¹¹ the ABA participated actively in the Conference and the Conference preparations. Focusing on the legal issues of human rights, violence against women, law reform to promote equality, and legal literacy, the ABA, as a co-chair of the Working Group on the Human Rights of Women, developed a legal framework for the Platform,¹² participated in the Preparatory Conference in New York City in March 1995, sponsored several workshops on law-related topics at the NGO Forum (the parallel event to the Conference for non-government organizations and individuals), and attended the Conference as an accredited NGO to work on the Platform issues that the ABA delegation had identified as its priority issues. In particular, the ABA delegates focused on provisions in the draft Platform that would, if adopted, have under-

8. PFA Ch. IV.I, ¶ 230(b), Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979).

9. PFA Ch. IV.I, ¶ 230(c&d).

10. PFA Ch. IV.I, ¶ 230(l).

11. In November 1994, the ABA adopted a resolution endorsing "international and domestic efforts to promote and protect women's human rights through the adoption and enforcement of legal provisions for equality and equal protection of the law," and recommending that the U.S. Government and NGOs participating in the Conference "actively support the inclusion in the Platform for Action of effective measures to accelerate the removal of the remaining obstacles to the realization of women's basic rights". American Bar Association Section of International Law and Practice Report to the Board of Governors, Recommendation, November, 1994, at 1. In addition to this resolution, numerous other ABA resolutions provide policy support for the ABA's activities at the Conference and NGO Forum and for the followup outlined here. These are set forth in Appendix C. The ABA has thus supported virtually all the human rights treaties including those which apply specifically to women and children, domestic legislation granting equal status under the law, equal protection of the law, and equality of opportunity and access to government benefits to women. It was one of the earliest groups to support effective measures to combat violence against women, including domestic violence, among other things.

12. Working Group on the Human Rights of Women (WGHRW), Human Rights Framework for the Platform of Action of the Fourth World Conference on Women: Action for Equality, Development and Peace [hereinafter "WGHRW Framework"]. The Working Group is a national network of approximately 35 international human rights organizations.

mined the universality of human rights. The extent to which traditional practices or cultural behavior could qualify human rights norms, was, as suggested earlier, a major issue in the Conference negotiations. The Platform, as finally agreed to, does not permit such qualification; following the conceptual approach suggested by the ABA, the Platform language makes clear that human rights norms are not to be so qualified, but without making culture or tradition completely irrelevant to how countries implement the Platform.¹³

ABA follow-up to the Conference, in addition to this series of reports and recommendations and actions taken to implement them, will include (1) study and development of model domestic violence legislation for use abroad; and (2) technical legal assistance to a domestic microenterprise initiative announced by the U.S. government at the Conference to promote self-sufficiency and combat poverty and welfare dependence.¹⁴ These projects require no special policy action by the ABA beyond what is set forth here. Other projects may be identified at a future date.

II. Analysis of Issues

A. THE WOMEN'S CONVENTION AND THE OPTIONAL PROTOCOL UNDER THE PLATFORM

1. The Platform for Action and the Women's Convention

The Platform for Action calls for the ratification and implementation of the Women's Convention so that universal ratification of the convention—now ratified by 139 countries—can be achieved by the year 2000.¹⁵

The Women's Convention was adopted and opened for ratification by the General Assembly of the United Nations in 1979. The United States signed the Women's Convention on July 17, 1980, and President Carter submitted it to the Senate for its advice and consent to ratification on November 12, 1980. While no language for reservations or implementing legislation was recommended at that time, the transmittal letter to the Senate indicated that a majority of the provisions of the Women's Convention were consistent with the existing laws of the United States. The Convention was favorably reported out of committee in 1994, but did not reach a floor vote. No action has been taken on the Convention by the Senate in 1995.

At a statement issued at the Fourth World Conference by the United States Delegation, the Clinton Administration stated that it had submitted its package for the ratification of the Women's Convention to the Senate and reaffirmed "its commitment to make every effort to obtain its ratification."¹⁶

13. See discussion in II.A.

14. See discussion in II.E.

15. Declaration, ¶ 22; PfA Ch. V, ¶¶ 286, 294, 305.

16. See U.S. Commitments, at 10.

2. Platform for Action and Optional Protocol

The Platform for Action also supports the adoption of an optional protocol to the Women's Convention that would grant women a right of petition to the international body that would monitor implementation of the Convention to enforce its substantive provisions.¹⁷

Such a petition procedure would facilitate and accelerate the full implementation of the Women's Convention. At the 1994 General Assembly, Finland introduced a resolution calling for a working group to draft such an optional protocol. The resolution was adopted by consensus (with the U.S. joining), but the working group has not been formed yet.

B. HISTORY OF ABA'S POSITION ON THE WOMEN'S CONVENTION AND THE OPTIONAL PROTOCOL

In 1984, the ABA's House of Delegates voted to endorse ratification of the Women's Convention subject to the Reservations, Understandings, and Declarations (RUDs) then put forward by the United States. In the fall of 1994, the ABA again spoke out in favor of ratification through the testimony of Robert Drinan before the Senate Committee on Foreign Relations. In his testimony, Father Drinan justified in great detail why the ABA supported ratification of the Women's Convention. He also explained that in general the ABA supported the RUDs set forth below. The testimony did not address the drafting of an optional protocol, which was not an issue before the Senate.

C. PURPOSES AND PROVISIONS OF THE WOMEN'S CONVENTION

The Women's Convention addresses the need to "ensure the universal recognition in law and in fact of the principle of equality of men and women."¹⁸ The General Assembly recognized that "discrimination against women is incompatible with human dignity and the welfare of society."¹⁹ Article 1 of the Women's Convention defines discrimination against women to 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 of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." The next fifteen articles of the Women's Convention obligate signatory nations to take appropriate measures to eliminate such discrimination in those fields.

17. See PfA Ch. IV.I., ¶ 230(l) (governments should support process initiated by the Commission on the Status of Women to draft optional protocol to the Women's Convention setting forth right of petition procedure).

18. See U.N. General Assembly Resolution adopting the Women's Convention.

19. *Id.*

Article 2 obligates nations to embody the principles of equality between men and women throughout their national legal framework and to ensure that no public authorities engage in discrimination.

Article 3 directs nations to take all appropriate measures, including legislation, to guarantee women their basic human rights.

Article 4 permits the signatory nations to take special temporary measures to accelerate the equality of men and women in particular areas with the understanding that such measures will be discontinued when the result is achieved.

Article 5 directs the nations to modify social and cultural patterns in order to eliminate gender-based prejudices. Article 5 mandates the provision of family education in recognition of both men's and women's roles in raising children.

Article 6 requires that nations adopt legislation to suppress all forms of traffic in women and exploitation of women through prostitution.

Article 7 requires nations to ensure equal rights of women in political and public life, including the right to vote, to hold office, to participate in the formulation of policy, and to participate in non-governmental political organizations.

Article 8 calls for equal opportunity for women to represent their governments at the international level.

Article 9 provides women the right to acquire, change, or retain a nationality for themselves and their children.

Article 10 sets out the requirements of equal rights in education and career guidance. This article also calls for the elimination of gender-based stereotypes in textbooks and school programs.

Article 11 provides for equal employment opportunities for women and prohibits job discrimination against women based upon marital or familial status.

Article 12 requires both (a) equal access to health care services and (b) appropriate services and nutrition during pregnancy, confinement and the post-natal period.

Article 13 provides for equal rights in obtaining financial credit as well as access to all aspects of cultural life.

Article 14 requires nations to ensure equality and participation in and benefit from rural development.

Article 15 requires nations to treat women equally under the law in the areas of contracts, the administration of property, and other business matters.

Article 16 requires the elimination of discrimination in domestic relations by permitting women to choose their spouses and to own property.

Articles 17-30 are administrative and enforcement provisions.

D. PROPOSED U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

The Administration has proposed a number of RUDs to the Women's Convention.

1. Reservations

a. *Private Conduct.* The Clinton Administration has proposed a reservation to Articles 3 and 5 of the Women's Convention lest the language therein be construed as imposing a requirement on the government to enact legislation or undertake other measures to prohibit and punish purely private conduct.

b. *Combat Assignments.* Administration is proposing a reservation to make it clear that the United States will not be obliged to assign women to military units and positions requiring direct combat.

c. *Comparable Worth.* The Administration has proposed a reservation concerning Article 11 so that the United States will not be obligated to enact legislation incorporating the doctrine of comparable worth. The United States attempts to address compensation inequities through such means as the Pay Equality Act.

d. *Paid Maternity Leave.* The Administration also includes a reservation concerning Article 11 which requires "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances." While the ABA has supported the enactment of legislation for reasonable, unpaid, job-protected family leave, the ABA has taken no specific position regarding the requirement that such leave be paid.

2. Understandings

a. *Federalism.* In our system, many issues discussed in the Women's Convention (e.g., prohibition of prostitution, rights to financial benefits, contract and property rights, and domestic relations) fall within the purview of state governments rather than the federal government.

b. *Freedom of Speech, Expression, and Association.* These First Amendment rights, which are probably stronger in the United States than anywhere else, may impede, at the margin, the ability of the United States to implement the Women's Convention fully.

c. *Free Health Care.* The Administration proposed an understanding that Article 12 does not mandate the provision of any particular health care services on a cost-free basis. The ABA has advocated the adoption and implementation of federal and/or state laws to provide every American with access to quality health care, including, on equal protection grounds, abortions. However, the drafting history of the Women's Convention demonstrates that neither the drafters nor its signatory nations are required to interpret "health care services" as including abortions.

3. Declarations

a. *Non Self-Executing.* The Administration does not want the Women's Convention to be self-executing (i.e., the Administration believes the Convention should not be directly enforceable in U.S. courts). The ABA agrees with the

Administration that the Women's Convention should not be self-executing under our constitutional structure of government. However, except in areas addressed in the RUDs, United States law already complies with the terms of the Women's Convention.

b. *Jurisdiction of the ICJ.* Article 29 grants jurisdiction to the International Court of Justice ("ICJ") for disputes under the Women's Convention. The Administration proposes a declaration leaving the issue of jurisdiction open for case-by-case determination by the United States and any other state that is involved. At the August 1994 Annual Meeting, the ABA house of delegates adopted a policy recommending that the United States accept the compulsory jurisdiction of the ICJ, which presumably would include disputes under the Convention; but the United States has not done so. This policy recommendation is, of course, contrary to the recent practice of the Senate Foreign Relations Committee to limit or eliminate altogether compromissory clauses agreeing to the jurisdiction of the ICJ.

E. THE WOMEN'S CONVENTION AND THE UNITED STATES

While the United States has made progress toward eliminating discrimination against women—e.g., the 19th Amendment and federal and state statutes ensuring equality of opportunity regardless of gender in the areas of employment, education, housing, and finance—gender-based discrimination persists. The United States still suffers from domestic violence against women, the existence of "glass ceiling" barriers in the work place, and persistent disparities in the amount of medical research done on women's health care issues.²⁰ In the aftermath of the 4WCW, the United States can make a significant and important contribution to the cause of gender equality by ratifying the Women's Convention.

F. BASIS FOR ABA SUPPORT OF THE WOMEN'S CONVENTION AND FOR DEVELOPMENT OF THE OPTIONAL PROTOCOL

Given the lapse of time since the ABA first adopted its policy in support of U.S. ratification, and given the importance the Platform ascribes to universal ratification of the Convention, reaffirmation by the ABA of its support for the Convention is appropriate and timely.²¹ While most if not all of the Convention's provisions may already be reflected in U.S. law, the Convention is an important symbol of U.S. support for equality of women. Ratification also commits the United States at the international level.

20. See U.S. Report to the UN on the Status of Women 1985-1994 (U.S. Dept. of State, 1994); see also Human Development 1995 (UNDP, Aug. 1995).

21. The RUDs proposed by the Administration and supported by the ABA are narrow, and derive in large part from the requirements of the U.S. Constitution and legal system. As such, we see no compelling reason to reexamine them in light of the Platform.