

Access to Justice – Concept Note for Half Day General Discussion

Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session

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I. Introduction

The Committee on the Elimination of Discrimination against Women (the Committee) decided at its forty-eighth session held in February 2011, pursuant to Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention), to start elaborating a general recommendation on access to justice. Since its fifth session in 1986, the Committee has, through the adoption of general recommendations, contributed to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women.

Respect and protection of human rights can only be guaranteed with the availability of domestic effective remedies. Indeed, legal rights are only meaningful if they can be asserted. Access to justice is therefore also an essential component of rule of law and a means for women to actively claim the entire range of rights provided for in the Convention. In practice, elements of discrimination and challenges remain in many instances when women seek justice, both within the laws and within justice systems.

The drafting of a General Recommendation on this topic by the Committee will contribute to enhance the visibility of the issue and to call States' attention to the measures required to overcome it. The purpose of this concept note is to initiate the discussion by providing preliminary information to interested parties in preparation of their written and oral submissions pursuant to the official notice issued by the Committee. The note starts with an overview of the CEDAW legal framework then proceeds to outline some of the challenges and barriers which women in accessing justice. Without intending to be exhaustive, conclusive or comprehensive at this stage, the note will rather serve as a basis for dialogue as the Committee embarks on its drafting process.

II. Envisaged Scope of the General Recommendation

Building on the principles articulated in the Convention, in the Committee's general recommendations, concluding observations, as well as decisions and views, the proposed general recommendation will serve to clarify the application of the Convention to address women's access to justice and its role in limiting the barriers to accessing justice.

In particular, it will elaborate on the nature of the right of access to justice in the context of CEDAW and will aim to set out a concrete framework within which states must exercise the obligation under the Convention to respect, protect, promote and fulfil access to justice for women as a human right. The proposed general recommendation therefore aims to provide interpretation of the normative content of the Convention and articulate recommendations regarding States party's obligations to address women's priority concerns in their access to justice. First and foremost, it will aim to be a practical and action-oriented tool issuing clear and precise guidelines for State parties. In so doing, it will touch upon the obstacles and barriers faced by women in accessing justice in the successive stages of the justice chain. The general recommendation will also identify and address the challenges for certain groups of disadvantaged women to access justice, as well as the particular obstacles for women in post-conflict contexts.

III. CEDAW legal framework

Access to justice has been an ongoing concern for the CEDAW Committee, which has continuously reminded State Parties of the need to take measures to ensure that women across the world have access to fair and effective remedies when their rights are affected. The Committee has addressed the issue of access to justice through its various general recommendations, concluding observations, as well as decisions on individual communications.

1. The Convention's legal basis for access to justice : art. 2 and 15¹

Article 2,² in particular article 2 (b) and (c), are the main source of the State parties' obligation to ensure the availability of remedies for women subject to discrimination. Laws prohibiting discrimination must embody some form of legal or other material consequence for those who violate them. This provision includes all types of remedies and all types of penalties, whether penal, civil or administrative depending on the forum that has jurisdiction over particular claims. The nature and extent of the sanctions will vary according to the particular subject and the nature of the infringement.

Article 2 (c) requires effective judicial protection of women's entitlement to enjoy rights on an equal basis with men. As such, it is a stringent obligation of result, meaning that the remedy be a practically available and accessible one as soon as women wish to assert their rights before the relevant courts, tribunals or other institutions. It should also be underlined that the national tribunals referred to in the provision comprise tribunals at all levels of the constitutional structure of the State parties. The application of article 2 (c) has led to include other institutions, such as administrative bodies or national human rights institutions.³ The interpretation of the obligations under this article is set out in General Recommendation 28. The structures and institutions comprising the justice system must ensure legal protection of the rights of women on an equal basis with men. Therefore, they should be impartial, efficient, adequately resourced and free from gender bias and negative stereotypes in the administration of justice.

Article 15⁴ is a response to the gender bias in legal systems. It embodies the principle of equality before the law, which is to be interpreted broadly, meaning equal access to courts

¹ Most of the information contained therein comes from the "The UN Convention on the Elimination of all Forms of Discrimination against Women, A Commentary", M. Freeman, C. Chinkin, B Rudolf, Oxford University Press, 2012.

² Article 2 reads: "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 realization 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, organization 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.

³ See section on Concluding Observations, p. 5.

⁴ Article 15 reads: "(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

and tribunal, non-discriminatory administration of justice, as well as equal protection of the law. It encompasses “all decision-making bodies, executive or judicial, including civil, criminal and administrative courts and tribunals”.⁵ Traditional legal systems are also bound by this provision. Under this article, the Convention seeks to protect women’s status before the law, be it as a claimant, a witness or a defendant. Further, State parties must ensure that a woman’s right to bring litigation is not limited by law or by policies or practices of the legal system. Within the structures of the domestic justice system, State parties must not only ensure equality of women’s legal capacity, but also not permit individuals or institutions to limit women’s legal capacity. Hence, legislative measures and legal reform are required to enshrine such capacity to women. Achieving substantive equality within the meaning of article 15 involves that legal literacy and legal aid must be accessible to women to claim their rights.

Article 15 bears fundamental importance to the realization of other social and economic rights under the Convention, such as employment (article 11) or health (article 12), as well as in the area of family relations (article 16).

2. An overview of the relevant General Recommendations

The Committee has been active in addressing the issue of access to justice in other specific areas of the Convention or related issues. This is reflected in previous general recommendations which provide substantial guidance on the obligations of State parties in this regard, such as:

- Ensuring that laws provide effective protection of the rights of women;
- Ensuring adequacy of structures and institutions to address violations and availability of effective, fair and protective mechanisms and complaints procedures;
- Ensuring effective, affordable, accessible and timely legal remedies and reparations, including compensation, penal sanctions, civil remedies;
- Developing preventive measures, including public awareness and education programme, as well as gender sensitive trainings of judicial and law enforcement officers.

Emphasis should be placed on General Recommendation 28, which clarifies the nature and scope of the core obligations of States Parties under Article 2 of the Convention.⁶ In relation to access to justice, the Committee stated that “States parties have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres. This protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies, where appropriate.”⁷ The Committee further made the following findings regarding the content of article 2(b) and (c):

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”.

⁵ “The UN Convention on the Elimination of all Forms of Discrimination against Women, A Commentary”, M. Freeman, C. Chinkin, B Rudolf, Oxford University Press, 2012, p. 392.

⁶ General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, 2010.

⁷ Ibid, para. 17.

“Paragraph 2 (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women”.⁸

“According to paragraph 2 (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention. However, where it is not possible to do so, courts should draw any inconsistency between national law, including national religious and customary laws, and the State party’s obligations under the Convention to the attention of the appropriate authorities since domestic laws may never be used as justifications for failures by States parties to carry out their international obligations.”⁹ “States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors. States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be determined in a fair hearing by a competent and independent court or tribunal where appropriate. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions. States parties should financially support independent women’s legal resource associations and centres in their work to educate women about their rights to equality and to assist them in pursuing remedies for discrimination.”¹⁰

In General Recommendation 19 on violence against women, the Committee endorsed the notion of due diligence as applicable under the Convention, when it stressed that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹¹ In the same Recommendation, it urged State parties to provide “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace.”¹²

In General Recommendation 21 on equality in marriage and family relations, the Committee held the following: “a woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.”¹³ It also found that “any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives”.¹⁴

⁸ Ibid, para 32.

⁹ Ibid, para 33.

¹⁰ Ibid, para 34.

¹¹ General Recommendation No. 19, eleventh session, 1992, Violence against women, para. 9.

¹² General Recommendation No. 19, eleventh session, 1992, Violence against women, para. 24 (i).

¹³ General recommendation No. 21, thirteenth session, 1994, Equality in marriage and family relations, para. 8.

¹⁴ General recommendation No. 21, thirteenth session, 1994, Equality in marriage and family relations, para. 9.

In General Recommendation 24 on women and health, the Committee called on States parties to “ensure fair and protective procedures for hearing complaints and imposing appropriate sanctions on health care professionals guilty of sexual abuse of women patients.”¹⁵

General Recommendations 26 and 27 address the particular needs of women migrant workers and older women respectively, who both experience additional difficulties in accessing to justice due to their vulnerable position.¹⁶

3. The Committee’s Concluding Observations

During the consideration of State party reports, the Committee has in many instances expressed its concern about the difficulties experienced by women in accessing justice.¹⁷ Essential guidance can therefore be found in concluding observations in this regard. A cursory analysis of the most recent recommendations reveals that the Committee has consistently referred to specific measures to be taken with a view to ensuring access to justice to women. These can be grouped in different thematic categories, some of which are non-exhaustively set out below.

The Committee has urged State parties to take steps to raise awareness of women’s rights among the general public, law enforcement agencies at all levels, and women in particular.¹⁸ Legal and institutional reform features prominently in the Committee’s recommendations, in order to make justiciable the rights enshrined in the Convention.¹⁹ The Committee has also relentlessly reminded State parties to conduct training of judicial officers, including judges, lawyers, prosecutors, lawyers and all relevant stakeholders on legislation prohibiting discrimination and on applying relevant laws in a gender-sensitive manner in conformity with the Convention.²⁰ A common recommendation of the Committee is the need to provide legal assistance to facilitate the submission of complaints by victims of discrimination.²¹ It has encouraged State parties to introduce or effectively implement legal aid in order to enable women to assert their rights in courts.

¹⁵ General recommendation No. 24, twentieth session, 1999, Article 12 : Women and health, para.15. The Committee considered that the obligation to protect rights relating to women’s health required States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations.

¹⁶ See General Recommendation No. 26, forty-second session, 2008, Women Migrant Workers, paras 21 and 24-27; General recommendation No. 27, forty-seventh session, 2010, Older women and protection of their human rights, paras 33-34.

¹⁷ For example, the Committee expressed its concerns about the barriers hindering women’s access to justice in Papua New Guinea, including in terms of geographical distance to and from courts, lack of legal aid, lack of information about their rights and lack of resources to access the services of lawyers (Concluding Observations, Papua New Guinea, CEDAW/C/PNG/Co/3 (2010), para. 17; the Committee stated that while women’s access to justice is provided for by legislation in Kenya, their ability to exercise that right and bring cases of discrimination before courts is limited by such factors as legal costs, the persistence of traditional justice systems, illiteracy, lack of information about their rights and other practical difficulties in accessing courts (COBs Kenya, CEDAW/C/KEN/CO/7 (2011), para. 13); the Committee expressed concern about certain provisions of the Traditional Courts Bill, under discussion in South Africa, which may jeopardize women’s access to justice and equality of treatment before the law, including by using a vague wording that enables the continuing representation of women by male family members (COBs South Africa, CEDAW/C/ZAF/CO/4 (2011) para. 16).

¹⁸ COBs Papua New Guinea, CEDAW/C/PNG/Co/3 (2010), para. 17; COBs Algeria, CEDAW/C/DZA/CO/3-4 (2012) para. 16;

¹⁹ COBs Malawi, CEDAW/C/MWI/CO/6 (2010), para. 11; COBs Brazil, CEDAW/C/BRA/CO/7 (2012), para. 19: The Committee recommended that Brazil increase the number of courts dealing with domestic and family violence cases.

²⁰ COBs Argentina, CEDAW/C/ARG/CO/6 (2010), para. 16; COBs Chad, CEDAW/C/TCD/CO/1-4 (2011), para. 15.

²¹ COBs Papua New Guinea, CEDAW/C/PNG/Co/3 (2010), para. 18; COBs Algeria, CEDAW/C/DZA/CO/3-4 (2012) para. 22; COBs Jordan, CEDAW/C/JOR/CO/5 (2012), para. 18; COBs Burkina Faso, CEDAW/C/BFA/CO/6 (2010), para. 16.

With regard to violence against women, the Committee has recommended to collect, analyse and use data, in particular in relation to the number of reported cases, prosecutions and convictions, as well as on the sentences imposed on perpetrators and the compensation, in order to determine the benefits of the law, and elaborate policies and programmes to promote women's access to justice.²² It has also systematically called upon State parties to act with due diligence to investigate all crimes perpetrated against women and girls and to ensure that perpetrators are prosecuted and punished.²³

The Committee has emphasized in many instances that access to effective remedies, adequate reparation and/or compensation be provided to women victims of discrimination in various areas of the Convention, notably in relation to violence against women, employment, health, as well as rights related to marriage and family.²⁴ The Committee stressed that remedies may also be available through legal complaints mechanisms such as administrative bodies, national human rights institutions, anti-discrimination agencies or ombudsman procedures.²⁵

4. Access to Justice in the Committee's Decisions under the Optional Protocol

Through its decisions on individual communications issued under the Optional Protocol, the Committee has produced noteworthy jurisprudence in relation to women's access to justice. As such, the Committee has strengthened the nature of States' obligations in this regard and further defined their content.

Violence against women

Due consideration was given to the issue of access to justice in a number of cases relating to violence against women, in particular domestic violence, in which the Committee has recalled core principles underlying access to justice.

In a very recent case against Canada, where an aboriginal woman suffered severe prejudice as a result of the action of the legal aid lawyers assigned to her case, the Committee stressed that more aboriginal women should be recruited and trained to provide legal aid to women from their communities. The Committee further requested Canada to "review its legal aid system to ensure that aboriginal women who are victims of domestic violence have effective access to justice".²⁶

In the case of V.K, a victim of domestic violence, against Bulgaria, the Committee concluded that the refusal of the courts to issue a permanent protection order against the author's husband "was based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence".²⁷ The Committee also recommended that the Law on

²² COBs Czech Republic, CEDAW/C/CZE/CO/5 (2010), para. 23.

²³ COBs Jordan, CEDAW/C/JOR/CO/5 (2012), para. 28; COBs India, CEDAW/C/IND/CO/SP.1 (2010) para. 19.

²⁴ COBs Chad, CEDAW/C/TCD/CO/1-4 (2011), paras 15 and 41; COBs Ivory Coast, CEDAW/C/CIV/CO/1-3 (2011), para. 29; COBs Djibouti CEDAW/C/DJI/CO/1-3 (2011), para. 13; COBs Israel CEDAW/C/ISR/CO/5 (2011), para. 21.

²⁵ COBs Papua New Guinea, CEDAW/C/PNG/Co/3, (2010), paras 19-20: The Committee urged Papua New Guinea to strengthen its legal complaints system, including through a national human rights institution, to ensure that all women have effective access to justice.

²⁶ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 19/2008 adopted on 28 February 2012, para. 9.16

²⁷ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 20/2008 adopted on 25 July 2011, para. 9.12

Protection against Domestic Violence be amended to ease the burden of proof in favour of the victim, and “to provide mandatory training for judges, lawyers and law enforcement personnel on the application of the Law on Protection against Domestic Violence, including on the definition of domestic violence and on gender stereotypes.”²⁸

In the case of Karen Vertido, a rape victim, against the Philippines, the Committee made the following landmark finding :“while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, the Committee considers that such a right is implied in the Convention, in particular in article 2 (c)”.²⁹ The Committee recommended a number of measures targeted at the legal system with a view to guarantee access to justice to victims of rape, namely “to ensure that legal procedures and court proceedings involving crimes of rape and other sexual offences are pursued in expeditious manner, are impartial and fair and not affected by prejudices or stereotypical gender notions”.³⁰ The Committee further recommended to provide appropriate training for judges, lawyers, law enforcement officers in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases.³¹

In the case of Fatma Yildirim, the Committee reminded Austria of its obligation to act with due diligence to prevent and respond to violence against women and adequately provide for sanctions for the failure to do so. The Committee recalled that prosecuting perpetrators of domestic violence and ensuring effective and timely criminal and civil remedies was part of Austria’s obligations. It also recommended that enhanced coordination of all relevant justice institutions and agencies be ensured and training programmes on domestic violence institutionalised.³² In an earlier case against Austria involving similar facts (Sahide Goekce), the Committee had developed an identical approach. It held that criminal and civil remedies were to be utilized in cases where the perpetrator in a domestic violence situation posed a dangerous threat to the victim and that due consideration was to be given to the safety of women.³³

In the case of Ms. A.T. against Hungary, the Committee underlined the need to investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence, to provide victims with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation.³⁴

²⁸ Ibid, para. 9.16.

²⁹ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 18/2008 adopted on 16 July 2010, para. 8.3. The Committee further stressed that “stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general”, para. 8.4.

³⁰ Ibid, para. 8.9. These measures included a review of the definition of rape and removing stringent evidentiary requirements.

³¹ Ibid.

³² Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 6/2005 adopted on 6 August 2007, para. 12.3.

³³ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 5/2005 adopted on 6 August 2007, paras 12.2, 12.3. In this respect, the Committee emphasized that the perpetrator’s rights could not supersede women’s human rights to life and to physical and mental integrity.

³⁴ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 2/2003 adopted on 26 January 2005, para. 9.6

Women in detention

In a very recent case involving a journalist and activist detained in Belarus who complained about the poor and degrading conditions of her detention, the Committee recalled the need for access to justice for women in detention. It requested Belarus to ensure that allegations by women detainees about discriminatory, cruel, inhuman or degrading treatment be effectively investigated and perpetrators prosecuted and adequately punished.³⁵

Health

The Committee has referred to the need for appropriate sanctions and compensation in cases of violations of reproductive rights. In the case of Alyne da Silva Pimentel, a Brazilian woman of African descent who died due to lack of timely obstetric care, the Committee notably found that “the State party violated its obligations under article 2 (c) (in relation to access to justice)”.³⁶ It recommended that Brazil should ensure “access to effective remedies where women’s reproductive health rights have been violated”, “provide training for the judiciary and the law enforcement personnel” and “ensure that adequate sanctions are imposed on health professionals who violate women’s reproductive health rights”.³⁷ The case of a Hungarian Roma woman subjected to coerced sterilization should also be noted, as the Committee recommended that Hungary monitor public and private health centres which perform sterilization in order to ensure that appropriate sanctions are in place, in the event that fully informed consent is not sought from the patient before any sterilization procedure is carried out.³⁸

Employment

In the case of R.K.B. against Turkey, the Committee was of the view that a Turkish Labour Court had allowed its reasoning based on law and facts to be influenced by stereotypes and that the Court of Cassation, by failing altogether to address the gender aspect, had perpetuated gender stereotypes about the role of women and men with it being accepted for the latter to have extramarital affairs.³⁹ It concluded that the State party had violated article 2 (c) in conjunction with article 5 (a) and 11, paragraphs 1 (a) and (d) of the Convention.

IV. Women’s challenges and barriers in Accessing Justice

State parties’ obligations have to be considered in relation to all factors which potentially have a bearing on effective access to justice. The justice chain consists of processes and institutions that women have to navigate in order to seek redress. The chain is complex and differs according to the case, the context and the type of legal systems in place. Fundamental to ensuring that the justice chain provides effective realisation of the right of access to justice is to understand the many obstacles faced by women when they pursue justice. This section endeavours to identify the challenges and/or barriers within justice systems, be it of a legal, social, institutional, procedural, or practical nature, which impact women’s capacity to access

³⁵ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 23/2009 adopted on 25 July 2011, para. 7.9.

³⁶ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 17/2008 adopted on 25 July 2011, para. 8.

³⁷ *Ibid.*, para. 8.2.

³⁸ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 4/2004 adopted on 14 August 2006, para. 11.5.

³⁹ Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 28 /2010 adopted on 24 February 2012, para. 8.8.

justice and limit the remedies available to them. It is paramount that such restrictions to women's access to justice be identified, recognized and addressed by State parties.

A. Legal, institutional and structural challenges

1. Discriminatory legal framework

National laws do not always embody the protection and recognise the rights to protect women from discrimination. In this regard, women's right to access justice is impaired firstly by constitutional, legislative and customary laws or jurisprudences which are not CEDAW compliant and contain explicit or implicit discriminatory norms or provisions.

2. Institutional and procedural obstacles

Access to justice also depends on the existence of adequate institutions and effective implementation of rules of procedure governing them. State parties must implement the laws through a functioning justice chain that is gender responsive. However, evidence shows that women face various institutional and procedural obstacles, some of which are described below.

- The plurality of legal mechanisms and systems for accessing justice in a given country poses challenges and obstacles for women to access justice. This plurality encompasses local and national civil and criminal court systems, other judicial and quasi-judicial systems as well as informal justice systems such as traditional, customary, tribal or religious systems and mechanisms, whether or not they are recognised by the State.
- Institutional weaknesses can be the result of lack of autonomy and independence of the judiciary, poor standards of education and training, lack of regulation of recruitment or appointment processes, poor accountability mechanisms, susceptibility to corruption or militarisation or privatisation of functions which are the responsibility of the State. Such problems extend throughout the justice chain. Further, officials involved in the administration of justice, namely prosecutors, police, lawyers and judges, may lack understanding on the sensitivities surrounding certain violations of women's rights or even of their justiciability. At the initial phase of the judicial chain, access to justice can be hindered by weaknesses in the operations of the police, prosecutors and entities first encountered by those seeking justice. These weaknesses can manifest themselves in poor investigation, evidence collection, forensic capacities. Other failures in effectiveness or inaction may result from mere lack of will of the State or a culture of impunity.
- Women seeking redress through alternative dispute mechanisms, such as mediation, are at enhanced risk of being discriminated against due to the imbalance of power and the absence of judicial safeguards, especially in domestic violence cases, where women often cannot obtain reparation when using mediation channels.
- Under-representation of women in the courts also needs to be addressed through institutional measures to increase participation and gender balance in the judiciary and other relevant structures.

- Women are also under-represented, and sometimes excluded, in informal justice systems, whether recognised or not by the State, which may cause additional impediments for women using these means to access justice.
- The justice process can only be initiated if acts of discrimination and violence against women are duly and systematically reported to the relevant authorities. Lack of reporting and procedures to identify victims prevent prosecution and judicial action to take place. Even when women do wish to pursue their complaints, they are often encouraged or even coerced by prosecutors, police, family or the community to reconciling and compromising on their demands.
- The inefficiency and/or lack of protection and legal support structures can hamper women`s access to justice. The provision of legal aid services and the stage at which it is made available, notably in criminal procedures, is an important safeguard contributing significantly to ensuring access to justice.⁴⁰
- The failure of the State to provide translators during proceedings is another serious impediment as women are not necessarily familiar with the languages in which the justice system operates. This procedural requirement is often overlooked and may frustrate their access to justice.
- Certain evidentiary standards, such as corroboration requirements related to the testimony of a woman or where evidence is analysed in a gender biased manner, have detrimental impact on women`s access to justice. So do gender-insensitive court procedure, long delays, inefficient or arduous administrative procedures.
- Securing the safety of those accessing justice and providing witness and victim protection through protection orders, injunctions or interim measures, are necessary components to allow women to effectively claim their rights, for instance in domestic violence cases. Safeguards such as rules and procedures that ensure confidentiality and other measures to protect rights-holders are paramount in circumstances where they are at risk of further violations, violence or other adverse consequences.
- Finally, another major barrier for women in accessing justice occurs when appropriate remedies for violations are not provided for by the laws which recognise the rights or when the remedies awarded are inappropriate and ineffective and actually pose further challenges for women. Many justice systems fail to provide access to preventive, timely, non-discriminatory, adequate, proportionate and/or transformative remedies. In addition, lawyers may argue cases on grounds that do not lend themselves naturally to remedies which address the root causes of the violations and provide adequate redress. Judges may also lack a substantive equality perspective in conducting cases and prescribing remedies leading to discriminatory judgments and further violations of women`s human rights in the course of seeking justice. The implementation of decisions on violations of rights often presents significant difficulties, for instance due to lack of enforcement mechanism or complex and lengthy procedures for enforcement.

⁴⁰ See the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted in April 2012, E7CN.15/2012/24, in particular guideline no 9.

3. Social barriers

Justice systems are designed to uphold the values and customs of a given society. Therefore, discriminatory social norms and constructions of gender naturally influence the development of justice systems, which, in turn, may perpetuate such norms and constructions. For example, justice systems of a patriarchal nature may lead to negative gender stereotypes and discriminatory attitudes of service providers, including the police and judiciary. Women are also discriminated in the administration of justice and application of the law as a result of lack of understanding on the part of the police, prosecutors, lawyers and judges of the sensitivities surrounding certain violations of women's rights or even of their justiciability. Other manifestations of gender bias in the court system include negative attitudes toward female victims and offenders, trivialization of sexual and domestic violence or re-victimization of women.

It is apparent that consistent and pervasive discrimination can constitute a barrier to accessing justice. In certain societies, seeking justice may result in challenging prevailing social, cultural, traditional, religious or community-based norms. Further, given that gender-based violence is often viewed as a private matter to be dealt with within the family or the community, women tend to be influenced by social perceptions and thus withdraw their complaints, particularly in cases of domestic violence. Women may also have an internalized sense of deep inferiority and lack the confidence or self-esteem needed to even begin claiming their rights or initiate proceedings. Furthermore, while formal justice systems often appear impersonal, distant, unfamiliar or threatening, women may not have confidence in the relevance or independence of the formal justice system and may feel reluctant to go through the intimidating process of court trial, thereby maintaining a culture of impunity.

4. Practical and economic challenges

Poverty and lack of financial resources often prevents women from engaging in a claim. Women may be dependent on others for transport, finances and childcare in order to be able to access justice. For example, in cases of domestic violence, women often do not pursue remedies for protection from violations because they are entirely dependent on the perpetrators for financial security, food, shelter, even social status and community membership.

High rates of women's illiteracy, especially in rural areas, are another major hurdle. Women may simply not be aware of their rights, of the remedies available, of which justice mechanisms exist and how to access them.

Access to affordable legal representation, such as legal aid, as well as family, community and other support services – crisis centres, shelters, hotlines, counselling, medical or psychological support - have proven crucial to overcome the numerous practical and economic obstacles preventing women to seek redress

B. Additional challenges faced by specific groups of women

1. Disadvantaged groups of women

Gender-based discrimination can furthermore be compounded by other biases within the justice system, as indicated by the Committee in its General Recommendation No. 28.⁴¹ Certain groups of women face additional difficulties in accessing justice because of intrinsic characteristics or particular circumstances which place them in an especially vulnerable position. This is the case in particular for rural women, indigenous women, migrant women, displaced or refugee women, elderly women, women with HIV/AIDS, women with disabilities and women belonging to ethnic or religious minorities.

Some groups of women are particularly disadvantaged because of their complicated legal status which restricts their access to certain rights. For instance, unregistered and irregular migrants, stateless women, refugees, and trafficked women may lack identity cards or may be excluded from legislative or constitutional rights guarantees.

Moreover, informal or customary systems may be easier to access for certain groups of women or certain communities, notably in rural areas, which in turn may not be CEDAW compliant or may result in a discriminatory remedies, unfair sanctions or absence of compensation or reparation. Reluctance to engage with formal systems of justice can extend to reluctance on the part of the community at large to respect and implement decisions or judgments given by such systems.

2. Women in conflict and post-conflict situations

Challenges related to access to justice are especially aggravated and acute in conflict and post-conflict situations, transition, and failed states. Formal systems may not exist or function with any level of efficiency or effectiveness. Existing public institutions may be more likely to violate rights than to protect or realize them and this in turn can deter the majority of victims from seeking justice. Large-scale rebuilding of structures, mechanisms and procedures may be required and their legitimacy may need to be re-established. Such processes may be challenged by a lack of infrastructure, incapacity and incompetence, a lack of leadership and continued violence. As a result, the obstacles faced by women in conflict and post-conflict situations in accessing justice may be even more testing.⁴² Further, sexual violence, displacement, the feminisation of poverty and the family responsibilities inherent in stereotypical gender roles can place women in an additionally vulnerable position in these contexts. Typically, in many instances, cases of domestic and sexual violence remain

⁴¹ The Committee has defined such intersectional discrimination in General Recommendation 28, para. 18: “Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”

⁴² For example, COBs Ivory Coast, CEDAW/C/CIV/CO/1-3 (2011), para. 20 : “The Committee remains concerned about the lack of effective access to justice for women and the serious logistical and human resource challenges experienced by the criminal justice system as a result of the conflict”; *idid*, para. 28: “The Committee is further deeply concerned that victims of human rights violations, including sexual violence, continue to face difficulties in accessing the criminal justice system, which is experiencing serious logistical and human resource challenges as a result of the conflict.”

underreported due to cultural taboos and victims' fear of being stigmatized by their communities. It is paramount to incorporate the particular needs of women and girls during the post-conflict reconstruction process, including in relation to reparation and reconciliation, in order to ensure that women affected by the conflict have access to justice.

Given the increased gender dimension of conflicts⁴³ and the limited success in prosecuting crimes of gender-based violence both at the domestic and international level,⁴⁴ international justice mechanisms and transitional justice initiatives, such as truth and reconciliation commissions, should also be addressed in the proposed General Recommendation. In this respect, particular concern should be placed on the imbalance between the important resources allocated to prosecution efforts and the lack of funding allotted to reparation for victims, especially women victims.

V. Expected outcomes of the General Discussion

The Convention requires that national justice systems effectively respond to women's difficulties in accessing to justice. The proposed General Recommendation will aim to provide guidance and issue specific recommendations to adequately address the obstacles and barriers encountered by women at all stages of the justice chain.

As emphasised, the domestic justice apparatus can encompass plural legal systems, as well as informal or customary systems (traditional, community-based, tribal or religious) which may or may not be recognised by the State.⁴⁵ As such, it may include local and national civil and criminal courts, administrative bodies, military courts, labour and land tribunals, as well as quasi-judicial systems, such as ad hoc entities on specific thematic issues, human rights commissions, ombudspersons, equality authorities and systems of mediation, arbitration and negotiation. In certain states, there may be two or more parallel structures of justice e.g. a civil justice system and a religious system. In this context, the proposed general recommendation will seek to address women's access to judicial and administrative justice, as well as quasi-judicial justice, whilst taking into account the impact and the role of informal mechanisms of justice and women's access to them. Discussions with the civil society and regional consultations on the latter issues will be of particular relevance.

Expected outcomes from the proposed general discussion with the United Nations entities, non-governmental organizations and gender experts include:

- a) Delineate the scope of the notion of 'justice' and 'justice systems' covered by the proposed General Recommendation;
- b) Understand the impact of customary and informal justice systems on the formal justice system and its consequences on women's access to justice;

⁴³ Security Council Resolutions 1325, 1820 and 1388.

⁴⁴ A ground-breaking success was the Akayesu Appeals Judgement, ICTR, 1 June 2001 which articulated a conceptual definition of rape under international law.

⁴⁵ See Report of the Special Rapporteur on the independence of judges and lawyers, 13 May 2008, A/HRC/8/4, para. 38: The Human Rights Committee held that informal justice systems "cannot hand down binding judgements recognized by the State unless the proceedings are limited to minor matters, they meet the basic requirements of fair trial and other procedural guarantees, and their judgements are validated by State courts and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant; judgements that do not conform to international human rights standards are not acceptable".

- c) Assess the need for customary systems which are recognised by the State to be harmonised with the formal justice system ;
- d) Further understand and identify the specific challenges that impact women's access to justice, as well as understand how they are interconnected;
- e) Make recommendations to ensure the gender-sensitive implementation of existing legal frameworks regarding access to justice, including provisions on legal aid;
- f) Make recommendations regarding legal and institutional reform necessary to guarantee women's access to justice at domestic level in all areas covered by the Convention;
- g) Make recommendations to enable women victims to seek and obtain redress through litigation, prosecution, punishment and/or a form of reparation, including compensation, in all types of justice systems;
- h) Identify good national, regional and global practices to ensure and facilitate women's access to justice, including measures to enhance awareness of their legal rights as well as legal education and training of all public officials involved in the administration of justice ;
- i) Identify the different stakeholders, including women's organisations, human rights non-governmental organisations, national human rights institutions, ombudspersons and human rights defenders, and their roles in supporting access to justice.

The Committee would also like to acknowledge and thank the Joint Programme on Access to Justice (OHCHR, UN Women and UNDP) for its support to the elaboration of the General Recommendation, as well as CLADEM and IWRAW Asia Pacific for their contributions to this concept note.