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**Vulnerable groups: access to justice, jurisprudence and procedure**

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1. **Vulnerable Groups -- deprivation and discrimination**

The topic given to me for today’s presentation is “Vulnerable groups: access to justice, jurisprudence and procedure.” In a newly published booklet entitled “United Nations Human Rights Appeal”, the High Commissioner for Human Rights, Mr. Zeid Ra’ad Al Hussein, begins his message by saying:

“The overwhelming majority of victims of human rights abuses around the world shares two characteristics; deprivation and discrimination- whether it is based on race or ethnicity, gender, beliefs, disability, caste or class. International human rights law can intervene, to make a real difference, in lives of these people.”

The work of the UN treaty bodies, to which I belong, is based on this firm belief.

Let me begin my presentation by introducing an overview of the individual communications under the Optional Protocol of the Convention on the Elimination of all forms of Discrimination against Women (the CEDAW Convention), and the quantitative and qualitative characteristics of its case law.

Then I would like to share with you CEDAW’s new general recommendation on access to justice, which is an authoritative guide for interpreting the Convention, and to show how it envisages enhancing access to justice for vulnerable groups.

Lastly I would like to conclude by answering the question, ‘How can international human rights law improve the way we respond to human rights violations, particularly against vulnerable groups?’ I aim to answer this question by introducing the recent academic work of Professor Bonita Meyersfeld.

1. **Jurisprudence of CEDAW-OP**

The individual complaint procedure is one the most significant achievements of international human rights law, since it allows a petitioner to institute a procedure against a state at the international level in areas which had previously been regarded within the sphere of sovereignty. I am very honoured to be at the European Court of Human Rights today, because the first individual complaint procedure was introduced by the European Human Rights Convention in 1950.

Some UN human rights treaties subsequently adopted in the General Assembly, such as the International Covenant on Civil and Political Rights, or the Convention on the Elimination of Racial Discrimination, are equipped with this procedure from the moment of their adoption, although they require the acceptance by the States Parties, separately from the treaties.

In contrast, in the case of the CEDAW Convention, it took 20 years after the adoption of the treaty in in 1979 to institute an individual complaint procedure.

When the Commission of Status of Women (CSW) drafted the CEDAW Convention in the 1970s, there were only a handful of states which supported the inclusion of individual communications into the draft of the Convention; the majority of states opposed the idea on the grounds that the causes of discrimination against women are primarily social and/or cultural in nature, and therefore it was neither appropriate nor functional to have such a mechanism involving investigation, examination, assessment and recommendation.

A change in this prevailing attitude was brought about by the Vienna Conference on Human Rights and the 4th World Conference on Women in Beijing in the 1990s, with the now legendary “Women’s Rights are Human rights” campaign. The outcome documents of these conferences endorsed the individual complaint procedure of the CEDAW Convention, which was finally adopted in 1999, and entered into force in 2000.

The reason I have touched upon the history of the Optional Protocol of CEDAW, is because I believe it is important to understand this characteristic of CEDAW’s jurisprudence.

Since the effectuation of the Optional Protocol in 2000, CEDAW has registered 90 cases of individual complaints as of October 2015, among them we found violations in 19 cases, non-violation in 1 case, 24 cases were declared inadmissible, 7 were discontinued and 39 are pending. For those cases which were found to be violations in merit, the follow-up procedures are on-going.

I observe 3 distinctive characteristics of the substance of CEDAW’s jurisprudence as follows:

First, the majority of cases are related to either violence against women (VAW) or the reproductive health rights of women and girls, including domestic violence, rape, sexual harassment, abortion and sterilization. The number of disputes over child custody and asylum or refugee applications has been steadily increasing, but they too involve allegations of VAW (e.g. gender based violence as a form of persecution in refugee applications).

Second, in most of these cases, the immediate perpetrators were Non–State Actors. The Committee has elaborated the general international law standard of due diligence as grounds for state responsibility, which entails action on the part of states parties to prevent and investigate violations, to punish perpetrators and to provide redress to victims. The most famous case law includes Cases Nos. 5 and 6 against Austria on domestic violence (CEDAW/C/39/D/5/2005 and CEDAW/C/39/D/6/2005), which was eventually quoted in the decision of the European Court of Human Rights in *Opuz v. Turkey* (App. No. 33401/02, June 2009).

Third, the views under the Optional Protocol contain ‘general’ recommendations to states parties about how to reform their laws and practices, including through the adoption of legislative measures, modification of existing laws, and formulation of national prevention strategies for non-reoccurrence and rehabilitation programs for both survivors and offenders. This practice itself could be debatable, as recommendations issued by CEDAW are often very detailed and prescriptive, which may not be compatible with the notion of “obligation of result” under international law. On the other hand, the positive side of such concrete recommendation is that it gives clear guidance to the states parties for implementing recommendations.

Let me now turn to the quantitative figures of CEDAW’s jurisprudence. As I already mentioned, there have been 90 cases of complaints registered with CEDAW in the 15 years since the inception of the mechanism. If we compare this figure with the number of complaints registered under the first Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR), in the first 10 years there were approximately 1,500 registered cases under ICCPR.

In my view, the fact that CEDAW receives so small a number of cases of individual complaints despite the pervasive gender-based discrimination all over the world exemplifies the challenges that CEDAW faces. These challenges include, but are not limited to, a lack of awareness or visibility of the CEDAW Convention in many jurisdictions and women’s insufficient access to justice because of limited legal literacy and/or legal aid. Furthermore, many justice systems themselves are often not vested with high standards of quality, let alone do they adhere to international standards of efficiency. In addition, as the history of the adoption of CEDAW’s Optional Protocol demonstrates, the causes of gender-based discrimination are rooted in social norms and values, which have been nurtured within patriarchal systems; it is therefore sometimes difficult to establish a legal argument within such a social context as to why and how a particular incident constitutes gender-based discrimination against women.

1. **Access to Justice**

To overcome these obstacles, the CEDAW Committee has been engaged in drafting a general recommendation on access to justice, which was adopted in July this year. In this GR, CEDAW identifies six inter-related and essential components of access to justice: namely, Justiciability, Availability, Accessibility, Quality Standards, Provision of remedies for victims, and Accountability.

* *Justiciability* requires women’s unhindered access to justice and the power to claim their rights as legal entitlements under the law, including international human rights law;
* *Availability* requires the establishment of judicial and quasi-judicial courts throughout the state party.
* *Accessibility* requires that all justice systems be secure, affordable and physically accessible, including to those who face intersecting or compounded forms of discrimination.
* *Quality* *standards* require that all components of justice systems adhere to international standards of competence, efficiency, independence and impartiality, and provide appropriate and effective remedies that are enforceable in a timely fashion.
* *Provision* *of remedies* requires that justice systems provide women with viable protection and meaningful redress for any harm that they may suffer.
* *Accountability* of a justice system is ensured through monitoring the legal responsibility of the justice system professionals when they violate the law.

I hope that this general recommendation will reach the many stakeholders and contribute to the enhancement of women’s access to justice, and the betterment of justice system itself.

1. **Good Practices and Role of International Law**

In pursuit of good practices under international human rights law, I have studied a number of resources. One of the most intellectually stimulating works is a book written by Professor Bonita Meyersfeld entitled *Domestic Violence and International Law* (Hart Publishing, 2010). Meyersfeld raises the following question; how can international law improve and respond to domestic violence? She gives two simple and clear answers, which she calls the ‘expressive function’ and the ‘implementing capability’ of international law.

First, international law has an ‘expressive value’: it gives concrete names to forms of harm that fall outside the ambit of established legal principles. In this way, international law facilitates the creation of new norms and laws to address harm in respect of which no regulations exist. According to Meyersfeld, the formulation of the neologism “genocide” in the 20th century is the best example of the expressive function of international law. The second function of international law, according to Meyersfeld, is its ‘implementing capability’. International law requires states to modify their laws in accordance with international standards, not only through compulsion but also through non-coercive measures such as discussing legislative and political changes among governments. The author cites, as an example of this function, the increasing prohibition of female genital mutilation (FGM) in legal systems around the world.

I am going to participate in CEDAW’s next session in Geneva immediately following this workshop. At the session, we will listen to survivors of feminicide, women with autism and women with albinism. There may be existing regulations to protect these victims; yet if we may name what are the central issues of these phenomena, it would assist in finding a solution, and international law may play a role in it.

Meyersfeld vividly illustrates how the judgments on mass rape in the ICTY and the ICTR influenced Security Council Resolution 1325 in 2000, and the decision of the European Court of Human Rights on *MC v. Bulgaria* in 2004 (App. No 39272/98). The court held that the a rigid approach toward prosecution, such as requiring proof of physical resistance, risks leaving certain types of rape unpunished and thus jeopardizes the effective protection of the sexual autonomy of individuals. Subsequently, CEDAW followed the reasoning of *MC v. Bulgaria*, though it does not make reference to it, in the decision of *Vertido v. Philippines* (Case No.18), which highlighted how gender-stereotyping in the judiciary appears to harm female victims of violence. These precedents have impacted national laws on sexual violence, wherein we see the implementing function of international law.

Members of treaty bodies are called “experts”; however our expertise can easily become outdated unless we proactively work to stay caught-up with the most recent best practices of other international and regional mechanisms. In this regard, I deeply appreciate the OHCHR for giving me the opportunity to attend this seminar to share experiences with and among the regional and sub-regional human rights mechanisms. We may need to consider how to institutionalize such sharing of information and communal training in the future.

Thank you very much for your attention.