

CEDAW Right of non-discrimination and State Obligations in connection to Trafficking in Women

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Abstract

Trafficking in human beings as a practice mostly involves women and is gender determined. Discrimination against women is both a push factor and a product of trafficking in women. The CEDAW (Convention for the Elimination of all forms of Discrimination of Women) is the central reference point in the context of the right to be free from discrimination regarding trafficking in women, since it is an instrument that deals exclusively with gender discrimination in an encompassing way. In 1979, the CEDAW addressed the issue of trafficking in women. This pivotal Convention for the affirmation and implementation of women's human rights sets out to assure respect for the human rights of women through elimination of all forms of discrimination against them, and thus it recognized trafficking of women as a product of the ongoing discrimination against women. CEDAW distinguishes between negative and positive obligations of states in addressing discrimination against women. It developed a typology of state obligations: the obligation to respect, fulfil and protect with respect to trafficking of women, and women victims. On the bases of the theoretical background the scope of application and the concept of the right affected by the practice of trafficking was established and analysed. The relevant state obligations with respect to the right to be free from discrimination affected by the practice of trafficking and the breaches of obligations in the context of trafficking that amounted to the violations of the right were identified, thus connecting it to the set of positive state obligations under CEDAW and the possible prevention and protections actions that derive from those international standards.

INTRODUCTION

Because trafficking in human beings as a practice mostly involves women and is therefore gender determined, the CEDAW will is the central reference point in the context of the right to be free from discrimination, since it is an instrument that deals exclusively with gender discrimination in an encompassing way. In 1979, the subsequent Convention for the Elimination of all forms of Discrimination of Women addressed the issue of trafficking in women. Even though this pivotal Convention for the affirmation and implementation of women's human rights sets out to assure respect for the human rights of women through elimination of all forms of discrimination against them, it only recognized trafficking of women as a product of the ongoing discrimination against women. It was silent on the violation of human rights suffered by women in the process and aftermath of trafficking per se. Even though the CEDAW Convention did not define trafficking nor the concept of exploitation of prostitution, it is very significant that they included trafficking in women explicitly, and provides for explicate set of obligations on part of State parties to it with respect to prevention, criminalization and protection of women victims.

Scope of application of CEDAW with respect to trafficking in women

The Committee on the Elimination of Discrimination against Women, has observed that non-discrimination also includes 'gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately, and it includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'

The Convention on the Elimination of All Forms of Discrimination against Women has a broader application, and covers acts falling within the private sphere. The Committee on the Elimination of Discrimination against Women has pointed out that discrimination under the Convention is not restricted to action by or on behalf of Governments (see Articles 2(e), 2(f) and 5). For example, under Article 2(e) the Convention calls on States Parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. The Committee, in its concluding observation on Uzbekistan's periodic report upheld this horizontal application of the Convention especially accenting the possibility of its direct horizontal application in front of domestic courts:

'166. The Committee expresses its concern that, although the Constitution and the domestic laws provide for the equality of all citizens, they do not contain a definition of discrimination against women modelled on article 1 of the Convention, which prohibits both direct and indirect discrimination. The Committee also expresses its concern about the status of the Convention, and whether its provisions can be directly invoked before the courts.'

Positive obligation stemming from CEDAW

Article 2 of the Convention, imposes on the States parties the following obligations:

'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g) To repeal all national penal provisions which constitute discrimination against women.'

The Convention provides more positive obligations for the State parties with respect to the conduct of the private persons and different cultures towards women within societies than the

ECHR and the ICCPR. In Article 5(a), the Convention recognizes that discrimination against women is often preconditioned by social and cultural norms. To that end, it imposes on governments the duty 'to modify the social and cultural patterns of conduct of men and women ... which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' In that respect, Article 5 lays down the bases for fighting the root-causes of trafficking in women and, as such, should be read in conjunction with Article 6 of the CEDAW targeting trafficking in women. Most countries in their state reports have connected Article 5 to Article 6 provision regarding trafficking in women. The Committee in its General Recommendation 19 on Violence against women has reaffirmed the influence of cultural settings on the status of women and its connection to the exploitation of women:

'11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.'

Moreover, the Convention in Articles 7 and 8 provides for the elimination of discrimination against women in the political and public life of a country. In Article 10, prohibits discrimination in education; in Article 11 in the area of employment; in Article 12 in the area of health care; and in Article 13 in other areas of economic and social life.

All of these positive obligations, articulated in the Convention with respect to actions of government officials and of private persons as well, target improvement in the status of women in societies and, thus are the corner stone in the prevention and the fight against trafficking in women. It is important to note that the Convention on the Elimination of all Forms of Discrimination against Women prohibits all types of discrimination against women; in Article 6 regards trafficking in women as a form of any such discrimination against women. The CEDAW Committee has addressed trafficking in women in the context of Article 6 of the Convention on the Elimination of All Forms of Discrimination and Trafficking in Women in a very broad manner. By addressing trafficking in women, the CEDAW Committee has recommended to the State Parties a number of practical measures to help eradicating trafficking in women.

The Committee has stressed the need for improvement in the area of female employment, stipulating positive obligations that extend to the conduct of private persons. In the concluding observation on Jordan, for example, the CEDAW Committee expressed its concern 'that women make up only 13.6 per cent of the paid labour force. It also expressed its concern that

restrictive employment legislation in the area of night work and regulations on jobs that ban them for women reinforce women's difficulties in obtaining paid employment,' which in turn, seriously affects the substantive equality of women and men. With respect to the positive obligations that the State has in the area of employment, the CEDAW Committee has pointed out that the States, apart from the obligation to halt the discrimination in society against women with respect to employment also have to eradicate harmful customary practices applied to women by private persons, and to amend legislation in the area of employment in a view not to be discriminatory towards women:

'293. The Committee is concerned that the State party's Constitution continues to contain provisions that discriminate against women, in particular in the area of nationality and employment, a fact that is explicitly recognized by the State party. It is further concerned at the slow pace of legislative reform to bring discriminatory legislation into conformity with the provisions of the Convention and to eliminate customary practices that discriminate against women.'

This link between poverty and unemployment on one hand and the trafficking in women on the other has been recognized by the Committee on the Elimination of Discrimination against Women in General Recommendation No. 19:

'14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.'

Second area of concern is education. Discrimination against women with respect to education is also a significant and serious contributor to trafficking in women. With little or no access to education women and girls have fewer opportunities to find work within their countries. Moreover, they usually do not have information about the dangers of trafficking. Many countries that are origin countries for trafficking have discriminatory educational systems or traditional discriminatory practices connected to education, which have a dramatic impact on women. For example, the CEDAW Committee has addressed this problem in its concluding observations on Nepal (origin country for trafficking in women):

140. The Committee is concerned at the very low literacy rate amongst women, especially in rural and remote areas, and the persistence of both a quantitative and qualitative gender gap at all levels of education. It is also concerned that the Basic Primary Education Programme covers only a small number of girls and women, and that illiterate women are systematically barred from vocational training because of the minimum educational requirements for entry into vocational centres. The Committee is also concerned that school curricula and textbooks convey gender stereotypes and entrench a vision of male superiority.'

Third area of concern is violence against women. Violence against women with respect to trafficking in women can be understood in a narrower and broader context. In a narrower context it is one of the root causes or factors that contribute to trafficking in women. For example, the Special Rapporteur on Human Rights in her report in 1995 on Violence against

Women, its causes and consequences, found that most of the women that end up in prostitution, and as victims to trafficking, have been victims of domestic violence. In a broader context, it can be said that violence against women as a category encompasses trafficking in women as well. Nevertheless, this type of discrimination in private or public life against women has a particularly corrosive effect on women either way. Violence against women encompasses, inter alia, 'physical, sexual and psychological violence occurring in the family and in the general community, including battering, sexual abuse of children, dowry-related violence, rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women, forced prostitution, and violence perpetrated or condoned by the state.' The CEDAW Committee has addressed violence against women in General Recommendation 19 as well as in its general observations on country reports. One example of progressive attitude towards the criminalization of prostitution and violence against women is that of Sweden, which, in 1998, passed a law that created a new offence: 'gross violation of a woman's integrity' including prostitution as a type of violence against women. In the authors opinion this approach taken by Sweden could be used as a model by other countries willing to achieve gender equality, and to prevent trafficking in women.

Trafficking in women as such has been addressed directly by the CEDAW Committee in variety of cases concerning State Reports and General Recommendations. In its General Recommendation 19, the Committee has stated that 'specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation.' The CEDAW Committee has further elaborated state obligations arising under the Convention and not explicitly stated in any of its articles. However, it is through the concluding observations on the State reports, examined below that the Committee has confirmed and entrenched the need for positive action on part of Governments with respect to their positive obligations under the CEDAW to prevent trafficking, to prosecute traffickers and to protect and assist the victims of trafficking.

Discrimination against women can occur together with violations of other substantive human rights as violations perpetrated on the victims of such discrimination. For example, the victims of trafficking often face detention and prosecution for illegal status in the countries of destination. Often they are prosecuted for engagement in prostitution, whereas the traffickers and others responsible parties are unpunished or insignificantly punished due to the lower status of women in that society compounded often by prejudice against prostitutes. Consequently, for example, the Committee on the Elimination of Discrimination against Women has urged Uzbekistan to:

'179. The Committee urges the Government to include in its next report more information and data on the situation of trafficking of women and girls and on progress made in that area. The Committee considers that comprehensive measures should be developed and introduced in order to address the problem effectively, including prevention and reintegration and the prosecution of those responsible for trafficking.'

The importance of having policies that will target trafficking in women is clear in the CEDAW Committee's concluding observations on Luxembourg. The Committee expressed its concern: 'that the State party has not developed comprehensive policies to combat trafficking in women and girls.' In addition, it recommended:

'313. The Committee recommends that the State party develop comprehensive policies and programmes to combat trafficking in women and girls, including measures to prevent trafficking in women and girls, the collection of data, the provision of services for trafficked women and girls and measures to penalize those who are involved in such trafficking.'

In its concluding observations on Lithuania, the CEDAW Committee noted that the omission on the part of the government to identify the victims of trafficking as victims, and consequently penalizing them under the laws on prostitution while circumventing the penalizing of traffickers, pimps and other persons involved in the exploitation creates a situation in which:

'criminal penalties imposed only on prostitutes entrench sexual exploitation of women" and thereby violate Article 6.'

Furthermore, in the CEDAW Committee's concluding observations on the Netherlands, the Committee expressed its concern for the huge number of non-European women trafficked to and in the Netherlands. It urged the Government of the Netherlands to ensure that trafficked women are provided with full protection in their countries of origin or to grant them asylum or refugee status.

This interpretation of discrimination against women vis-à-vis trafficking in women is most elaborate and useful. It should be adopted by other treaty bodies that could use the CEDAW position elaborated in this text.

Moreover, the CEDAW Committee has also concentrated on the effective combating of trafficking in women by relying on the positive obligations flowing from non-discrimination. It has done so by expressing its concern about the effective prosecution of traffickers; it also has affirmed the important role of the victims of trafficking as witnesses in trafficking cases in its concluding observations on Germany. The CEDAW Committee has pointed out the importance of adopting legal and non-legal measures to target trafficking in women. It has also noted that the cooperation of the receiving country with the country of origin is a step up in the successful fight against trafficking in women and also it can be a tool in the protection of the human rights victims against further violations. The CEDAW Committee, in connection to practices that mitigate discrimination against women, has stressed that practices such as sex phone lines have to be reconsidered since they generally encourage discriminatory views regarding women as sex objects. With respect to the referred to non-legal measures, the Committee in General Recommendation 19 has recommended State parties take effective measures to ensure that the media respects and promotes respect for women.

The CEDAW Committee has taken the notion of the State's obligations with respect to trafficking in women a step further by recognizing that in the successful fight and prevention of trafficking in women, measures also must address the demand for prostitution. It also observed that, on a level of protection and assistance the states have to take active steps in order to support and rehabilitate women involved into prostitution. For example, in the CEDAW Committee's concluding observations on Croatia it stated:

'38. The Committee urges the State party to step up its efforts to combat trafficking in women and girls, including finalization and implementation of its Operative Plan for Prevention of Trafficking, 2004 to 2008. The Committee further calls on the State party to take all appropriate measures to suppress exploitation of prostitution of

women, including through discouraging the demand for prostitution and taking measures to rehabilitate and support women who want to get out of prostitution.'

One mechanism for meeting State's obligation to promote the rights of women under CEDAW is affirmative action and the adoption of temporary special measures as a method to achieve substantive equality. The text of CEDAW seems to allow for 'temporary special measures' in Article 4(1) and can be said to imply an obligation to adopt 'temporary special measures' aimed at achieving substantive equality for women. This is confirmed by the previously conducted analyses noting that the goal of CEDAW is to not only eliminate discrimination against women, but also to eliminate direct and indirect discrimination that will definitely require the use of temporary special measures.

This is crucial with respect to the prevention of trafficking and to addressing issues of the causal factors of trafficking. The obligation to take special measures aimed at realizing substantive equality does not rely solely on the 'temporary measures.' It also involves as General Comment 25 states, measures that will provide for non-identical treatment of women and men recognizing their differences in order to achieve the real substantive equality: 'it is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences'.

General Comment 25, also stresses that the 'state parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1 to accelerate the achievement of a concrete goal for women of de facto or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures'.

As to the question of remedies available under CEDAW, in General Recommendation 5 the CEDAW Committee announced that the State Parties should make more use of temporary special remedial measures such as positive action, preferential treatment, or quota systems to advance women's integration into education, employment, politics and economy.

The Human Rights Committee has also identified positive state obligations to adopt special measures (and thus differential treatment) through its typology of state obligations. More specifically, the HRC has several times recommended to States to take positive measures especially with regard to women. These positive measures could consist of (additional) training or education in order to enhance employment and higher education possibilities. To some extent, this obligation to adopt differential measures is closely related to an obligation to adopt affirmative action measures. General Comment no 18 on non-discrimination explicitly introduced the requirement to take affirmative action, which would flow from the equality principle:

'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant'

CONCLUSION

All human rights are not absolute and some of them have limitations provided for in their respective article. CEDAW distinguishes between negative and positive obligations, and developed a typology of state obligations: the obligation to respect, fulfil and protect with respect to trafficking of women, and women victims. On the basis of the theoretical background the scope of application and the concept of the right affected by the practice of trafficking was established and analysed. The relevant state obligations with respect to the each relevant right affected by the practice of trafficking and the breaches of those obligations in the context of trafficking that amounted to the violations of the rights concerned were identified, thus connecting it to the set of positive state obligations under CEDAW and the possible prevention and protection actions that derive from those international standards.

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