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State obligations under CEDAW to eliminate the social barriers that undermine women's access to justice

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Madam Chair, distinguished members of the Committee, my fellow panellists, ladies and gentlemen,

I have been asked to speak about the *social barriers* that impede women's access to justice—those aspects of our social and cultural lives that influence the development and operation of our justice systems and that play a defining role in whether or not justice is achievable for women.

Women encounter numerous social barriers in their efforts to seek justice: limited awareness of women's rights; cultural perceptions of men (and not women) as rights-holders; fear of stigma and reprisals; and, for example, the inability to claim rights when fighting for survival, such as in conflict situations or when fleeing a situation of domestic or family violence.

The particular barrier I want to focus on affects all women and was raised as an issue of concern in over half of the submissions received by the CEDAW Committee for today's General Discussion. It's the issue of gender stereotyping.

Harmful gender stereotypes and the practice of wrongful gender stereotyping affect women's ability to obtain justice in diverse and complex ways.

Firstly, gender stereotyping affects women's experiences as **victims** of human rights violations, beginning with whether or not a violation of women's rights is perceived to have occurred through to whether or not women are able to obtain reparations for those violations.

Let me explain.

Gender stereotyping is often a key factor in the failure of states to recognise violations of women's rights, such as in cases where states fail to criminalise marital rape or the rape of trans women.

Stereotyping has been shown to discourage women from reporting or pursuing violations of their rights. And, for some women, for example women with a disability or women subject to male guardianship laws, stereotyping has led to the denial of women's legal capacity and their ability to pursue complaints in their own right.

Stereotyping has also played a significant role in the failure of states to investigate and prosecute violations of women's rights, significantly reducing women's chances of obtaining justice. In the recent case of *Isatou Jallow v. Bulgaria*, for example, we saw how the stereotype of men as heads of households and the related assumption of male superiority influenced the decision of the State Party to investigate allegations of domestic violence made by Jallow's partner, but not by Jallow herself.

Stereotyping has influenced the treatment of women by a range of different actors within the justice system, placing them at a distinct legal disadvantage. For example, the various inquiries into abduction, rape and murder of women in Ciudad Juárez, Mexico, have revealed how state authorities failed to conduct timely and effective investigations into these serious human rights abuses and, instead, made potential victims responsible for their own protection because of their perceived failure to comply with prescriptive stereotypes—they were out at night, had boyfriends or because of the clothes they were wearing. The case of *Atala Rifo and Daughters v. Chile*, decided by the Inter-American Court of Human Rights, provides another example. It highlighted discriminatory treatment in child custody proceedings

resulting from harmful stereotypes related to the capacity and suitability of a lesbian parent to care for her children.

There are also numerous examples of states failing to punish and remedy violations of women's rights as a result of gender stereotyping. *R.K.B. v. Turkey* provides such an example. The Committee held the State Party accountable in that case for the failure of its courts to challenge and reject evidence submitted by an employer in an unfair dismissal case, which relied on sexual stereotypes and the related assumption that "extramarital relationships [are] acceptable for men and not for women and that only women [have] the duty to 'refrain from even the slightest offence against morality'."

Secondly, in addition to affecting women's experiences as victims, gender stereotyping undermines the role and perceptions of women as **witnesses** within the justice system.

There is a long history of women's credibility as witnesses being questioned on the basis of stereotypes as well as women's non-conformity with stereotypes. For some women, including women with a disability, the effects of stereotypes are particularly pronounced. *Karen Tayag Vertido v. The Philippines*—the case initiated by my fellow panellist and now the leading international decision on stereotyping—highlights how stereotypes affect perceptions of the competence of female witnesses. The CEDAW Committee concluded in that case that the trial judge's reliance on stereotypes was a determining factor in her forming a negative view of the credibility of Karen Vertido's testimony and a favourable view of the accused's testimony.

In some cases, as we heard from Mr Tayler, States Parties have enshrined stereotypes related to women's credibility as witnesses into their laws and rules of procedure, requiring women, but not men, to satisfy additional evidentiary requirements, such as corroboration by a third party.

Thirdly, female **offenders** are also affected by gender stereotyping. By this, I mean that gender stereotyping can influence the introduction of different crimes and whether or not women are charged with and convicted of criminal offences.

States will often criminalise behaviour that falls foul of prescriptive gender stereotypes and, at the same, will often take punitive action against women who fail to conform or only partly conform to those stereotypes. For instance, gender stereotypes play a significant role in the criminalisation of sex work and abortion as well as in relation to the practice of charging rape survivors with adultery in cases where they have been unable to prove rape.

And, finally, gender stereotyping also affects women's ability to **participate in the justice system**—as judges, as lawyers, as prosecutors, as jurors and as law enforcement officials. And, as we all know, women's level of participation in the justice system has significant implications for women's ability to access justice on a basis of equality with men.

The multiple and complex ways in which stereotypes and stereotyping affect women's ability to access justice reinforce the importance of adopting a holistic view of the obligations set out in articles 2 and 15 of CEDAW. We need to consider the obligations in these articles not only in their own right, but also in light of CEDAW's

overarching object and purpose and in light of crosscutting obligations, like those obligations found in articles 2(f) and 5 of CEDAW.

When articles 2(b), 2(c), 15(1) and 15(2) of CEDAW—the primary focus of today’s discussion—are interpreted in conjunction with articles 2(f) and 5, it is clear that States Parties must take all appropriate measures to address stereotypes and stereotyping that undermine women’s ability to access justice. In other words, it is not enough for States Parties to guarantee women equal access to justice in their laws and policies. They must also take steps to address the barriers that women encounter—in this case, harmful gender stereotypes and wrongful gender stereotyping—so that women are able to access justice in practice.

The Committee’s General Recommendation on access to justice provides an important opportunity to acknowledge that addressing stereotyping is an important aspect of States Parties’ obligations to ensure women equal access to justice. Perhaps more importantly, it provides an opportunity to elaborate the content and meaning of those obligations and to provide practical guidance on the types of measures States Parties should adopt to eliminate this particular social barrier.

The General Recommendation might explain, for instance, that States Parties must adopt legislation and other measures to prohibit wrongful gender stereotyping in the justice system as well as in other areas of life.

It might clarify that courts and tribunals must effectively enforce legal protections against wrongful gender stereotyping and provide reparations to women whose access to justice has been compromised as a result of being wrongly stereotyped.

The Committee might also clarify that States Parties are obligated to take all appropriate measures to ensure that gender stereotyping does not nullify or impair women’s right to equality of and before the law. For example, drawing of the Committee’s decisions in the *Vertido* case and *V.K. v. Bulgaria*, the Committee could again confirm that

the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence....

It might also clarify, as the Human Rights Committee has done, that stereotypes should not be a determining factor in deciding the extent of women’s legal rights and protections.

And, finally, the Committee might make it clear that States Parties must ensure that the legal capacity of women is not denied or restricted on the basis of harmful stereotypes or wrongful gender stereotyping.

In addition to addressing stereotyping as part of its General Recommendation on access to justice, I would encourage the Committee to consider developing a stand-alone General Recommendation that elaborates the full extent of States Parties’ obligations with respect to gender stereotyping across all areas of life. After all, the stereotypes that affect women’s ability to access justice are rarely—if ever—limited to the justice system.

In conclusion, I would like to congratulate the Committee on its leadership in developing a General Recommendation on the important issue of women's access to justice. The Recommendation will make an invaluable and much needed contribution to women's access to justice around the world. I would also like to thank the Committee, the Office of the High Commissioner for Human Rights, the United Nations Development Programme and UN Women for the opportunity to join this conversation and to share some of my views on stereotyping.

Gender stereotyping has been proven to affect a wide range of women's rights—and women's right to access justice on a basis of equality is no exception. If we are to succeed in addressing this issue, we need to tackle it with vigour at every available opportunity. And this includes in the Committee's General Recommendation on access to justice.

Thank you