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On the occasion of a general discussion
on the elaboration of a
**General Recommendation
on Access to Justice**

Women's Access to Justice

Avocats Sans Frontières' submission to the Committee on the Elimination of Discrimination against Women



Avocats Sans Frontières is an international nongovernmental organisation. Its mission is to independently contribute to the creation of fair and equitable societies in which the law serves society's most vulnerable groups. Its aim is to contribute to the establishment of institutions and mechanisms allowing for independent and impartial access to justice, capable of assuring legal security, and able to guarantee the protection and effectiveness of fundamental rights (civil, political, economic, social and cultural). ASF is active in Burundi, Democratic Republic of the Congo, Uganda, Tunisia, Nepal, Israel/Palestine, Kenya, Tanzania, Chad, and Timor Leste, and works in Colombia through our partner ASF-Canada.

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I. Introduction

Avocats Sans Frontières (ASF) welcomes the opportunity to submit a contribution to the Committee on the Elimination of Discrimination against Women's (the Committee) discussion on the elaboration of a General Recommendation on access to justice. This submission is informed by ASF's twenty years' experience promoting access to justice for people in vulnerable contexts, especially women.

Avocats Sans Frontières (ASF) is an international NGO that contributes to the development of a fair society in which the law benefits the most vulnerable groups of the population. Its main objective is to set up mechanisms contributing to the access to an independent and impartial justice, capable of ensuring legal security and effective protection of human rights. ASF's headquarters are in Brussels, Belgium and has permanent missions in Burundi, Democratic Republic of the Congo, Uganda, Tunisia and Nepal and implements projects in Israel/Palestine, Tanzania, Chad, and Timor Leste. ASF also works in Colombia through our partner ASF-Canada. ASF's principles are sustainability, local ownership, achieving objectives and evaluating results, and a human rights-based approach. ASF's commitment to gender mainstreaming is informed by the fundamental principle of equality and non-discrimination, and the view that women and men's equal access to (legal) resources and participation in the justice domain is essential for building democratic societies.

II. Why access to justice can help combat discrimination against women

ASF considers access to justice as the foundation for ensuring that people can realise all their human rights – economic, social, cultural, political and civil. Without rule of law, decisions are decided arbitrarily, and de facto at the whim, and in favour, of those who hold the most power in society. Rule of law is a precondition for affirming and upholding the principle that all people have equal rights and are equal before the law. The absence of the rule of law makes it impossible to hold duty-bearers to account through the systems that uphold the national laws and the international human rights framework, and the realisation of human rights becomes unattainable.

It has already been discussed in various reports¹ that discrimination against women is both a cause and consequence of their lack of access to justice, and this submission will not elaborate on the importance of improving the existing international and national legal frameworks that formally guarantee non-discrimination against women. Instead, ASF would like to use this widely accepted correlation as a starting point to highlight the importance of translating norms and standards on anti-discrimination into concrete change in the lives of women globally. Accordingly, a central issue is enhancing access to justice for women in vulnerable situations. Human rights are interdependent, and ASF focuses its efforts to promote and protect **access to justice as a human right² that is key to achieving and realising all other human rights**. Women's access to justice involves the strategies, processes and mechanisms that ensure that this right is implemented in order to provide a legally-based response to a problematic situation (formulated in terms of human rights violation), whether on an individual or group basis.

ASF works in post-conflict and fragile countries, where States often lack political will and commitment, and have low capacity to carry out their obligations as the final duty-bearer. Even when justice mechanisms are put in place and carried out, the general population holds little trust that these institutions will guarantee fair justice and will guarantee their human rights. It is in such contexts where women have the fewest possibilities for recourse that they are discriminated against on both the structural and personal levels. Thus, in addition to

¹ See this discussion's [concept note](#), the UN Women's Progress of the World's Women 2011 report "[In Pursuit of Justice](#)", and the UN Special Rapporteur of Extreme Poverty and Human Rights' 2012 report on the [obstacles to access to justice for persons living in poverty](#).

² See for example, Article 14 of the International Covenant on Civil and Political Rights

discussing access to justice as a human right in itself, the discussion can also be advanced with an **analysis of how access to justice as an instrument can help combat discrimination against women**. Without looking at how women can access justice and ensure that their rights and needs in the legal system are met, it is all but impossible that other efforts to respect, protect and fulfil women's human rights will be successful. ASF experience in supporting local stakeholders to implement access to justice norms provides useful lessons for understanding how strengthening women's access to justice can help fight discrimination.

III. How access to justice can help combat discrimination against women

In fragile and post-conflict contexts ASF's experience shows that there is still a lack of concrete mainstreaming gender perspective through efficient and innovative approaches. Most of the duty-bearers and stakeholders express their "official commitment" but the reality shows little progress. The difficulties women often face in accessing justice provide dramatic illustrations.

ASF's legal aid work in fragile countries has shown that when women can access justice, they are able to realise a wider range of their rights than the specific problem for which they sought help. In Nepal, for example, when a woman obtained legal advice and aid in the local bar association's joint legal clinic with ASF after her husband beat her and kicked her out of their house, she was able to not only seek damages and continued financial support for their children, she was also successful in stopping his threats and abuse that had at first been overlooked by her husband's friends in the police force. In this case, as in many others, **the issue is less the absence of norms and guidelines to which this woman could turn, and more about enforcing existing laws**. But in order to get this decision, this woman, a victim of domestic violence, had to overcome numerous obstacles before becoming aware of her rights and of the existing legal and judicial mechanisms to exercise her rights. It also required other judicial stakeholders to carry out their obligations in upholding the law and this woman's rights to end the violence against her.

ASF strongly recommends that **more efforts to translate norms into action be directed at all stakeholders in the legal chain** – from the rights-holders (to know that they have rights, such as the woman above), to civil society, lawyers and the State. That means focusing first on the importance of (a) justiciability and access to justice mechanisms to enforce the existing legal means. In fragile States, enhancing enforceability of human rights requires innovative approaches that must (b) legally empower right-holders, (c) engage with the State as the duty-bearer, while also recognising the importance of (d) customary justice and alternative dispute mechanisms.

a) Enforcing norms: justiciability and access to justice mechanisms

In most fragile countries, the causes of discrimination are so numerous that most women become **victims not only of discrimination, but also of the lack of enforceability of the existing protection norms**. This situation is the consequence of a combination of factors stemming from the situation of these women (right-holders), of civil society support (NGOs, bar associations, etc.) that of the States (duty-bearers). Enhancing access to justice mechanisms includes addressing issues of sensitisation and information-sharing, capacity-building, and advocating for legal reforms and best practices. But above all, it is often the **only way to hold duty-bearers to account in respecting human rights and making tangible women's rights**. This is the challenge of enforceability of women's rights.

For example, the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders ("the Bangkok Rules") establish international standards for treatment of women in custody. To be used in addition to the UN Standard Minimum Rules for the Treatment of Prisoners, the Bangkok Rules highlight issues specific to the needs of women in the justice system's custody. These rules provide specific guidelines for States to ensure that women prisoners are able to realise their human rights in such

circumstances, without becoming victims of discriminatory practices, especially as related to access to justice. The Bangkok Rules are not however, widely known yet, nor are they commonly applied. The current challenge is to guarantee their enforcement through **mechanisms based on both the justiciability of women's rights and the availability of access to justice mechanisms**. ASF's programme on "Fighting illegal pre-trial detention in DRC" illustrates that strategy.³

In order to make use of these guidelines, it is necessary to foster political will on the part of the duty-bearer to guarantee women's access to justice, and in this case, proper treatment of women accused of crimes. Generating the State's political will to implement and uphold the rule of law (a system in which the needs of women are met in the justice sector) suggests that it is not only important to develop guidelines for States, but also to make clear the systemic issues related to the importance of implementing these guidelines, such as how resource-allocation decisions are made, and by whom. The discrimination against women that is often cause and consequence of women's lack of access to justice should be emphasised, along with the related political economic structures that perpetuate the lack of human rights realisation.

b) Legally empowering rights-holders

Participation of rights-holders can have a positive effect in encouraging the State to fulfil its human rights obligations, especially in fragile settings. **The lack of awareness is a basic obstacle to address**, and one that can provide significant progress in ensuring women's access to justice. For example, ASF's work in Timor Leste included community dialogue activities, in which young women learned that men and women had equal rights. This led one to continue her schooling, and become the first woman to attend university in the history of her village. While such community dialogue activities cannot directly guarantee rights protection, it is an important first step in breaking the cycle of marginalisation and discrimination against women.⁴ In order for any legal mechanisms to be useful, they must be used. This requires legally empowered women, who know their rights and know how to go about claiming them.

c) Engaging the State

In order for States to implement guidelines on ensuring women's access to justice, they must devote the necessary resources, both human and financial, to meeting women's needs in the justice sector. This is a real challenge in fragile and poor countries and requires that States set priorities and consider the rule of law and access to justice essential aspects for fulfilling their human rights obligations. This means developing innovative strategies and programmes that involve all the relevant stakeholders in a holistic approach.

For example, in Burundi, ASF and its partners have been working since 2010 on an approach to establish a National Legal Aid Strategy (SNAL, in its French acronym) in which the government progressively plays a role,⁵ for example, by establishing a thematic group "Demand Justice" that was integrated into the "Sectoral Group on Justice and Rule of Law", piloted by the Ministry of Justice, DFID, and CTB.⁶ While the process has not yet been completed, the integration of the government of Burundi at this stage could be key for a future sustainable legal aid system.

³ <http://www.asf.be/action/field-offices/asf-in-the-democratic-republic-of-congo/>

⁴ Low, Sally, 2007. "Evaluation of the 'Providing Access to Justice – Legal Awareness at the Grassroots Level' Project; Timor Leste for Avocats Sans Frontières"

⁵ ASF's contribution to the Universal Periodic Review: *L'enjeu de l'accès à la justice, condition d'un état de droit durable au Burundi*, ASF, July 2012

<http://www.asf.be/fr/publications/pour-un-acces-effectif-a-la-justice-au-burundi-contribution-dasf-a-lexamen-periodique-universel-2013/>

⁶ Via Ministerial Ordinance from 2 December 2011

d) Recognising the importance of alternative dispute mechanisms and customary leaders

ASF's strategy for developing access to justice mechanisms⁷ is based on the identification of those who can legally help individuals in vulnerable situations. To optimally respond to the demands of the population, it is vital that service providers are allocated to the various tasks depending on their specialisation and that the skills and knowledge specific to each participant are used in a complementary way. Several international and regional principles and studies on best practice refer to this need for complementarity.⁸ In ASF's experience, this means integrating, when necessary, customary legal systems and alternative dispute resolution mechanisms into access to justice strategies, as these are the legal systems to which most women in fragile countries have access.

Taking these alternative systems and its contradictions with the formal system into account is essential to addressing discrimination against women. For example, while international conventions and laws have *de jure* command on customary laws globally, in Democratic Republic of Congo the formal law states that customary law is authorised unless it is in contradiction with the national law⁹. Despite these principles, the prevalent customary laws that deny women inheritance and property rights are officially against the national law, but nevertheless widely applied. But in this case, the duality of justice systems is less of an obstacle for women to access to justice than the lack of information and knowledge about the complementarity of these two systems. Because most people are unaware of the national law, it is the customary law that is commonly applied, generally depriving women of their most basic human rights and dignity and perpetuating discrimination.

In such situations, ASF suggests looking at **how the formal justice system can reinforce the customary justice system in upholding human rights norms and ensuring global access to justice for women**. In this example, applying the national law means raising awareness about it and supporting those in the customary justice system to apply it or at least fundamental principles to interpret the norm, like the prohibition of discrimination. ASF recommends that States take a proactive approach **in engaging with customary justice actors and other alternative dispute resolution mechanisms**, in order to emphasise their responsibility in applying their norms in accordance with international human rights standards. Given that many legal contexts recognise the authority of customary leaders, this engagement does not have to be seen as taken away their traditional power, but rather supporting them in remaining relevant and necessary for the vast majority of populations who are unable to access the formal justice systems.¹⁰

⁷ *Manual on the organization of legal aid services*, ASF 2012

⁸ See Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, §7; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 13 Human Resources, 2012; UNDOC, Handbook on Legal Aid in Africa, 201; Access to Justice and legal aid in East Africa, a comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, Danish Institute for Human Rights, Dec. 2011; Practitioners meeting on legal aid programming in Africa, UNDP/UNICEF, Dakar, June 2010

⁹ Code de l'organisation et compétence judiciaire, ordonnance loi 82/020 du 31/03/1982; Code de la famille loi n°87/010 du 01/08/1987

¹⁰ ASF is working with customary and religious leaders in Chad to understand the complementarity and duality of the legal systems, and to support them in effectively applying it. In this context, given the difficulty in general of managing conflicting norms, it is especially important to focus on supporting those who find themselves managing this in a context of little or no available formal justice actors or the State. In Chad, there are around 100 lawyers in a population of around 11.5 million, the vast majority of them in the capital of N'Djamena. Given that the State and its legal and administrative apparatus are largely absent, and generally untrusted when present, in the lives of the majority of people in Chad, the religious and customary leaders have a crucial role to play in promoting and ensuring women's access to justice; they are often the only ones who are in a situation to make a difference.

IV. Conclusions and Recommendations – a holistic approach to enforcing women’s right to access justice

As the Committee deliberates the elaboration of a general recommendation to guide States on measures to adopt to ensure that they are fully complying with their related human rights obligations, ASF is keen to emphasise the **holistic approach needed to enforce already existing international norms and standards**. The only sustainable solutions are ones that take into account the role of the State, and the role of all other stakeholders, such as the rights-holders, the civil society that represents them, customary leaders to which rights-holders in fragile countries often turn, and the lawyers and other legal actors who are responsible for the proper functioning of justice system. Knowledge of the laws and norms is the foundation for any strategy based on legal empowerment, and should be a starting point for analysing both the obstacles women face in accessing justice, and the realities of discrimination that women face in general. Finally, enhancing access to justice for women is an absolute condition to guarantee the justiciability of human rights, thus enforcing the illegality of discrimination against women.

Recommendations

- Direct efforts to translate norms into action at all stakeholders in the legal chain – from the rights-holders, to civil society, lawyers and the State.
- Enhance access to justice mechanisms by addressing issues of sensitisation and information-sharing, capacity-building, and advocating for legal reforms and best practices.
- Work to ensure that women are legally empowered to seek justice – so that rights-holders know what their rights are and know how to claim them.
- Look at how the formal justice system can reinforce the customary justice system in upholding human rights norms and ensuring global access to justice for women.