



## Mandate of the Special Rapporteur on violence against women and girls

### Position paper on the definition of “woman” in international human rights treaties, in particular the Convention on the Elimination of All Forms of Discrimination Against Women

#### Special Rapporteur on violence against women and girls, Reem Alsalem \*

*Background: In March 2024, I made an application to submit an amicus brief in the case of Roxanne Tickle versus Giggle for Girls Pty Ltd & Anor (NSD1148/22). I was not granted leave to intervene by the Federal Court of Australia on grounds that the submission was made late. I was asked instead to provide input to the Australian Human Rights Commission, which is intervening in this case, on the meaning of the word “woman” in the Convention on the Elimination of All Forms of Discrimination against Women and Girls (CEDAW) by the 18<sup>th</sup> of March, which I have done. I conveyed my expectation that given my application, the Australian Human Rights Commissioner would bring my submission to the attention of the Australian Federal Court and other parties. At the time of sending my submission to the Commissioner, I had copied the respondents’ solicitor on the communication, acknowledging their assistance to date in navigating the Australian federal legal system up to that point.. The below position maintains the core message of the input sent to the Commissioner, while expanding some of the supporting arguments.*

---

CEDAW does not define the word “woman” “man” or “sex” explicitly. Article 31 of the Vienna Convention on the Law of Treaties (1969) mandates that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>1</sup> The same article also specifies that States shall take into account – together with the context in which a treaty was concluded – any relevant rules of international law applicable in the relations between parties” and any subsequent practice.<sup>2</sup>

In this case, the meaning and practice attached to the definition of “non-discrimination based on sex” becomes important. As CEDAW’s reference to the prohibition of discrimination based on sex mirrors that of the UN Charter, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), “sex and sex-based discrimination is understood as a biological category”.<sup>3</sup> In fact, the resolution establishing the mandate of the Special Rapporteur on violence against women, its causes and consequences 30 years ago stated in its preambular section that the Commission on Human Rights was: “*Reaffirming that discrimination on the basis of sex is contrary to the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination*

---

<sup>1</sup> Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 31.

<sup>2</sup> Ibid.

<sup>3</sup> Chinkin et al (Ed.), the UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary, 1992, first edition, p. 15.

against Women and other international human rights instruments, and that its elimination is an integral part of efforts towards the elimination of violence against women [emphasis added]”.<sup>4</sup>

Such an understanding of the intention and objective behind the term sex goes beyond a mere reasonable interpretation, especially since the word “gender” was not defined at the time in any international human rights treaty leading up to CEDAW. Following the adoption of CEDAW, the Rome Statute of the International Criminal Court included the term “gender”; however it was defined as referring to two sexes, male and female.<sup>5</sup> It can therefore be inferred that the understanding of States that are parties of international treaties such as CEDAW, supported by a long history of state practice, is that the term “woman” referred to a biological female.

While CEDAW did not define “gender”, the Committee in charge of monitoring the its implementation (hereafter, the “CEDAW Committee”) has defined the term “gender” in its general recommendations. These general recommendations are not binding, yet they are recognized to constitute authoritative guidance to States Parties. In General Recommendation No. 28, the CEDAW Committee defined “gender” as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning *for these biological differences* resulting in hierarchical relationships between women and men [emphasis added]”.<sup>6</sup> “This understanding of gender clarifies that the term ‘gender’ is not to be equated with women”.<sup>7</sup> It is also clear that the CEDAW Committee did not equate a person who may identify as a woman and a man with someone who is a woman or a man – the latter being defined as either biologically male or female.

While not addressing or defining the terms “sex” or “gender”, many foundational human rights treaties, and declarations, including CEDAW, enshrine a prohibition of discrimination based on sex which can only be taken to mean as referring to biological sex<sup>8</sup>. In General Recommendation No. 28, the CEDAW Committee reiterated that “the objective of the Convention is the elimination of all forms of discrimination against women on the basis of sex”.<sup>9</sup>

States have an obligation to guarantee non-discrimination in the enjoyment of human rights, including based on sex (i.e. biological sex). Articles 2 and 3 of the ICCPR mandates States Parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, putting an end to discriminatory actions, both in the public and the private sector which impair the equal enjoyment of rights by women.<sup>10</sup>

Based on the above analysis of relevant international law, it is clear that sex and gender are two different concepts. However, international law does not permit any derogation to the prohibition of discrimination against women based on sex. Where tension may arise between

---

<sup>4</sup> Commission on Human Rights, Res 1994/45, preambular para. 13.

<sup>5</sup> Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art. 7(3).

<sup>6</sup> Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, para. 5.

<sup>7</sup> Chinkin et al, the UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary, p. 17

<sup>8</sup> Chinkin et al, the UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary, p. 15

<sup>9</sup> CEDAW Committee, General Recommendation No. 28, para. 4.

<sup>10</sup> International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2, 3.

the right to non-discrimination based on sex and non-discrimination based on gender or gender identity, international human rights law does not endorse an interpretation that allows either for derogations from the obligation to ensure non-discrimination based on sex or the subordination of this obligation not to discriminate based on sex to other rights. Such a reading is supported by the General Recommendation No. 25 of the CEDAW Committee which states that “*biological* as well as socially and culturally constructed differences between women and men must be taken into account [emphasis added]”.<sup>11</sup>

It is my view that international human rights treaties, including CEDAW, prohibit such derogation under any circumstance, including during a public emergency. While some treaties may permit derogations from human rights obligations, such exceptions must not involve discrimination on the ground of sex (amongst other grounds).<sup>12</sup> Article 26 of the ICCPR not only enshrines a general right to equality before the law and, without discrimination, to equal protection of the law, but also directly prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination, including sex-based discrimination.<sup>13</sup> As noted by the Human Rights Committee, “[t]he right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields”.<sup>14</sup>

Building on the implicit understanding that the word “woman” refers to biological females, the CEDAW Committee’s reference to lesbian women can only be understood to mean biological females that are attracted to biological females. Such a conclusion can be inferred from its description of the term “lesbian” as reflected in the Committee’s view under article 7(3) of the Optional Protocol concerning communication No. 134/2018, which refers to “same sex sexual activity”.<sup>15</sup> In expressing its view, the Committee mentions lesbian women as one of the groups of women that experience discrimination (in addition to bisexuals, transgender, intersex, and others).<sup>16</sup>

The CEDAW Committee also took a very strong stance on to intersectionality, i.e., imploring States Parties to take measures to address the discrimination that they may suffer from as a result of both sex and other factors. Specifically, in its General Recommendation No. 28, the CEDAW Committee has explicitly recognized lesbian women as part of the groups of women who are particularly vulnerable to discrimination through civil and penal laws, regulations, and customary law practices. The Committee has also considered that the rights enshrined in the Convention belong to all women, including lesbian women, and that Article 16 of the

---

<sup>11</sup> CEDAW Committee, ‘General Recommendation No. 25 on Temporary Special Measures’ (2004) UN Doc A/59/38(SUPP), para. 8.

<sup>12</sup> Article 4.1 of the ICCPR states that: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

<sup>13</sup> ICCPR, art. 26.

<sup>14</sup> Human Rights Committee, ‘General Comment No. 18: Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.9 (Vol. I), para 13.

<sup>15</sup> CEDAW Committee, ‘Views on Communication No. 134/2018’ (2018) UN Doc CEDAW/C/81/D/134/2018.

<sup>16</sup> *Ibid*, para. 9.2.

Convention applies to non-heterosexual relations.<sup>17</sup> Based on this intersectional approach, the CEDAW Committee, in its jurisprudence has highlighted that discrimination against women was inextricably linked to other factors that affect their lives and which include “*being* lesbian, bisexual, transgender, or intersex”<sup>18</sup>.

4 April 2024

**\* The Special Rapporteur on violence against women and girls, as a Special Procedures mandate of the United Nations Human Rights Council, serves in her individual capacity independent from any government or organization.**

---

<sup>17</sup> CEDAW Committee, ‘Views on Communication No. 134/2018’ (2018) UN Doc CEDAW/C/81/D/134/2018, para 9.7.

<sup>18</sup> CEDAW General Recommendation 35, para. 12.