

Addendum to the Women's Caucus submission on the ASEAN Human Rights Declaration to the ASEAN Intergovernmental Commission on Human Rights

THE UNIVERSAL Declaration on Human Rights (UDHR) is an appropriate reference for a foundational regional human rights document. However more than half a century since the UDHR was written, different individual and collective experiences have challenged this framework, necessitating a deeper understanding and broader recognition of human rights. In line with the evolutionary approach that the ASEAN Intergovernmental Commission on Human Rights (AICHR) has adopted, we reiterate our position on specific areas which must be included in the ASEAN Human Rights Declaration (AHRD).

Due Diligence and State Obligation

IN THE GENERAL principles of the ASEAN Human Rights Declaration (AHRD), emphasis must be placed on due diligence and state obligation. As the primary duty-bearers, states have the obligation to ensure an individual's exercise of one's human rights. Due diligence must be exercised by the state in four areas: prevention, protection, punishment and reparations. In fact, state obligation is one of the building blocks of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Moreover, the CEDAW Committee's General Comment 19 says that "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." This should also include *inter alia* the due diligence to a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors. The framework should consist of three pillars:

- a. The State's duty to protect against human rights abuses by third parties, including business and international financial institutions, through appropriate implementation of policies, regulation, and adjudication;
- b. The corporate responsibility to respect human rights, which means to act with due diligence and put in safeguards to avoid infringing on the rights of others;
- c. Greater and direct access for victims to effective remedy, judicial and non-judicial.

Further clarifying the application of the principle the Special Rapporteur on Violence Against Women its Causes and Consequences in her Report to the Commission on Human Rights at its 62nd Session considered the application of due diligence standards in order to (a) focus on State Obligation to transform the societal values and institutions that sustain gender inequality while at the same time effectively respond to violence against women when it occurs, and (b) examine the shared responsibilities of State and non-State actors with respect to preventing and responding to violence and other violations of women's human rights.

Non-derogation and Non-retrogression of Human Rights

ALTHOUGH the AHRD is a regional human rights principle document that may take into account "national and regional particularities" (AICHR TOR 1.4), the AHRD must be at par with international human rights standards. The general principles of the AHRD must include a provision that reiterates the non-derogation and non-retrogression of human rights. Once a particular level of enjoyment of rights has been articulated and realized in international, other regional and/or national context it should be maintained and not be undermined.

Moreover national and regional particularities must be used to strengthen rather than limit existing human rights.

Duties and Limitation of Human Rights

THE PRIMARY duty-bearers are states. This was underscored in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Citing the duties of individuals is unnecessary. The same declaration points out that human rights may only be limited based on the rights of others: "In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (Art. 17).

"Morality," "Public Morality" and "Public Morals"

ALTHOUGH Article 29 of the Universal Declaration of Human Rights uses "morality" as a limitation of rights, having "morality" and other similar terms such as "public morality" and "public morals" have proved to undermine women's human rights because of their subjectivity.

"Morality" has not been defined but in practice has been oriented towards the interpretation of the dominant political and religious hierarchies.

"Morality" can also render certain gender identities transgressive, especially for sexual minorities. It can also deflect attention from seeing sexual violence, for example as a crime against person, rather than honor.

We propose that **the term be dropped** as in the case of the Charter of Fundamental Rights of the European Union.

Women as "Marginalized" rather than "Vulnerable" Group

DESCRIBING women as a "vulnerable" group overlooks their own agency as individuals. Although the Vienna Declaration uses the term "vulnerable" to groups which need more protection, the document takes into account the conditions which caused such vulnerability. Hence the wording "rendered vulnerable" (Para. 24). Moreover, there are men and boys who are also rendered vulnerable by crises especially conflict. It is important to note that even UN Security Council Resolution 1820 which prohibits the use of rape and other sexual violence as weapons of war, while placing emphasis on women and children, does not mention the term "vulnerable."

Right to citizenship

THE CEDAW Convention (Article 9) provides the right to nationality, underscoring that marriage must in no way deprive a woman of her nationality. However studies of women legal and human rights advocates and experts have found the term "citizenship" more precise in denoting rights and entitlements than "nationality" which can be essentialist.

This shift is suggested by the more recent CEDAW statement in 2011 on the anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness: "The CEDAW Convention promotes gender equality and sets out measures for the advancement of all women without distinction on the basis of their nationality/citizenship or other legal status, such as refugee, migration or marital status." Hence for language, we propose **"the right to citizenship."**

Refugees, undocumented migrants, asylum seekers

As a region where there is significant movement of peoples due to political and economic crises, **"freedom of movement"** must be

framed broadly and closely linked to related rights such as right to work and right to citizenship. The specific context of refugees, undocumented migrants, asylum seekers and their children must be considered.

It is also equally important to note that these groups of people should be recognized as an “individual or person” albeit considered “illegal” under certain state legislations to ensure their rights as a “person” is promoted and protected.

In accordance with CEDAW and UN Security Council Resolution 1325, we propose the language, **“Gender-sensitive safeguards and practices must be institutionalized in registration, reception, interview and adjudication processes to ensure women’s equal access to asylum.”**

This should also be strengthened by a call for the ratification of other international treaties, primarily the UN Convention Relating to the Status of Refugees and the Convention on the Rights of Migrant Workers and their Families, amongst others.

Responsibilities of labor-receiving countries

Since labor migration prominently marks the region’s economic activities, it is appropriate that the responsibilities of labor-receiving countries be emphasized. The CEDAW Committee in its General Recommendation 26 on Women Migrant Workers emphasizes that all categories of women migrants, including those who are undocumented in either in country of origin, transit or destination, fall within the scope of the obligations of State parties to the Convention and must be protected against all forms of discrimination.

We propose the following language, **“Labor-receiving governments must promote and protect the rights of migrant workers, be they document or undocumented and skilled or unskilled. It must extend such protection to migrant workers’ dependents.”**

Sexual orientation and gender identity

Sexual orientation and gender identity must be a ground for non-discrimination, along with race, color, sex, political or other opinion, national or social origin, social and economic status, marital status, age, disability, ethnicity, religion, nationality, language, birth or any other condition.

The CEDAW Committee in its General Recommendation 27 and 28 has explicitly stated that there should not be any discrimination on the basis of sexual orientation and gender identity. Further, in 2011, Human Rights Council issued a resolution, “expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”

Meanwhile, the Yogyakarta Principles also states that, “Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.” Along this line, it is important to ensure that the language of the AHRD must be inclusive of the different gender identities and not adopt a heteronormative approach.

Right to found a family and family as a social unit

Aside from the equal rights and roles in marriage and family (See Women’s Caucus 31 October 2011 submission), we propose that “family” in the context of **“the right to found a family”** be interpreted in its broadest and most inclusive fashion so as to encompass as other forms of family that do not conform to the nuclear two-parent family.

The family must be recognized as a social unit rather than a “natural” unit --- and the AHRD should include language that does not discriminate those consisting of unmarried and LGBT parents and does not stereotype any forms of non heteronormative family arrangements.

Sexual and Reproductive Health and Rights

Reproductive health must not be limited to procreation, maternal care or married women. It is part of the right to health and right to self-determination, as suggested by the International Conference on Population and Development and its Plan of Action, which is linked to the Millennium Development Goals.

The ICPD reads, “Reproductive health care also includes sexual health, the purpose of which is the enhancement of life and personal relations... Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence. Full attention should be given to promoting mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality.”

There should not be any distinction/discrimination as well in terms of the recipients of social services related to SRHR. Unmarried women and girls, along with men and boys equally have the right to have an informed choice and protection over their bodies and relationships.

Rights related to work and maternity

Right to work must cover maternity entitlements. Maternity benefits must be based not on mere reasonable standards but rather those set by the International Labor Organization (ILO) and CEDAW. CEDAW specifically prohibits dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.

It also stipulates the need for states to introduce maternity leave with pay or with comparable social benefits without loss of former employ-

ment, seniority or social allowances; ensure that the Labor Law expressly provides for equal remuneration of women and men for work of equal value; protects the rights of women employed on fixed-term contracts to paid maternity leave and to return to work after childbirth.

It also requires states to introduce special non-transferable paternity leave to promote the active participation of fathers in child-raising; and to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.

It further requires states to provide special protection to women during pregnancy in types of work proved to be harmful to them and their baby.

Access to Justice

The Secretary General of the UN has stated that the “United Nations has learned that the rule of law is not a luxury, and that justice is not a side issue. And we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We must take a comprehensive approach to justice and the rule of law. It should encompass the entire criminal justice chain – not just police, but lawyers, prosecutors, judges, and prison officers – as well as many issues beyond the criminal justice system. We must make better use of the resources we have. We have taken steps in-house to help all agencies work together, so that we can better identify justice and rule of law issues in our reports to this Council. But a one-size-fits-all approach does not work. Local actors must be involved from the start – local justice sector officials and experts from government, civil society, and the private sector. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace.”

The CEDAW Committee has repeatedly made the case that de jure and de facto access to adequate and effective judicial remedies is essential towards advancing the rights of women in all spheres, including civil, political, economic, social and cultural.

Access to Justice is a basic human right – it is an essential tool in ensuring the full realization of all human rights. Respect and protection of human rights can only be guaranteed with the availability of effective judicial remedies. When a right is violated or damage is caused, access to justice is of fundamental importance for the injured individual and it is an essential component of the rule of law.

Effective access to justice provides women a means to exercise choice and actively claim the entire range of rights without discrimination on any grounds, including civil and political rights such as to participation, to protection of their rights to life, liberty and security of the person, to freedom from torture and economic, social and cultural rights such as to health, education, work, social security, an adequate standard of living, to take part in cultural life etc. and the resources to realize all rights.

It also empowers those who are disadvantaged to seek full, appropriate and effective redress when their rights are violated.

As such the AHRD should address very specifically access to judicial justice, administrative and quasi judicial justice, as well as informal mechanisms of justice, which decide on and create jurisprudence on rights being violated and provide the required remedies.

Access to this type of justice takes into consideration all the substantive, structural, economic, cultural, social or political obstacles to this access, and also includes in the remedies access to economic, cultural, political, social, civil rights that have been denied on grounds of discrimination against women based on sex and/or gender, inextricably linked with other

factors that affect women, such as race, ethnicity, religion or belief, nationality, health, status, age, class, caste and sexual orientation and gender identity.

Right to Development

Corporate social accountability **must be extended to international financial institutions and multilateral development banks**, whose social safeguards which address issues on environment, involuntary resettlement, indigenous peoples, health and gender as well as public communications (disclosure and consultation) let alone are not always implemented with the highest standards. In fact, these have been circumvented on different occasions even in the name of development.