

International Human Rights Mechanisms and the Bangkok Rules

This paper focuses on efforts by the United Nations human rights mechanisms to advance protection of the rights of women in detention or prison through the application of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the 'Bangkok Rules').

International human rights law protects the rights of all persons, including women, who are arrested or detained. The right to liberty and security of person prohibits arbitrary arrest and detention and provides minimum guarantees to those detained and the right to humane treatment while in detention.¹ There is a comprehensive framework of norms and standards for the protection of persons deprived of their liberty. However for many women deprived of their liberty, deeply rooted gender discrimination is often manifest in laws and practices that discriminate against them in the criminal justice system. For certain groups of women who are deprived of their liberty, gender discrimination is compounded by the intersection of amongst others, disability, poverty, minority status, professional status including as sex workers, women human rights defenders or and members of the opposition. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has noted that failure by the State to address the specific needs of women in detention facilities constitutes discrimination. Moreover, it recommends State parties take general measures to, inter alia, protect the dignity, privacy, as well as the physical and psychological safety of women detainees, girls and women detained in mixed-sex prisons;² women political activists;³ refugee women, women asylum seekers⁴ and migrant women and to provide safeguards to protect women detainees from all forms of abuse, including gender-specific abuse.⁵

Traditionally, the framework for the treatment of pre-trial detainees and persons who have been convicted of a crime and who are imprisoned has been the Standard Minimum Rules for the Treatment of Prisoners, commonly referred to as the Standard Minimum Rules. The Standard Minimum Rules articulate rules applicable to the treatment of women prisoners. For example, the Rules stipulate that men and women shall be held in separate institutions as far as is possible, and if an institution receives both men and women, separate premises

¹ Arts 10 and 11 of the UDHR, Arts 9 and 14 of ICCPR, UN Standard Minimum Rules for the Treatment of Prisoners, Art. 5(a) of ICERD; Art. 15 of CEDAW; and Art. 40 of CRC, the UN Body of Principles for the Protections of All Persons under any Form of Detention or Imprisonment, Other documents include: Basic Principles for the Treatment of Prisoners, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Code of Conduct for Law Enforcement Officials. There are those that specifically addresses juveniles: United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"). At the regional level, Art. 7 and 26 of AfCHPR; Art. 17 and 30 of AfCRWC; Art. 8 America CHR; Art. 7 of Africa CHR; Arts. 6 and 7 of ECHR and Arts. 2, 3 and 4 of Protocol 7. For further information see also General Comment No. 32(2007) of the Human Rights Committee on Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32)

² CEDAW/C/CAN/CO/7, para. 33.

³ CEDAW/C/BLR/CO/7, para. 25.

⁴ CEDAW/C/MYS/CO/2, para. 27.

⁵ Communication No. 23/2009, paras 7.4, 7.5, 7.9.

will be allocated to women. In addition, it contains provisions under medical services that are specific to women such as that women are to receive all necessary pre-natal and post natal care and treatment, that the birth of a child shall take place in a hospital outside the prison if possible, as well as provision for a nursery for infants when they are allowed to stay in the premises with their mother. The Standard Minimum Rules also provide that in institutions with both men and women, the part of the institution set aside for women shall be under the authority of female wardens, and those women prisoners shall be attended and supervised only by women officers, except for professional staff such as doctors and teachers. It is further stipulates that no male staff member shall enter the part of the institution set aside for women unless accompanied by a female officer.

In October 2010, the General Assembly approved the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) to supplement to the Standard Minimum Rules. The Bangkok Rules are the first United Nations standards for the treatment of women offenders and contain gender-specific provisions concerning, for example, personal hygiene, health-care services, mental health care, HIV-related prevention, treatment care and support, substance abuse treatment, suicide and self-harm prevention services. It also contains rules on searches, discipline and punishment, contact with the outside world, and juvenile female prisoners. There are also provisions relating to the treatment of specific categories of women prisoners such as those who are foreign nationals, minorities or from an indigenous group.

There are other documents at the international level that effect on women in detention or prison. Firstly, the Principles and Guidelines on Legal Aid in the Criminal Justice Process. These Principles were developed with the supported by the United Nations Office on Drugs and Crime (UNODC) and with the involvement of the Office of the High Commissioner for Human Rights (OHCHR). The Principles and Guidelines facilitate access to legal aid for women who lack sufficient resources to pay for legal representation. There is currently a process underway to update the Standard Minimum Rules. UNODC, in response to a request contained in the Salvador Declaration adopted at the Twelfth United Nations Congress on Crime Prevention and Criminal Justice, held in April 2010 in Salvador. The Third Inter-governmental Expert Working Group will meet in later this month to consider further revision to the Rules, including how they apply to the treatment of women prisoners. The Office of the United Nations High Commissioner for Human Rights (OHCHR) is also actively participating in this process.

International human rights mechanisms – treaty bodies and special procedures mandate of the Human Rights Council – regularly refer to or require information on the implementation of the Bangkok Rules and frequently remind States to adhere to their standards and principles as minimum guarantees for the treatment of prisoners. For instance, the CEDAW Committee referred to the situation of women deprived of their liberty in its general recommendations on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women;⁶ on women migrant workers;⁷ and on violence

⁶ General Recommendation No. 28 (2010), paras 19 and 31.

against women.⁸ The CEDAW Committee has also addressed women and girls in detention in its concluding observations. It has recommended for State parties to address the conditions of women's detention facilities and treatment of women during detention; violence against women;⁹ guarantee separate accommodation for women detained in mixed-sex prisons;¹⁰ and ensure the provision of adequate health facilities and services, in accordance with the Bangkok Rules.¹¹ The Committee on Torture has recommended that States take prompt and effective measures to combat prison violence more effectively in accordance with the Bangkok Rules and to establish and promote an effective mechanism for receiving complaints, including sexual violence. The Human Rights Committee (HRC) has also recommended that State parties act to ensure without delay that women prisoners are guarded only by female warders, and that there are effective procedures for making and investigating complaints by prisoners and detainees. Other examples include the concluding observations of the Committee on the Rights of the Child (CRC). The CRC Committee has urged State parties to take effective measures, including setting up multidisciplinary programmes and care and rehabilitation measures, to prevent and combat child abuse and ill-treatment of children within the family, at school and other institutions, and in society at large. During the Universal Periodic Review (UPR) process, the UPR Working Group has made recommendations to States to take steps to circulate and implement the Bangkok Rules and to ensure that special needs of women in prisons or in custody are appropriately addressed.

In their thematic reports, a number of the Special Rapporteurs of the Human Rights Council have addressed women in detention facilities. The Special Rapporteur on the right to education has addressed issues related to the rights to education of women deprived of their liberty.¹² The Special Rapporteur on violence against women has addressed issues related to the protection of women deprived of their liberty, such as custodial violence as well as protective custody as a form of detention.¹³ In country visit reports, the Special Rapporteur has addressed several other related issues: sexual violence in detention, the necessity to have female police officers present when women are detained, the use of instruments of restraint, complaints procedures and impunity of corrections officers, privatization of prisons, the need for protection from arbitrary detention and distinct health care needs of detained women.¹⁴ In one report, the Special Rapporteur examined the parental rights of incarcerated or detained mothers, alternatives to detention, sexual violence in places of detention and adequacy of health care in detention facilities.¹⁵ The Special Rapporteur also raised issues linked to criminal policy leading to over-incarceration of women, such as the use of incarceration solely for the purpose of punishment thereby excluding the rehabilitation aspect and mandatory sentencing for certain offences. The Special Rapporteur on trafficking

⁷ General Recommendation No. 26 (2008), paras. 10, 19, 21, 26.

⁸ General Recommendation No. 19 (1992), paras. 6-7.

⁹ CEDAW/C/BRA/CO/7, para. 32; CEDAW/C/YEM/CO/6, para. 42.

¹⁰ CEDAW/C/CAN/CO/7, para. 33.

¹¹ CEDAW/C/GRC/CO/7, paras 34 and 35.

¹² A/HRC/11/8.

¹³ E/CN.4/1998/54

¹⁴ E/CN.4/1999/68/Add.2, E/CN.4/2006/61/Add.2, E/CN.4/2006/61/Add.3.

¹⁵ A/HRC/17/26/Add. 5.

in persons, especially women and children has in the context of country reports raised a number of issues related to persons deprived of their liberty, such as humane treatment of persons detained in immigration centres, guarantees and due process rights of women detained in relation to sexual or moral crimes and legal assistance to detained migrant workers.¹⁶

The Office of the United Nations High Commissioner for Human Rights has assisted States in implementing the recommendations of human rights monitoring bodies on detention so as to enhance protection of the rights of persons deprived of their liberty. The Office provides technical guidance the implementation of the Bangkok Rules by its field offices undertaking monitoring of places of detention, as well as relevant national institutions and NGOs. It also manages direct assistance provided to victims of torture through the Voluntary Fund established by the General Assembly and supports the preventive activities of the Subcommittee for the Prevention of Torture.

There is increased understanding that women and girls in the criminal justice system have specific needs different from those of men and boys and that developing a gender-sensitive criminal justice system is a prerequisite to the full and non-discriminatory realization of human rights for all, and the achievement of gender equality on the ground. Despite important progress over the last few decades as highlighted above, women have yet to be considered globally as key actors in the administration of justice, and their equality before the law and the courts have yet to become a reality in many countries. In many areas the police, and judiciary are male-dominated. Women may find it difficult or impossible to get fair representation and may experience discrimination or even abuse when they seek to do so.¹⁷ Some of the factors that contribute to the marginalization of women and restrict their access to justice are gender disparities among those who make and enforce laws, male domination of informal systems of dispute resolution and lack of access to education. Many gender specific obstacles that stand in the way of women's equality in the administration of justice include laws, policies and practices that discriminate against women.

As highlighted in this statement, there is a multiplicity of norms and standards for the protection of women deprived of their liberty. The main challenge is the effective implementation of the existing and accepted legal framework, which if effectively implemented at the national level, would greatly enhance the protection of all persons deprived of their liberty. Furthermore, more sustained efforts are needed to ensure follow-up on recommendations made by international human rights mechanisms as well as to secure clear political commitments from States, and translate these commitments into concrete practice at national and international levels.

¹⁶ E/CN.4/2006/62/Add.3

¹⁷ Justice Indicators Paper prepared for the UNDP Governance Indicators Project, Oslo Governance Centre, Vera Institute of Justice, April 2005, p.3.