



UNODC

United Nations Office on Drugs and Crime

CEDAW General Comment on Access to Justice – UNODC contribution for the Half Day General Discussion (18 February 2013)

I. Background

The United Nations Office on Drugs and Crime (UNODC) respectfully submits this contribution to the Committee on the Elimination of Discrimination against Women (CEDAW) for its consideration.

The work of UNODC in crime prevention and criminal justice reform is guided by the UN standards and norms in crime prevention and criminal justice. The UN standards and norms are sets of non-binding rules, principles, and guidelines relating to different aspects of criminal justice. Most of the UN standards and norms are resolutions adopted by the General Assembly or the Economic and Social Council. They represent best practices and are reflective of the views of experts. Some are still the main resource for guidance on specific issues (for example the Standard Minimum Rules for the Treatment of Prisoners).

Several of these normative instruments are extremely relevant to the discussion on access to justice for women, and it is therefore proposed that relevant principles and guidelines already agreed upon, as reflected in those documents, shall be included in the general recommendation and referred to. In particular, this applies to *the Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*¹, *the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*², and the newly adopted *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*.³ Specific suggestions are made below in line with the expected outcomes of the general discussion as outlined in the Concept Note.⁴ In fact, most of these suggestions are in line with previous statements of CEDAW in the context of its concluding observations to Member States.

¹ GA resolution 65/228, **Strengthening crime prevention and criminal justice responses to violence against women**, 21 December 2010 (hereinafter: the Updated Model Strategies).

² GA resolution 65/229, **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)**, 21 December 2010 (hereinafter: the Bangkok Rules).

³ GA resolution 67/187, **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**, 20 December 2012 (hereinafter: the Principles and Guidelines). Currently included in report A/67/458, page 40.

⁴ Items e) and g).



II. Recommendations to ensure the gender-sensitive implementation of existing legal frameworks regarding access to justice, including provisions on legal aid

A. Women's Access to Legal Aid

On the provision of legal aid,⁵ the first relevant principle is that States are responsible to ensure provision of legal aid, both in legislation and institutionally, by putting in place a system that is accessible, effective, sustainable and credible.⁶ Special measures should be taken to ensure meaningful access to legal aid for women. Such measures should be gender-sensitive.⁷ In the design of their nationwide legal aid schemes, States should take into account the specific needs of women.⁸

More specifically, States should introduce “**an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice**”; and take “active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims”.⁹

In order to address financial and cultural obstacles women may face in accessing legal aid, it is recommended that whenever States apply **a means test** to determine eligibility for legal aid, they will not do so on the basis of the family income, but rather on the basis of the income of the person in need of legal aid, when family members are in conflict.¹⁰ This is meant to apply to those situations where women may want to take legal action against a family member (particularly a spouse), but do not meet the criteria for legal aid (free of charge) due to high family income, which they do not really have access to.

B. Women Victims of violence

In the case of women victims of violence, States should provide legal aid, advice and court support services in all legal proceedings to female victims of violence in order to

⁵ For the purpose of the Principles and Guidelines the term “legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require”.(paragraph 10)

⁶ Principle 2, the Principles and Guidelines: “States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system”.

⁷ Principles 10, the Principles and Guidelines: Equity in Access to Legal Aid.

⁸ Guidelines 11, the Principles and Guidelines

⁹ Guideline 9, the Principles and Guidelines: Implementation of the right of women to access legal aid.

¹⁰ Guidelines 1, the Principles and Guidelines. (f) If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test.



ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.¹¹

In criminal proceedings against perpetrators, measures should be taken to protect the privacy and safety of women; evidentiary rules should be established that are non-discriminatory; and the credibility of the complainant should not be assumed to be different than in any other case. Specifically, the introduction of sexual history should be prohibited.¹²

C. Women in detention/Women Prisoners

In the case of women in detention, the Bangkok Rules include several provisions on access to legal aid of all categories of women deprived of their liberty. Rule 2 states that newly arrived women shall be provided with access to legal advice. This implies that both referral mechanisms as well as the actual services should be in place.

Rule 26 of the Bangkok Rules states that “Women prisoners’ contact with their families, including their children, and their children’s guardians **and legal representatives** shall be encouraged and facilitated by all reasonable means.” This implies for example having appropriate facilities for visits.

¹¹ Guideline 9, the Principles and Guidelines: Implementation of the right of women to access legal aid.

¹² Paragraph 15, the Updated Model Strategies.

III. Criminal procedure

15. Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that:

(a) The police and other law enforcement agencies have, with judicial authorization where required by national law, adequate powers to enter premises and conduct arrests in cases of violence against women and to take immediate measures to ensure the safety of victims;

(b) The primary responsibility for initiating investigations and prosecutions lies with the police and prosecution authorities and does not rest with women subjected to violence, regardless of the level or form of violence;

(c) Women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the women; ensure safety during legal proceedings; and avoid “secondary victimization”. In jurisdictions where the safety of the victim cannot be guaranteed, refusing to testify should not constitute a criminal or other offence;

(d) Evidentiary rules are non-discriminatory; all relevant evidence can be brought before the court; rules and principles of defence do not discriminate against women; and “honour” or “provocation” cannot be invoked by perpetrators of violence against women to escape criminal responsibility;

(e) The credibility of a complainant in a sexual violence case is understood to be the same as that of a complainant in any other criminal proceeding; the introduction of the complainant’s sexual history in both civil and criminal proceedings is prohibited when it is unrelated to the case; and no adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof;

(f) People who perpetrate acts of violence against women while voluntarily under the influence of alcohol, drugs or other substances are not exempted from criminal responsibility;

(g) Evidence of prior acts of violence, abuse, stalking and exploitation by the perpetrator is considered during court proceedings, in accordance with the principles of national criminal law;



Rule 47¹³ adds that support **following release** be provided to released women prisoners, including to those who need legal and other help to ensure their successful social reintegration.

1. Women facing abuse or violence

Rule 7 of the Bangkok Rules applies to all categories of women deprived of their liberty, and emphasizes the duty of prison administration to inform them of their right to seek recourse from judicial authorities on the grounds of sexual abuse or other forms of violence both before or during detention:

“1. If the existence of sexual abuse or other forms of violence **before or during detention** is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.

2. Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling.

3. Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action.”

Rule 25 of the Bangkok Rules, which is equally applicable to all categories of women deprived of their liberty, describes the special support and protection mechanisms required for women reporting, or having been subjected to, (sexual) abuse during detention or imprisonment:

“1. Women prisoners who report abuse **shall be provided immediate protection**, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.

2. Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, **shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.**

3. In order to monitor the conditions of detention and treatment of women prisoners, **inspectories, visiting or monitoring boards or supervisory bodies shall include women members.**”

Taking into account the exposure of women to domestic violence, Rule 44¹⁴ grants women prisoners the right to be consulted in the context of personal visits:

¹³ Which applies only to women prisoners.

¹⁴ Which applies only to women prisoners.



“In view of women prisoners’ disproportionate experience of domestic violence, they shall be properly consulted as to who, including which family members, is allowed to visit them.” In order to provide such special consultation, prison staff should be trained on these issues, or specialists should be in place.

III. 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

The rights of different groups to be assisted in seeking redress is recognized in different instruments.¹⁵ The right of victims to legal aid in general is recognized in principle 4 of the UN Principles and Guidelines on Access to Legal Aid.¹⁶ This applies to women victims, and supplemented by special measures for them (as mentioned above).

Specific measures to assist victims through legal aid include:¹⁷

“(a) Appropriate advice, assistance, care, facilities and support [...] throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;

(b) Child victims receive legal assistance as required, in line with *the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*;¹⁸

(c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;

(d) Victims are promptly informed by the police and other front-line responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights;

(e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;

(f) Victim services agencies and non-governmental organizations can provide legal aid to victims;

(g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals

¹⁵ For example, Article 6(2.) of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* reads: “Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

¹⁶ Principle 4. Legal aid for victims of crime: “Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.”

¹⁷ Guideline 7. Legal aid for victims: “Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:”

¹⁸ Economic and Social Council resolution 2005/20, annex.



(i.e., health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.”

In addition, the Updated Model Strategies provide a long list of measures that will enable women **victims of violence** to seek and obtain redress, which include:¹⁹

- (a) provision of relevant information to victims on their rights;
- (b) providing protection to victims;
- (c) taking measures to ensure that victims are treated with dignity and respect;
- (d) ensuring access to prompt and fair redress;
- (e) establishing court rules and procedures that are sensitive to the needs of women;
- (f) establishing procedures for issuing restraining orders;
- (g) recognize children witnessing violence against someone close are also recognized as victims;
- (h) ensure free access to legal aid for victims;
- (i) ensure victims support and care throughout the trial;

¹⁹ Paragraph 18, updated Model Strategies: Member States are urged, as appropriate and taking into account all relevant international legal instruments, in particular the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

- (a) To make available to women who have been subjected to violence **relevant information on rights, remedies and victim support services** and on how to obtain them, in addition to information about their role and opportunities for participating in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings, as well as any orders against the offender;
- (b) To encourage and assist women subjected to violence in lodging and following through on formal complaints by providing protection to the victims and advising them that the responsibility for pursuing charges and prosecuting offenders rests with the police and the prosecution;
- (c) To take appropriate measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that victims are treated with dignity and respect, whether they participate in the criminal proceedings or not;
- (d) To ensure that women subjected to violence have access to prompt and fair redress for the harm that they have suffered as a result of violence, including the right to seek restitution from the offender or compensation from the State;
- (e) To provide court mechanisms and procedures that are accessible and sensitive to the needs of women subjected to violence and that ensure the fair and timely processing of cases;
- (f) To provide efficient and easily accessible procedures for issuing restraining or barring orders to protect women and other victims of violence and for ensuring that victims are not held accountable for breaches of such orders;
- (g) To recognize that children who have witnessed violence against their parent or another person with whom they have a close relationship are victims of violence and need protection, care and support;
- (h) To ensure that women subjected to violence have full access to the civil and criminal justice systems, including access to free legal aid, where appropriate, court support and interpretation services;
- (i) To ensure that women subjected to violence have access to qualified personnel who can provide victim advocacy and support services throughout the entire criminal justice process, as well as access to any other independent support persons;
- (j) To ensure that all services and legal remedies available to victims of violence against women are also available to immigrant women, trafficked women, refugee women, stateless women and all other women in need of such assistance, and that specialized services for such women are established, where appropriate;
- (k) To refrain from penalizing victims who have been trafficked for having entered the country illegally or for having been involved in unlawful activities that they were forced or compelled to carry out.



UNODC

United Nations Office on Drugs and Crime

(j) apply the same guarantees to immigrant women, trafficked women, refugee women, stateless women and all other women in need of such assistance, including through specialized services.

(k) to refrain from penalizing victims of trafficking for illegal entry.

IV. Cross cutting issues and other considerations

Additional standards should be applied when it comes to access to justice of children – there are detailed normative instruments on children as victims and witnesses, as well as children in conflict with the law. They were not addressed here, but could be included. Access to justice in its widest sense also touches upon judicial integrity and oversight over law enforcement. They are probably beyond the scope of the general comment, but may be relevant to the analysis of the different stakeholders (item i). UNODC stands ready to provide additional inputs during the process of drafting the general comment.