



Comments by the Centre for Human Rights Law on Draft update of General Recommendation No.19 (1992) on gender based violence against women

September 2016

I. Introduction

The Centre for Human Rights Law, SOAS, University of London, commends the Committee for its initiative to update the landmark General Recommendation 19.¹ This update presents an important opportunity to reflect on developments and to provide clear and detailed guidance to states parties on their obligations in respect of gender-based violence. This submission focuses on selected aspects of the draft update, particularly on certain aspects of states parties' obligations that merit further elaboration. It does not address a host of issues that have already been aptly raised by other organisations.²

II. International Standards

The draft update refers to a number of international instruments that deal specifically with gender-based violence against women (para. 1 – text in brackets refers to Draft Update). It does not specifically refer to the obligations of states under general human rights treaties, as interpreted by relevant bodies. Human rights courts and treaty bodies in particular have recognised that several forms of gender-based violence constitute torture or other ill-treatment.³ In turn, they have developed a rich jurisprudence on states' obligations in respect of gender-based violence and adequate forms of reparation.⁴ General Recommendations are by their nature confined to the obligations of states parties under the Convention. However, emphasising that gender-based violations may also constitute violations of other obligations under international law, including those having jus cogens status such as the prohibition of torture, would serve to recall states parties parallel obligations under international human rights law. It would also enable the Committee to draw on relevant developments and jurisprudence in order to set out common standards

¹ The submission was prepared by Dr. Lutz Oette, Director, Centre for Human Rights Law, with the support of Dr. Catherine Jenkins, School of Law, SOAS.

² See e.g. IWRAW, Asia Pacific Partner Feedback to the Update on General Recommendation No.19 on Violence against Women by the CEDAW Committee, 2016.

³ See in particular Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, 5 January 2016, and REDRESS, Redress for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment, October 2013, available at www.redress.org/downloads/publications/1310Rape%20as%20torture.pdf.

⁴ See in particular Case of González et al. ("Cotton Field") v Mexico, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C. No.211, and Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo, UN Doc. A/HRC/14/22, 19 April 2010.

that inform the interpretation of states parties' obligations under the Convention. Such approach is in line with its understanding of the Convention as a "dynamic instrument that accommodates the development of international law".⁵

III. Cross-reference to other General Recommendations

The approach taken by the Committee to cross-reference relevant elements of its previous general recommendations (para. 7) constitutes good drafting practice and helps to maintain overall coherence of the Committee's recommendations. To this end, we suggest that the Committee ensures consistency of terminology and legal concepts referred to, and adequately reflects on recent developments relating to areas covered in previous General Recommendations. In respect of sexual violence in armed conflict, for example, the Committee, in its General Recommendation 30 of 2013, sets out in considerable detail its position on jurisdiction and the applicability of the Convention. The draft update does not fully reflect this understanding of jurisdiction, as it confines the obligation of States parties to being applicable "within their territories" (para. 6). It is silent on the obligations that states may have for extraterritorial acts or omissions related to gender-based violence. While such an obligation can be deduced from General Recommendation 30, spelling it out, and elaborating on it (para. 13) would help to reinforce, and clarify the Committee's position in this regard. In addition, it would be useful for the draft update not mention important documents that states parties are encouraged to use in order to ensure that they adequately discharge their obligations under the Convention, such as the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.⁶

IV. Legislation

Impunity for serious human rights violations, including gender-based violence of women, constitutes a major obstacle both to justice and prevention.⁷ Such impunity is due to a multitude of factors, including legislative shortcomings.⁸ The Draft Update rightly emphasises that states parties "[i]ntroduce, where these do not exist, or strengthen legal sanctions for all forms of gender-based violence against women, commensurate with their seriousness, in all spheres without delay" (p.9, para. (g)). It further specifies that "sexual assault, including rape" is to be characterised as a crime (p.10, (f)). Specifying the elements of rape is important. In state practice, though, there are frequently additional lacunae in respect of other forms of sexual violence.⁹ In this regard, we suggest that the Committee provide further guidance to states parties on the types of sexual violence that would have to constitute crimes under national law. This

⁵ 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, UN Doc. CEDAW/C/GC/28, 16 December 2010, para.2.

⁶ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law, June 2014.

⁷ See 'Accelerating efforts to eliminate violence against women: preventing and responding to violence against women and girls, including indigenous women and girls', UN Doc. A/HRC/RES/32/19, 19 July 2016, particularly para. 4.

⁸ See Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/23/49, 14 May 2013, particularly para. 20.

⁹ See UN Department of Economic and Social Affairs, Division for the Advancement of Women, Handbook for Legislation on Violence against Women, ST/ESA/329, 2010, and, for a detailed study of sub-regional developments in this regard, Rashida Manjoo, Gift Kweka and Suzzie Onyeka Ofuani, 'Sexual Violence and the Law: Comparative Legislative Experiences in Selected Southern African Countries', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, 2011), 269-295.

includes, at the very minimum, forms of gender-based violence of women that are recognised as international crimes¹⁰ or that states have committed themselves to make a criminal offence, such as trafficking and female genital mutilation.¹¹ In that regard, the Committee may also wish to draw attention to the fact that several forms of gender-based violence are recognised as crimes subject to universal jurisdiction, such as where they constitute torture.¹²

The updated General Recommendation would also benefit from setting out in more detail legislative obstacles that states parties must remove or modify in order to discharge their obligations under the Convention. In addition to time limitations explicitly mentioned (p.10, paragraph (1)), this includes in particular amnesties and immunities whose scope may cover acts of sexual violence that constitute serious violations of international human rights law.¹³

V. Prevention

The Draft Update sets out a number of steps that states parties should take with a view to preventing gender-based violence. The recommendations made are generic, applying to gender-based violence in various settings. They offer limited guidance on specific obligations that states parties have in respect of women who are subject to the control of authorities and public service providers, such as in detention and healthcare settings (other than a brief mention of the Bangkok Rules, p.8 (d), fn.28). The United Nations (UN) Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has recently set out in considerable detail steps that states should take in relation to gender-based violence falling within his mandate, which we suggest the Committee draw upon to provide detailed recommendations to states parties under the Convention.¹⁴

The Draft Update refers to the provision of mandatory training for a number of key actors, which includes “[d]omestic legal provisions and institutions on gender-based violence against women, international standards and associated mechanisms and their responsibilities in this context” (p.9 (d) (iii)). Training is an important tool but its effectiveness and impact is often unclear, if not limited due to shortcomings in design and implementation.¹⁵ It is therefore critical to provide further, more specific guidance to states

¹⁰ See in particular articles 7(1)(g) as well as 8(2)(b)(xxii) and 8 (2)(e)(vi) of the Rome Statute. See further ICC, The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

¹¹ Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979; Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2000; and article 5 (b) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003 (“prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilations) respectively. See for an extensive list, articles 33-40 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

¹² See articles 5-8 UN Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment, 1984. See also article 44 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011.

¹³ See generally, Human Rights Committee, General Comment No.31: Nature of the Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18, and, Case of Espinoza González v. Peru, Preliminary objections, merits, reparations and costs, Inter-American Court of Human Rights, Judgment of 20 November 2014, Series C No.289, para. 309.

¹⁴ See Report of the Special Rapporteur on torture, above note 3, paras. 70 and 72.

¹⁵ See Report of the Special Rapporteur on violence against women, above note 8, para. 53.

parties in this regard, both on the content of training, including the documentation of gender-based violence, and on how to ensure its effectiveness.¹⁶

VI. Investigation

Effective investigations into gender-based violence are crucial to ensure accountability and prevention, both in terms of general deterrence and protection of individuals against further violations.¹⁷ The Draft Update makes mention of several of states parties obligations in this regard but not in a single paragraph or section, which risks undermining both the importance of this obligation, and a clear understanding of its various components. In respect of complaints procedures, we suggest that the Committee specifies (p.9, (h)) that investigations should commence even in the absence of a complaints, particularly in cases of serious gender-based violence.¹⁸ The recommendation that businesses and transnational corporations establish internal complaints procedures (p.9, (e)) should be revisited, or at least qualified. In practice, internal complaints procedures, such as by private service contractors in immigration detention, have added a layer of complexity, and delays incompatible with effective complaints procedures.¹⁹ It should therefore be clarified that internal complaints procedures must be effective, must not exclude recourse to the police or other competent bodies, and must not result in delays of an official investigation in case of prima facie evidence that a crime of gender-based violence has been committed.

The Draft Update is silent on documentation even though the latter constitutes a crucial component of effective investigations.²⁰ The lack of adequate documentation of gender-based violence, particularly rape, constitutes a major challenge in practice. Health services in several countries are often not well equipped to react promptly and adequately to rape allegations, medical forms used to report sexual violence are inadequate, and victims of rape face delays in accessing examinations within the critical first 48 hours.²¹ Lacking or inadequate documentation, particularly medical documentation (especially in the absence of psychological expertise and reports recognised by the authorities and the judiciary in the state in question), frequently result in impunity, and undermine the confidence of victims in the criminal justice system. We suggest that the Committee draws attention to the importance of ensuring timely and adequate documentation of sexual violence, with reference to minimum standards and best practice set out in the

¹⁶ See e.g. Committee against Torture, General Comment No.3: Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3, 19 November 2012, para. 35.

¹⁷ Report of the Special Rapporteur on violence against women, above note 8, para. 20: "...State responsibility [obligation] to act with due diligence is both a systemic-level responsibility, i.e. the responsibility of States to create good and effective systems and structures that address the root causes and consequences of violence against women; and also an individual-level responsibility, i.e., the responsibility of States to provide each victim with effective measures of prevention, protection, punishment and reparation."

¹⁸ See in this regard also article 55 of the CoE Convention on preventing and combating violence against women and domestic violence, 2011.

¹⁹ See e.g. REDRESS' Submission to the All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration, Inquiry into the Use of Immigration Detention, October 2014, 6-9, available at www.redress.org/downloads/publications/REDRESS%20Submission%20to%20Detainee%20Inquiry%20%28Immigration%29%203%20October%202010.pdf.

²⁰ See on forensic, scientific and medical evidence in this regard, UNODC, Handbook on effective prosecution responses to violence against women and girls, Criminal Justice Handbook Series, 2014, 102-111.

²¹ REDRESS, Redress for rape, above note 3, 77-80.

Istanbul Protocol and the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.²²

VII. Effective access to remedies and reparation

The Draft Update rightly endorses, and cross-refers to the Committee's General Recommendation 33 of 2015, which sets out in considerable detail states parties' obligations in respect of access to justice for a violation of Convention rights, refers to the Nairobi Protocol and emphasises the transformative dimension of reparation. We suggest that, in addition, the Committee sets out specific obligations recognised in international jurisprudence, such as that states need to provide judicial remedies in case of serious human rights violations, including gender-based violence.²³

The Draft Update provides that states parties "[p]rovide effective reparation to women victims/survivors of gender-based violence" (p.11, paragraph (c)). This is sufficiently broad to include not only direct victims of gender-based violence but also indirect victims, such as family members, who suffer harm as a result. We suggest that the Committee, in line with jurisprudence of international human rights treaty bodies and courts, and recognised standards, sets out in more detail who is to be considered a victim of gender-based violence.²⁴ In respect of the forms of reparation to be provided, in addition to the cross-reference to General Recommendations 28, 30 and 33, we suggest that the Committee also draws on General Comment 3 of the UN Committee against Torture on article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, particularly with respect to the right to rehabilitation.²⁵ The Committee rightly calls on states parties to "consider the creation of specific reparation funds" (p.11, paragraph (c)) and to "implement administrative reparation schemes rather than requiring individual litigation" (ibid.). In respect of the latter, we suggest clarifying that the existence of such a scheme should be without prejudice to victims' rights to seek judicial remedies for serious forms of gender-based violence.²⁶

²² Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1999, particularly Chapter V, 8., paras. 215-232.

²³ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, 16 December 2005, para. 12.

²⁴ See on the notion of victim, ibid., para. 8 and Committee against Torture, General Comment No.3, above note 16, para. 3.

²⁵ Committee against Torture, ibid., paras. 11-15.

²⁶ Ibid., para. 20.