STATEMENTS AND SPEECHES | MULTIPLE MECHANISMS

International Association of Women Judges, Jubilee Biennial Conference - Statement by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights, Seoul, 12 May 2010

12 May 2010

Distinguished Members of the International Association of Women Judges,
Esteemed Colleagues,
Dear Friends,

It is a great pleasure to participate in the Tenth Biennial Conference of the IAWJ. I was a member of the IAWJ and the proud recipient of your honour award. In 2006, I addressed your Eighth Biennial Conference held in Sydney, and I am delighted to see many of the participants in that Conference and other friends here. I pay tribute to the Korean Chapter of the International Association of Women Judges which has been instrumental in bringing the Conference to the splendid city of Seoul, and has been so generously hospitable.

Today, I speak to you not only as the United Nations High Commissioner for Human Rights, but also as a former judge of the South African High Court, a former President of the International Criminal Tribunal for Rwanda, and a former judge of the International Criminal Court (ICC). With regard to the latter, I am very pleased that my presentation follows that of my friend and former colleague, the current President of the ICC, the Honorable Sang-Hyun Song.

Multi-tasking and wearing several hats simultaneously are what women do in their daily lives everywhere in the world. Indeed, our gathering here both as women and jurists testifies to the fact that our identities have many layers. These layers, in turn, inform our actions and judgment.

In what has become a trite contention, many continue to ask whether judges should not rise above and even shed their personal histories, identities and circumstances in order to fulfill their role of impartial arbiters. These critics maintain that judicial deliberation is clogged or even undermined by gender connotations and gender sensitivity. In short, they would question whether there is such a "thing" as a woman judge.

Echoing our discussion in Sydney, my answer is yes. Not only do I respond in the affirmative, but I also insist that absent a women's perspective in any judgment—be that delivered in a court of law or elsewhere—women's life experience may remain invisible or conveniently bypassed and their rights and entitlements unrealized.

Ideally, the judiciary should reflect the varied groups that make up our societies – women and men, as well as majority and minority groups. This is essential for public trust, as the public perceive its judges to be fair, impartial and representative of the diversity of those who are being judged.

From a gender perspective, I posit that since women and men have diverse life experiences because of their gender differences, they are also likely to have different views regarding particular issues. From a judicial perspective, it can be argued that such consideration of gender may lead to better judicial decisions because the diversity of society is better represented and issues are tackled with fitting sensitivity.

Indeed, many of the enlightened judgments that have advanced the cause of women have been handed down by women judges or have been influenced by their engagement. For instance, and with reference to our gracious hosts, let me refer to the jurisprudence that found the patriarchal and discriminatory "Hoju" or head of the family system, that is, the family head registry system incompatible with the South Korean

Constitution. I also wish to cite the 2009 decision by the Busan District Court that identifies the sexual violence committed by a Korean husband on his Filipino wife as marital rape.

It is certainly both in the interest of better serving the purpose of justice and upholding the rights and views of women that, in the context of the United Nations International Criminal Tribunal for Rwanda, I issued the *Akayesu* ruling that determined that rape may be used as an act of genocide, as well as an act of torture..

Thus, it may come as no surprise to you that in addressing this Conference's theme of judicial challenges in a changing world,

- I will focus on how the international human rights machinery has worked to make the basic human rights principles of equality and non-discrimination alive to the rights of women and relevant to their daily lives.

- I will provide some examples of how these principles and their interpretation by international human rights bodies have been used by judges to advance the interests of women and girls.

- I will then touch on the current situation of women judges, concluding with some thoughts on possible steps that could be taken to increase the number and influence of women judges in countries throughout the world.

Allow me to begin by noting that the principles of non-discrimination and equality lie at the heart of the Universal Declaration of Human Rights. The Universal Declaration outlines a set of universal human rights and fundamental freedoms which are the inherent patrimony of all human beings and entitles all individuals to equal protection under the law.

These principles of non-discrimination and equality are echoed in

the twin International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the other core human rights treaties which translate the aspirations of the Declaration into legally binding norms.

Crucial to leveling the playing field between women and men is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the General Assembly in December 1979. Together with its Optional Protocol, and the 1993 Declaration on the Elimination of Violence against Women, the Convention creates a comprehensive human rights framework for women and girls.

The Convention marked a watershed. It pioneered the concept of substantive equality for women, making clear that although laws may not overtly discriminate against them, women are not considered equal until they enjoy, in fact, the same opportunities and privileges as men. Where women have not achieved substantive equality, it underscores the need for laws, policies and programmes to attain this goal. These may include carefully designed temporary special measures, such as affirmative action, aimed at addressing historic imbalances in access to opportunities.

By requiring that States take measures to ensure equality between women and men in the civil, cultural, economic and political spheres, the Convention underlines the interdependence and indivisibility of all human rights, and provides the basis to move beyond the traditional focus on human rights violations in the public sphere to those committed in the private sphere, including the family.

Further, CEDAW enjoins States parties to take all appropriate measures to modify the social and cultural patterns of conduct, including harmful practices, that are predicated on notions of asymmetric or stereotyped roles for women and men, and that fuel and perpetuate prejudices and inequalities. In sum, CEDAW requires no less than the transformation

of States, communities and families so as to achieve full gender equality.

Since its adoption, the Convention has attracted wide acceptance from States from all regions of the world, with only eight ratifications being required before it achieves universal effect. But implementation lags behind. For example, not all States, which are party to CEDAW, have incorporated its provisions and approach into their constitutions, other laws, policies and programmes. More must be done so that the provisions of this literally vital instrument of international law resonate fully at the national level. It is at that level that a sense of normative ownership has the potential of making a tangible difference in the lives of women and girls. It is there that judges have a profound responsibility to ensure that the lofty goals of this international treaty are translated into reality.

Distinguished Participants,

The human rights set forth in CEDAW and other core human rights treaties are legal rights that can be - and are - tested before courts of law. As State actors, judges have obligations in international law to ensure that substantive rights are enjoyed without discrimination. This duty must be fulfilled when they deliberate on specific cases and devise procedures to be applied in courts, as well as by ensuring fair and equal access to justice.

In discharging this task and in addressing possible discrepancies and gaps in national legislation, policies and programmes, judges can draw on the treaties and the jurisprudence of human rights treaty bodies. These are committees of independent experts charged with the responsibility of considering progress States have made in implementing the international human rights conventions to which they are party. A veritable treasure trove of jurisprudence can be found in the treaty bodies' general comments or recommendations that are

developed on the basis of the examination of periodic reports and information submitted by States, as well as in their views adopted following their consideration of petitions submitted by individuals alleging violations of their rights.
Let me draw your attention to some **general comments** and **recommendations** and views that have addressed the issue of equality and non-discrimination and that are thus pertinent to our discussion today.

I will begin with **general recommendation 19** of the Committee on the Elimination of Discrimination against Women, the treaty body that oversees implementation of CEDAW. Deeply concerned by the growing number of reports of violence against women, the Committee developed this general recommendation to take gender-based violence against women out of the private realm and place it squarely into the public arena of international human rights law where it engages State responsibility.

Recommendation 19 was a crucial building block in the recognition of gender-based violence as a violation of human rights, and provided the impetus for the formulation and adoption of the Declaration on the Elimination of Violence against Women, the creation of the Special Rapporteur -- or independent expert-- of the Human Rights Council on violence against women and the various regional human rights instruments which address this violation.

It was also part of the background to the crafting of gender-based crimes and gender-sensitive procedural rules which are contained in the statutes of the United Nations ad hoc war crimes tribunals and of the International Criminal Court. It contributed to the Security Council's recognition of the gendered nature of peace and security through its adoption of resolutions 1325, 1820, 1888 and 1889.

Many of you will be familiar with the content of general

recommendation 19, not least because a number of IAWJ's members contributed to its formulation. These colleagues will recall that it defines gender-based violence as violence, be it physical, mental, sexual, and other coercive acts, directed at a woman because she is a woman or that affects women disproportionately. You will remember also that it defines such violence as discrimination and a human rights violation whether it is perpetrated by public officials or private actors where the State has failed to act with due diligence to prevent it, and identifies measures States must take to meet that obligation.

Other important general recommendations adopted by CEDAW address equality in marriage and family life, women in political and public life, women's health and women migrant workers, while its general recommendation on temporary special measures provides essential guidance on the meaning of substantive equality and the means that can be used to achieve this goal.

But CEDAW is not the only human rights treaty body which has formulated general recommendations which are pertinent to this discussion. Let me highlight **general comment 28** adopted by the Human Rights Committee which tracks implementation of the International Covenant on Civil and Political Rights and **general comment 20** adopted by the Committee on Economic, Social and Cultural Rights which has the same role in respect to the obligations contained in the International Covenant on Economic, Social and Cultural Rights.

The former makes clear that inequality in women's enjoyment of civil and political rights is deeply embedded in tradition, history, culture, and religious attitudes, which often relegate women to a subordinate role in society. It calls on States to be attentive to these obstacles and ensure that they do not deprive women of the full enjoyment of their civil and political rights under the Covenant. These include violence against

women, and practices that may threaten women's right to life, including access to safe abortion, female infanticide, dowry killings, burning of widows, and extreme poverty or deprivation that may be life threatening.

It mandates the protection of women against trafficking, forced prostitution and slavery, which is often disguised as domestic service or other kinds of personal service. It condemns State law that specifically regulates the clothing to be worn by women, as well as laws or practices, which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement in their homes. It prohibits restrictions on a woman's freedom of movement through, for example, the exercise of marital power over the wife or parental power over adult daughters; and legal or de facto requirements that prevent women from traveling.

These are only highlights of the general comment which merits close reading by all jurists engaged in upholding the principles of equality and non-discrimination in matters such as nationality, equality in marriage including its dissolution, participation of women in the conduct of public affairs, and obligations of States to prevent and punish discrimination and violence against women, including so called honour crimes.

Eminently relevant to our discussion is the definition of non-discrimination put forward by the Committee on Economic, Social and Cultural Rights in its General Comment 20. The Committee made clear that non-discrimination is an immediate and crosscutting obligation for States parties to the International Covenant on Economic, Social and Cultural Rights. In its view, discrimination constitutes any distinction, exclusion, restriction, or preference or other differential treatment that is directly or indirectly based on prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the

recognition, enjoyment or exercise, on an equal footing of Covenant rights.

The Committee considered that direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for any reason related to a prohibited ground. This discrimination also includes acts or omissions on the basis of prohibited grounds when there is no comparable situation.

Indirect discrimination occurs when laws, policies or practices which appear neutral at face value, have a disproportionate discriminatory impact on the exercise of human rights by individuals from certain groups. The Committee also indicated that discrimination includes incitement to discrimination and harassment, and specified that in implementing the principle of equality, States may be required to take positive measures - some may call it affirmative action - in order to diminish or eliminate prohibited discrimination.

A number of treaty body general comments, and particularly general recommendation 19, have been profoundly influential in law reform and the formulation of policies and programmes to address gender-based discrimination and inequality. They have also been relied on by advocates and courts around the world. Let me cite a number of cases, which will be well-known to some of you.

In Canada in 1999 in R v Ewanchuck, the Supreme Court drew on general recommendation 19 and CEDAW in deciding, in a case of alleged sexual assault, that violence against women is as much a matter of inequality as it is an offence against human dignity and a violation of human rights, and that stereotypical assumptions had created the myth that women are sexually available if dressed in a certain way or until they resist.

In Vishaka v State of Rajasthan in 1997, where the local officials failed

to investigate the gang-rape of a social worker campaigning against child marriage, the Supreme Court of India held that by ratifying CEDAW, India had accepted legal obligations to eliminate discrimination against women which required ensuring their protection from sexual harassment in the workplace. The Court also drew on general recommendation 19 to formulate a set of guidelines on sexual harassment to bind private and public employers pending the introduction of suitable legislation.

In 1999 in The State v Godfrey Baloyi in the Constitutional Court of South Africa, my distinguished countryman Albie Sachs drew on CEDAW to uphold the constitutional validity of legislation which reversed the burden of proof in allegations of breaches of interdicts in cases of domestic violence against women.

Just as general comments and recommendations have provided tools for judges, so too have the outcomes of treaty bodies' deliberations on individual petitions. Again there are many examples here, but I was particularly pleased that in 2009 in Opuz v Turkey the European Court of Human Rights drew on views adopted by CEDAW in several petitions relating to domestic violence, including fatal domestic violence, as it decided for the first time that gender-based violence is a form of discrimination under the European Convention on Human Rights.

Colleagues and friends,

I have expanded on treaty bodies' jurisprudence because their legal practice may have a more evident kinship with and relevance to your daily work, and because I wished to show you what a valuable tool it can be for a judge. There are, however, other human rights mechanisms whose output may also be used.

Let me refer to the Human Rights Council, the pre-eminent international intergovernmental human rights body, and in particular to its Universal

Periodic Review (UPR), the process through which the human rights record of all United Nations Member States is reviewed by their peers. Clearly, tracking progress or regress in State law, including actual cases before national courts and tribunals, over human rights issues is of crucial importance in the UPR process.

Judges can reflect on the conclusions and recommendations of the UPR which, typically, highlight areas of concern and gaps in the application of the law. Judges can also ensure that cases emerging through their judicial practice are brought to the attention of other State authorities and thus reflected in their submissions and follow up with the UPR. They can also draw on the expert analysis and advice contained in the reports of the thematic special rapporteurs of the Human Rights Council.

Indeed, the European Court of Human Rights drew on the work of the Special Rapporteur on violence against women in the Opuz case to which I have referred.

In order to bolster this cross-fertilization in human rights standards implementation and norm creation, judges should be cognizant of the activities of National Human Rights Institutions (NHRIs), namely those independent bodies that represent the linchpin between the realm of international and national human rights practice.

NHRIs have built links with judicial educational bodies and professional legal training bodies to engender a culture of respect for human rights within the legal profession. Many NHRIs have a specific mandate to intervene in cases and can make submissions to the court on the interpretation of constitutional and legislative human rights protections in line with international legal obligations. Within their general mandate to increase public awareness and education about human rights, NHRIs carry out activities that promote individuals' understanding of the justice system.

Many NHRIs have a quasi-judicial role complementing that of courts, which provides an alternative forum for the resolution of complaints of human rights violations. Frequently though, NHRIs are dependent on the courts to ensure the enforceability of their findings, so there is a need to effectively manage, or create or enhance this relationship.

I am sure that I have no need to remind this audience of the importance of non-governmental organizations in this context. In particular, the efforts of women's non-governmental organizations have ensured that gender perspectives are now included in our interpretation of human rights thus strengthening basic human rights principles, such as respect for diversity and indivisibility of rights. Many have also been at the forefront in international and national litigation on women's rights, often as advocates or amici. Allow me to pay tribute to one such individual, the world-renowned Professor Rhonda Copelon who sadly passed away last week. Many of you would have known Rhonda as she participated in IAWJ's conferences and activities.

Dear Colleagues,

Building interdisciplinary strategic partnerships at the national level and expanding networks at the transnational level have been key ingredients to women's advancement, irrespective of particular circumstances and specific spheres of action. The judicial profession is no exception. As Anne Marie Slaughter observed in her study *A New World Order*, it is no longer utopian to think of a "global community" of courts where judges around the world interact with one another in full awareness that they are participating in a common enterprise.

She believes that this judicial community is driven by the recognition of the plurality of national, regional, and international legal systems, as well as by a willingness to draw inspiration from different traditions of judicial expression beyond the constraints of geography. This is the

approach that the IAWJ has made its own, in particular through its conferences. I commend such foresight and commitment.

I wish to conclude by offering some observations regarding the steps we should take to bolster the ranks of women judges in terms of effectiveness and numbers at all levels, particularly in the upper echelons of the profession. In countries where women judges sit on appeal courts or supreme courts, I am optimistic. Although I would note that progress has been slow and – yes – sometimes very slow, we are at least moving in the right direction even though much more can be done.

Nevertheless, we will need to work with capable women in national bar associations, women prosecutors and women law professors in an organized way to ensure that those women who are duly qualified and merit being considered for appointment to the judiciary are given a fair chance to become judges. A creation of a network of mentors, perhaps drawn from the IAWJ, for aspiring and junior judges is one strategy to consider.

As for those States that do not yet have women judges, the strategy should be three-fold.

- We should work with women who are in the legal profession in those countries to help identify good candidates for the judiciary and support them in their quest for appointment.
- We should encourage women in the legal profession in those countries to raise the issue of the appointment of women judges through the domestic political processes as an important equal rights issue.
- And finally, we should pursue a dialogue with these States at the international level.

We should also take this opportunity to express our solidarity with judicial colleagues who have been attacked or jailed by their governments, not necessarily because they are women but for their integrity and conviction. I am concerned in particular for Birtukan Mideksa in Ethiopia and Maria Lourdes Afiuni in Venezuela

We must remind Governments of their obligations in international human rights law to implement the principles of equality and non-discrimination both in public and private life so that women are guaranteed the opportunity of aspiring to their day in court.

Thank you.

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