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# Written Submission on the General Recommendation on Women's Access to Justice<sup>1</sup>

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<sup>1</sup> This written submission builds on the initial submission of a *Briefing Note on the General Recommendation on Women's Access to Justice*, prepared by IWRAP Asia Pacific, 30 September 2011

# Written Submission on Women's Access to Justice<sup>2</sup>

## 1. Introduction

The CEDAW Committee has repeatedly made the case that both de jure and de facto access to adequate and effective judicial remedies are essential for advancing the rights of women in all spheres, including civil, political, economic, social and cultural. In addition, the Optional Protocol to CEDAW guarantees women's right to access international human rights mechanisms in the absence of or for failure of existing national institutions and mechanisms to ensure effective and efficient redress to eliminate discrimination experienced by women by challenging actions or omissions by the State to respect, protect and fulfill its obligations under the CEDAW Convention.

Nonetheless, restrictions and barriers to women's access to justice at the national level limit remedies available to address discrimination against women. They further impact women's capacity to access international mechanisms, such as CEDAW and its Optional Protocol, which could contribute to the protection and promotion of human rights of women at the national level. Evidence will point to the fact that social and institutional barriers as well as discriminatory attitudes among service providers continue to deny women access to justice through legal redress. High cost of litigation, language barriers, illiteracy and the geographical distance of justice mechanisms are just a few examples of the capacity deficits that prevent women from coming forward and pursuing claims through formal legal channels. The State's responsibility for ensuring compliance with human rights standards extends to all justice practices, including non-state legal systems that exist without formal state sanction, customary and religious systems that are incorporated into the state system, as well as quasi-state mechanisms such as alternative dispute resolution. But in practice, as with all justice systems, elements of discrimination and barriers to women's access to justice remain in many instances.

Women's right to access justice is often exacerbated by the substance and the implementation structures of the legal framework which do not ensure that the constitutional, legislative, customary law and jurisprudence are CEDAW compliant. Often the culture which underpins laws and justice systems is patriarchal in nature and often rooted in discriminatory constructions of gender leading to negative gender stereotypes, hetero-normative bias, and restrictive constructions of sexuality prohibiting transgressions and thus leading to discriminatory treatment of women in the administration of justice by law enforcement and courts as well as the discriminatory application of the law. Gender bias can be compounded by other biases within the justice system and most approaches also fail to consider the heterogeneity among women and provide for the multiple and intersectional identities of women. Certain groups face additional difficulties accessing justice because of intrinsic characteristics or particular circumstances which place them in an especially vulnerable position. This includes women vulnerable to multiple discriminations because of their identity as poor women, girls, elderly women, women living with HIV/AIDS, women from ethnic and religious minorities, lesbian, bisexual, transgendered, intersex and queer (LBTIQ) women, women with disabilities, rural women, indigenous women, migrant women, displaced women and refugees, dalit women, and widows, including war widows, amongst others.

A gender-responsive justice framework needs to take on comprehensive reform which aims at establishing a fair, accessible, trusted and accountable justice sector for all groups within society; place the promotion of gender equality as a central principle of the system; ensure equal access to judicial and other processes for women claiming rights; and to support capacity of the state to identify and address problems and gaps within existing laws, mechanisms and processes and to which impede justice for women.

The scope of the proposed general recommendation should address very specifically **access to judicial justice<sup>3</sup>, administrative and quasi-judicial justice, as well as informal mechanisms of justice<sup>4</sup>**, which interpret and create jurisprudence/precedents and provide the required redress and

<sup>2</sup> To support the Committee on the Elimination of Discrimination against Women's (the CEDAW Committee) decision at its forty-eight session held in February 2011 to adopt a general recommendation on access to justice, pursuant to Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention).

<sup>3</sup> Including state sanctioned plural legal systems.

<sup>4</sup> Including traditional, customary, tribal or religious systems and other forms of conflict resolution mechanisms.

remedies. Access to this type of justice should take into consideration the substantive, structural, economic, cultural, social or political obstacles to this access, and include in the **interpretation and remedies, the access to economic, cultural, political, social, civil rights** that have been denied on grounds of multiple and intersectional discrimination against women.

Thus, building on the **principles** articulated in CEDAW and other international human rights instruments, it is proposed that the General Recommendation on Women's Access to Justice serve to **address the gap in understanding of the nature of women's human rights to access justice as well as** clarify the definition and application of the CEDAW Convention to address women's access to justice within the normative framework of non-discrimination and substantive equality that clearly address. **It should explicitly reinforce the normative framework and set out concretely the elements within which states must exercise their Convention obligations to respect, protect, promote and fulfill women's human right to access to justice.**

## 2. Challenges and Barriers to Accessing Justice

### A) Approaches to Equality

a. Even where justice systems seek to realise equality between the sexes, they may apply **approaches to equality** which are not CEDAW's substantive equality approach. This could contribute to reinforcing discrimination which will be insufficient to fully realise women's human rights especially when using a protectionist or a formal approach.

b. Systems using an approach other than the CEDAW's substantive equality approach will not contain holistic measures to ensure equality of access, opportunity and results for women in accessing justice. Rather they tend towards ad hoc, inadequate and inappropriate remedies for violations, lack of recognition of rights and denial of the basic principles of state obligation and non-discrimination. They often fail to recognise the indivisibility and inter-relatedness of rights and therefore lead to uncoordinated efforts to achieve access to justice.

c. Such systems will also not address the historical and systemic discrimination which acts as a formidable barrier to women seeking to access justice. They do not integrate special and temporary special measures to create enabling conditions for women's access to justice and fully equality and to overcome women's chronic lack of power.

### B) Substantive recognition of rights

a. There is often a gender neutral approach or rather a formal approach to recognition of the right to access to justice that creates barriers for women and continues to deeply impact the interpretation and implementation of the substance of human rights using the gendered lens.

b. Substance of the legal framework that does not ensure that the constitution, legislation, and customary law and jurisprudence are CEDAW compliant and does not promote the principles of non-discrimination and substantive equality;

c. Issue of reservations and interpretative declarations upon ratification of CEDAW and its impact on holding states accountable, particularly on core principles and elements of the Convention;

d. The hierarchy and applicability of the different laws at the national level which impede application, including lack of enforceability and enabling legislation to implement CEDAW and other international human rights obligations;

e. There is also tension between "formal law" and "customary practices" in guaranteeing legal protection of women's human rights. The challenges arise due to the lack of clarity and actual hierarchy of the laws. In situations related to women's access to justice, particularly in matters related to personal status laws and in instances of domestic violence or rape, customary practices tend to come in conflict with formal law and impact the women adversely.

f. There is also a lack of recognition and understanding of the **justiciability<sup>5</sup> of rights**, by prosecutors, police, lawyers and judges that creates substantive barriers to equal access to justice for women. Often denial and violations of economic and social rights are not seen as justiciable or treated in a gender neutral manner by the different justice sectors. Non-recognition that these rights are claimable and have specific ramifications on women would lead to denial of legal aid, effective legal proceedings and remedies. Justice systems continue to question the value of a complaint and adjudication procedure for many aspects of social and economic rights on the basis of the alleged “vagueness” of those rights and the inappropriateness of interference with governments’ decisions about socio-economic policies.

Concerns about the justiciability of social and economic rights have been based on three general assumptions or propositions<sup>6</sup>: i) that social and economic rights are inherently different from civil and political rights; ii) that it is not legitimate or appropriate for courts to intrude into the sphere of social and economic policy of the government, particularly on where to allocate its resources; and iii) that courts or other decision-making bodies lack the capacity to properly adjudicate and enforce social and economic rights.

Yet when women and marginalized communities are denied the basic requirements of security and dignity by poverty, homelessness or other violations of social and economic rights, the decision of the judiciary to not interfere with the governments’ choices of socio-economic policy and resource allocation is likely to mean that there will be nowhere for them to go for a hearing in relation to violations of these rights and that no institution will hold governments accountable for violating them. In many countries for example, buildings and workplaces are not regulated to be designed to cater to the needs of persons with disabilities and paid maternity/parental leave have not been legally enforced to ensure that women have sufficient recovery and nursing period without affecting their economic status. If claims to positive measures or claims affecting resource allocation such as these are not heard by courts, or if courts excessively defer to legislatures in these areas, they exacerbate existing patterns of social exclusion and effectively deny remedies to women and disadvantaged groups in society.

### **C) Culture of the law**

a. Often the culture which underpins laws and justice systems is patriarchal and rooted in discriminatory constructions of gender leading to negative gender stereotypes, hetero-normative bias, and restrictive constructions of sexuality prohibiting any transgressions of prevailing norms. This can lead to discriminatory treatment of women in the administration of justice by law enforcement agencies and courts as well as discriminatory application of the law.

b. The main manifestations of gender bias in the court system are:

- i. negative attitudes toward women and girl victims, especially in cases of rape and sexual violence;
- ii. apathy towards women who commit crimes, including higher penalties and harsher treatment during the legal process;
- iii. trivialization of sexual and domestic violence, where women are often judged as having provoked violence ;
- iv. high percentage of impunity when men commit crimes against women, especially when it is considered as preserving the honour of the man, family and community;
- v. gender-insensitive court procedures;
- vi. gender stereotypes affecting court action, including the types of remedies and reparations given by the court to women;
- vii. lack of gender awareness by court officials including the prosecution which present weak cases; and

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<sup>5</sup> The U.N. Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No.9 on the Domestic Application of the Covenant, has made it clear that, regardless of whether or not domestic courts in a particular legal system are able to enforce all, or only some aspects of social and economic rights, these rights must still be subject to effective remedies. There must be somewhere to go to be heard and there must be an effective remedy provided if a right has been violated. As emphasised by the Committee, this is fundamental to the relationship between human rights and the rule of law.

<sup>6</sup> Aoife Nolan, Bruce Porter & Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, August 2007, Electronic copy available at: <http://ssrn.com/abstract=1434944>

viii. under-representation of women in the courts<sup>7</sup>

As a result, cases are dismissed or women feel reluctant to go through the intimidating process of court trial, and thus impunity persists.

c. The culture of the law is also influenced by the exigencies of the political economy, globalisation, militarization and fundamentalisms which can distort the purpose and content of laws at the drafting stage as well as in their interpretation, application and implementation. The law and justice system then become an instrument for maintaining power imbalances and entrenching social hierarchies and discrimination rather than creating a culture of human rights compliance.

**D) Structural, procedural and other barriers**

**a. Plural legal systems**

Formal (including parallel system recognised by the state); informal and quasi-judicial systems contribute to the discrimination and non recognition of women's rights to access to justice. This plurality encompasses local and national civil and criminal court systems as well as other judicial and quasi-judicial systems, such as military courts, labour and land tribunals, ad hoc tribunals e.g. on specific thematic issues or truth and reconciliation commissions, administrative methods of redress, human rights commissions, ombudspersons, equality authorities and systems of mediation, arbitration and negotiation and often relate to the question of the hierarchy of the systems and the conflicts of the laws.

Informal justice systems such as traditional, customary, tribal/indigenous or religious systems and mechanisms are further compounded in situations where there are two or more parallel, formal structures of justice e.g. a civil justice system and a religious system such as Syariah/Shari'a which is formally recognized by the state. Increasingly, there are also international or regional justice systems such as under human rights treaties, including regional judicial and quasi-judicial mechanisms and international criminal tribunals.

While informal justice systems have certain unique advantages for women's access to justice, they can also cause and permit serious violations of human rights as they are often insufficiently understood or regulated by states, leaving those who depend on them as redress mechanisms unable to fully exercise their right of access to justice. Barriers experienced by women are superimposed in the context of plural state and non-state legal systems, through implementation in the context of family laws based on religion, customary justice practices and alternative dispute resolution (ADR) mechanisms.

This creates instances where:

- i) A specific dispute or violation is governed by multiple norms, laws or forums that co-exist within a particular jurisdiction or country. This can lead to confusions over jurisdiction and the application of laws; lead to abuses of jurisdiction and power; leading to uncertainties of the competency and impartiality of the courts; and undermining of rights often resulting in lower due process and procedural standards and limits access to justice. For example the plural legal systems in Malaysia allows for the different states to apply different sets of Syariah laws in context of marriage and family matters for all Muslims in their respective states. This allows for continued discrimination against Muslim women in the context of marriage, divorce, custody, maintenance, inheritance, etc as the decisions are often based on negative stereotypical interpretation of the rights of women in the family by the courts and the implementing officers. For example, a violation of a maintenance order<sup>8</sup> in one state cannot be enforced if the man moves to another state. In addition, the issue of jurisdiction also applies when there are disputes and contravention of orders issued by the various mechanisms allowing for misuse of the systems. Again in Malaysia<sup>9</sup>, there are cases of non- Muslim married men converting to Islam and accessing the

<sup>7</sup> However, while increased participation by women in the administration of the justice system and on the bench can mitigate these biases, it does not necessarily follow that more women automatically translates into less patriarchy.

<sup>8</sup> NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Prepared by the Malaysian NGO Shadow Report Group, 2005

<sup>9</sup> In the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416, a Hindu mother filed for custody of her two children. Her former husband had converted to Islam and converted their minor children without her knowledge or consent. The High

Syariah legal systems, which are denied to their non-Muslim wives, to obtain custody of their children and dissolve their marriage.

- ii) While preserving or creating 'local', 'traditional' or 'customary' laws and legal systems, states failed to ensure compliance with international human rights principles and standards. Whenever there are competing rights, the decisions have been to favour the cultural claims or religious freedoms over women's human rights<sup>10</sup>.

State obligation thus requires states to resolve the question of how to harmonise and domesticate CEDAW within plural legal systems.

#### **b. Weakness in the implementing structures of the justice system**

At the initial phase of the judicial process, access can be hindered by **weaknesses in the operation of the police, prosecutors** and entities first encountered by those seeking justice. These weaknesses can manifest in poor investigation, evidence collection, forensic capacities, and many other failures in effectiveness. They can be the result of poor standards of education and training, lack of regulation of recruitment or appointment processes, poor accountability mechanisms, susceptibility to corruption or committing acts of violence, or militarisation or privatisation of functions which are the responsibility of the state. Such problems can extend throughout the justice system, encompassing the **judiciary, legal profession, civil servants, structures responsible for implementation of decisions such as local government bodies, prisons etc. as well as those responsible for the operation of quasi-judicial mechanisms**. The lack of coordination between these mechanisms and the implementing agencies too continue to impact the implementation of the laws and legal remedies effectively.

There is also lack of autonomy and independence of the various mechanisms often exacerbated by the political environment. This sometimes includes legal professional's lack of independent thinking vis a vis gender roles and stereotypes which influences how they interpret the issues at hand and the laws promulgated to deal with those issues. Further, insufficient regulation of the structures of the justice system through standards of conduct, ethics and requirements regarding appropriate qualifications and time allocation will result in additional barriers for rights-holders seeking justice. Without regulation and transparency in recruitment and appointment processes, nepotism, patronage, discrimination and bribery, it can lead to the appointment of unqualified and/or incompetent persons.

#### **c. Procedural barriers within the justice system**

Inadequate procedures contribute to long delays, inefficient or arduous administrative procedures etc. One such procedural issue which often creates barriers to access to justice relates to rules of locus standi. In some jurisdictions strict requirements in this regard may be used to prevent CSOs from litigating on behalf of or in support of victims of human rights violations or submitting amicus curiae briefs. They may also prevent individuals from submitting cases regarding public interest claims or certain other types of violations. For example, indigenous women may have difficulty proving locus standi for a claim relating to communal land to which they do not have personal title.

In most circumstances too there are often no or delays in drafting procedural laws and policies to support implementation of specific substantive laws. For example, in some countries the laws on domestic violence will require additional procedures and policies to support its implementation. This would require amendments to the penal codes and criminal procedural codes but in most instances there is delays and lack of such procedural processes to enable the police, prosecutors and judges to deal with cases of domestic violence effectively.

Implementation of decisions on violations of rights may also be caused by long and complex administrative procedures for enforcement or lack of will to change administrative arrangements in line with prescribed remedies. For example, despite the 1999 amendment to the *Guardianship of Infants Act* and the subsequent administrative directive providing equal guardianship rights to all Malaysian women irrespective of religion, bureaucratic red tape still prevented mothers from exercising this right. The

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Court decided in April 2004 that the civil court had no jurisdiction to hear a case involved the issue of conversion to Islam. The decision meant that the Hindu mother who has no legal standing in the Syariah Court is left with no remedy at law.

<sup>10</sup> International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, 2009  
International Women's Rights Action Watch (IRAW) Asia Pacific, Ver.\_8Febrary2013

application forms for a passport or travel document were not changed and continued to read “father/legal guardian”. It was only after complaints made through the press that the Ministry of Home Affairs followed up with making sure that the Immigration Department adopted this new policy<sup>11</sup>.

Limitation periods can also present insurmountable barriers to justice when they stipulate unreasonable periods e.g. only days or weeks within which to file a charge of rape.

Failures in the conduct of justice proceedings as well as in the implementation of remedies can in turn be exacerbated by the **lack of adequate judicial review procedures and effective appeals**, not only against judgments but also against the decisions or actions of those officials charged with implementing a given remedy.

Unfair and lengthy procedures, including length of proceedings, statutes of limitation; evidentiary standards and requirements can also exacerbate women's access to justice. Procedural issues such as application of the ‘cautionary rule’ requiring corroboration in rape cases; two finger test<sup>12</sup> and use of the term “habituated to sexual intercourse”, rules which require character evidence<sup>13</sup> and proof of force<sup>14</sup> continues to hamper timely and effective access to justice. They continue to perpetuate stereotypes of rape survivors as “loose” women and used by defence attorneys to challenge the credibility, character, and lack of consent of the survivors.

Lack of fiscal and human resources too continue to impact the institutional arrangements required for the effective implementation of justice.

#### **E) Inefficient and lack of protection and support structures and insufficient regulation of such structures**

- a. Lack of legal support structures and measures – such as information provision, free or affordable legal aid services;
- b. Lack of information and awareness amongst women, including women from marginalised and vulnerable groups, about available remedies, or relevant justice mechanisms;
- c. **lack of necessary safeguards** such as rules and procedures to ensure **confidentiality** and other measures to protect rights-holders who seek to use the justice system in circumstances where to do so places them at risk of further violations, violence or other adverse consequences;
- d. Ineffective protection for and safety of those accessing justice, such as lack of witness and victim protection, protection orders, injunctions, interim measures, etc;
- e. Inadequate family, community and other support structures such as crisis centres, shelters, hotlines, counselling, financial support, medical, psychological support, etc.

#### **F) Ineffective legal remedies and sanctions**

- a. Often unfair and which is not equal, impartial, timely and expeditious manner, proportionate, gender sensitive and transformative<sup>15</sup>.

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<sup>11</sup> NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Prepared by the Malaysian NGO Shadow Report Group, 2005

<sup>12</sup> Human Rights Watch, World Report: India (2012) - The Maharashtra and Delhi governments continue to recommend the finger test in their forensic examination templates. For example, as recently as June 2010, the Maharashtra state government introduced a standard forensic examination template that includes a series of questions about the hymen, including the number of fingers that can be admitted into the hymenal orifice. <http://www.hrw.org/news/2010/09/06/india-prohibit-degrading-test-rape>

<sup>13</sup> M.C. v Bulgaria, (39272/98) [2003] ECHR 646 (4 December 2003). **Facts:** the applicant was victim of a rape and brought criminal proceedings. The applicant's criminal proceedings regarding allegations of rape were terminated by Bulgarian state authorities because there was insufficient evidence, including proof of force and character evidence.

<sup>14</sup> Ibid

<sup>15</sup> Inter-American Court of Human Rights, Case of Gonzalez et al. (“Cotton Field”) vs. Mexico. Judgement of November 16, 2009 (Preliminary Objection, Merits, Reparations and Costs). *Court reasoned that one or more measures could repair a specific damage without it being considered double reparation. It also emphasized the integral character of the concept of reparation and that it involves three essential aspects: 1) the reestablishment of the former situation, 2) the elimination of the effects produced by the violation, and 3) an indemnity as compensation for the damages caused. However, in the first aspect, in a case such as this where the crimes are framed by a situation of structural discrimination, it indicated that the reparations must have a transformative effect on the situation. It stressed that the reparations must have a corrective effect and not only a restitutive effect, as a restitution of the same structural situation of violence and discrimination would not be admissible.*

**G) Intersectionality and multiple discrimination**

- a. Gender bias can be compounded by other biases within the justice system, such as those related to class, race, religion, caste, disability, marital status, age, sexual orientation etc. which also contribute to subverting the role of the law in furthering equality, by instead perpetuating power inequalities.
- b. This is further compounded by the feminisation of poverty and illiteracy amongst women that creates barriers to women recognising and claiming their rights to access to justice.
- c. Certain groups face additional difficulties accessing justice because of intrinsic characteristics or particular circumstances which place them in an especially vulnerable position. This includes women vulnerable to multiple discriminations because of their identity as poor women, girls, elderly women, women with HIV/AIDS, women from ethnic and religious minorities, lesbian, bisexual, transgender, intersex and queer women, women with disabilities, women in prisons and correctional institutions, rural women, indigenous women, migrant women, displaced women and refugees, dalit women, or widows, amongst others.

**H) Conflict, transition and failed states**

- a. Challenges to access to justice are especially aggravated and acute in the context of conflict, 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, which deter the majority of victims from accessing them to seek justice. Informal justice systems are much more likely to dominate but even these may be undermined and fragmented. They may also be inherently discriminatory and/or arbitrary in their functions and outcomes.
- b. Specific challenges to justice and upholding rule of law, include the gendered nature of violence and violations and the failure to address impunity, and the role of international institutions and non-state actors;
- c. In these situations, reform of institutions is not necessarily relevant, and large-scale rebuilding of structures, mechanisms and procedures may be required as well as re-establishing the legitimacy needed for them to operate. This may be challenged by a lack of infrastructure, incapacity and incompetence, a lack of leadership and continued violence. It is also compounded by issues which may remain regarding state control of the military and law enforcement agencies, and the widespread existence of rebel bands or private armies. For women, sexual violence, displacement, the feminisation of poverty and the family responsibilities inherent in stereotypical gender roles can place them in an additionally vulnerable position in these contexts.

**3. Principles Underlining Access to Justice for Women**

**a) Human Rights General Principles relevant to access to justice for women**

Access to justice is entrenched as a right under several human rights instruments through a number of general principles, which set the basis for the consolidation of more specific principles regarding women's access to justice. There are five main principles that demand special consideration:

- i. the principles of universality, indivisibility, inter-dependence and inter-relatedness of all human rights, as stated by the Vienna Declaration<sup>16</sup>
- ii. the right to redress and effective remedy by competent, independent and impartial tribunals and other state institutions<sup>17</sup>;
- iii. the principle of equality before courts and tribunals including the right of every individual to fair and public hearing<sup>18</sup>, the right to appeal to competent national organs against acts violating fundamental rights recognised and guaranteed by conventions, laws, regulations and customs in force; and the right to be tried within reasonable time by impartial court or tribunal.<sup>19</sup>

<sup>16</sup> Article 5 and Vienna Declaration and Programme of Action, 1993

<sup>17</sup> Art.8, Universal Declaration of Human Rights, 1948, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"; Art.2.3 and Art.14, International Covenant on Civil and Political Rights, 1976; Art.6, International Convention on the Elimination of All Forms of Racial Discrimination, 1969

<sup>18</sup> Art 14.1, International Covenant on Civil and Political Rights, 1976; Art. 6 & 7 of European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>19</sup> Art. 7 the African Charter on Human and Peoples' Rights (Banjul Charter), 1981



- iv. the right to be recognised as a person under law<sup>20</sup>
- v. the right to fair and adequate compensation<sup>21</sup> and the right to participate,<sup>22</sup>

**b) Specific Principles regarding women's access to justice**

Recalling the commitment of all states to fulfil their obligations in promoting universal respect for, and observance and protection of, all human rights and fundamental freedoms in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law under the Vienna Declaration and Programme of Action, access to justice for women would be based on the following principles:

- i. Principle of non-discrimination and substantive equality**
- ii. Rule of law** is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency<sup>23</sup>. This principle can only be fully applied by ensuring the equal participation and inclusion of women in the promulgation of the laws; adjudication systems as well as in the structures and processes to support implementation.
- iii. Principle of due diligence** requires state parties to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of discrimination against women, whether those acts are perpetrated by the State or by private persons. The application of due diligence standards requires (a) focusing on the State obligation to transform the societal values and institutions that sustain gender inequality while at the same time effectively responding to discrimination against women when it occurs, and (b) examining the shared responsibilities of State and non-State actors with respect to preventing and responding to all violations of women's human rights.<sup>24</sup>

**4. Elements to be considered in the Drafting of the General Recommendation on Women's Access to Justice**

**A) Substantive and procedural recognition of rights**

- a. To ensure that the substance of the legal framework (including the constitution, legislation, customary laws and jurisprudence) is CEDAW compliant.
- b. To address the hierarchy and applicability of different laws at the national level
- c. To address removal of reservations and interpretative declarations to CEDAW
- d. To ensure adoption of temporary special measures that addresses the historical and systemic discrimination, identifying particularly the diverse and often marginalised groups and communities of women.
- e. To address the culture of the law by ensuring the elimination of negative stereotyping and modify social and cultural patterns of conduct that are prejudicial and harmful to women accessing justice.

<sup>20</sup> Art. 16, International Covenant on Civil and Political Rights, 1976;

<sup>21</sup> Art. 14, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." Additionally it states: "Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

<sup>22</sup> Art.13, Convention on the Rights of Persons with Disabilities, 2008, "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff"

<sup>23</sup> Report of the Secretary- General, The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616

<sup>24</sup>Integration of the Human Rights of Women and Gender Perspective: Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Report of the Special Rapporteur on Violence Against women, its causes, consequences, Yarin Erturk, E/CN.4/ 2006/61, 20 January 2006.

**B) Redress mechanisms [courts, commissions, arbitration, mediation, ombudsmen and tribunal]**

- a. To address the various structures of the redress mechanisms, including their powers and hierarchy in relation to other structures and ensure the cohesiveness of these mechanisms.
- b. To address the conflict and overlaps in plural legal systems: formal (including any parallel system recognised by the state); informal and quasi-judicial systems.
- c. Addressing the autonomy and independence of the various mechanisms
- d. Procedures – to ensure that the procedures, including the substance and administration is fair and effective; length of proceedings, statutes of limitation; evidentiary standards and requirements are of international standards.

**C) Protection and support structures**

- a. Securing the safety of those accessing justice: witness and victim protection, protection orders, injunctions, interim measures
- b. Ensuring legal support structures and measures – such as information provision, legal aid services
- c. Ensuring family, community and other support – crisis centres, shelters, hotlines, counselling, financial support, medical, psychological support.

**D) Effective legal remedies and sanctions**

- a. Contribute to the realisation of all rights, including civil, political, economic, social and cultural rights;
- b. Remedies to be provided in a fair and equal, impartial, timely and expeditious manner, proportionate, gender sensitive and transformative<sup>25</sup>
- c. Range of remedies – recognition of the truth, justice and reparation; provide individual redress; address systematic and systemic problems; include pecuniary and non-pecuniary compensation; prescribe medical and psychological care and other social services; mandate institutional reforms; orders to repeal, amend or enact laws etc [*non-exhaustive*]

**E) Structures of Implementation :**

- a. Measures to facilitate intra and inter-agency coordination, communications and cohesion:
  - i. With **all relevant State machineries**, including all relevant line ministries (particularly ministry of home affairs, ministry of law and justice, ministry of women, ministry of finance, etc), local government, inter and intra departments and inter agencies such as the police, welfare, courts, hospitals, etc;
  - ii. With the **national human rights institutions (NHRIs)**, including with specialised national agencies on women. To also facilitate the establishment of independent National Human Rights Institutions (NHRIs), particularly specialised institutions [on women] to ensure the promotion and protection of human rights;
  - iii. With close and regular consultations with **civil society organisations** including those who are involved in advocating for the protection and promotion of women's human rights to ensure meaningful, substantive and full participation and representation of people, including women, in all stages and initiatives of accessing justice. This shall include measures to ensure the protection of human rights defenders including those who provide information to and participate in processes of and in supporting women's access to justice.
- b. Measures to mobilise support and enabling participation of women for the interventions, including drafting and implementation of laws, policies and programmes
- c. Measures to increase participation and representation of women in justice institutions and other relevant structures
- d. Institutional arrangements to ensure effective implementation including;

<sup>25</sup> Inter-American Court of Human Rights, Case of Gonzalez et al. ("Cotton Field") vs. Mexico. Judgement of November 16, 2009 (Preliminary Objection, Merits, Reparations and Costs). *Court reasoned that one or more measures could repair a specific damage without it being considered double reparation. It also emphasized the integral character of the concept of reparation and that it involves three essential aspects: 1) the reestablishment of the former situation, 2) the elimination of the effects produced by the violation, and 3) an indemnity as compensation for the damages caused. However, in the first aspect, in a case such as this where the crimes are framed by a situation of structural discrimination, it indicated that the reparations must have a transformative effect on the situation. It stressed that the reparations must have a corrective effect and not only a restitutive effect, as a restitution of the same structural situation of violence and discrimination would not be admissible.*

- i. Procedures and effective systems in place
  - ii. Allocation of fiscal and human resources
  - iii. Clear rules and regulations for implementation (enforcement/implementation responsibilities) and safeguards against discrimination in implementation against women
  - iv. Capacity building of duty holders (all branches of governments – vertically and horizontally), including human rights education
- e. Setting and adhering to time frame for implementation.

**F) Monitoring and accountability:**

- a. Continuous transparent and accountable monitoring (internal and external) of implementation –by all organs of the state (executive, legislative, judiciary), including through participation of rights-holders. This includes the creation of specific agency or department within the justice system to monitor and evaluate the status and impact of incorporation of a gender perspective within the justice system.
- b. Collection, analysis and utilisation of data, (disaggregated by sex and other identities) to determine benefit of laws, policies and programmes to promote women's access to justice (evidence base of impact – is there equality of access, results, etc);
- c. Provisions to provide for transparency of and access to all information collected;
- d. Internal monitoring mechanisms (within a ministry or department) to ensure accountability for institutional commitment to equality;
- e. Measures to ensure availability of gender-sensitive complaints mechanisms and procedures;
- f. Tracking of the utilisation of resources allocated for the advancement of women (both national revenue and foreign aid).
- g. Identifying the nature of accountability, including,
  - i. How will the person, department or mechanism responsible be held accountable?
  - ii. What will be the relief/remedies for the woman/women affected by lack of implementation?
  - iii. How will the denial of the right be redressed?
  - iv. What would be the sanction for non-adherence to laws and policies and not implementation?
- h. To institute an independent monitoring system to monitor and hold the judiciary accountable in fulfilling its role in maintaining the checks and balance between all organs of the state.

**G) Interim justice systems**

- a. In the context of states in conflict, post conflict transitional and peace building processes as well as failed states [*reference to Security Council Resolutions 1325, 1820, 1888, 1989, 1960*]
- b. Identifying the specific challenges to justice and upholding rule of law, including gendered nature of violence and violations.
- c. Addressing issues of impunity through:
  - i. Acknowledgement of the role of international institutions and non-state actors
  - ii. Enabling an environment of seeking justice through participation of victims and vulnerable groups in justice processes, security sector and institutional reforms.
  - iii. Establishing truth seeking and truth telling mechanisms including reconciliation and rehabilitation measures.
  - iv. Offering effective remedies such as reparations.
- d. Monitoring and accountability of interim mechanisms affecting the administration of justice and rule of law.

**H) Role of other stakeholders:**

- a. Recognising the different stakeholders and their roles in supporting access to justice and addressing the barriers to access to justice such as culture and tradition, including civil society organisations and other stakeholders e.g. NHRIs, academics, professional bodies, religious leaders, traditional leaders, education institutions, labour unions, corporate sectors, think tanks and research institutions, media;
- b. Role of the state to regulate and monitor the regional and international institutions and agencies, including UN agencies, IFIs, MNIs; on their role in promoting women's access to justice as well as acting as barriers to women's access to justice.
- c. Awareness raising and capacity building, including on legal education.