



## Comments on the Draft update of General Recommendation No. 19 (1992) on gender based violence against women by Creating Resources for Empowerment in Action (CREA)

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1. Founded in 2000, Creating Resources for Empowerment in Action (CREA) is a feminist human rights organisation focusing on sexuality, gender and rights, based in New Delhi, India. CREA works at the grassroots, national, regional, and international levels. CREA advocates for positive social change through national and international fora. CREA's mission, goals, and programmes are determined by an analysis of the current global conditions, including for women, girls, sexual minorities, transgender people, sex workers, and women living with disabilities.
2. CREA respectfully recommends the CEDAW Committee to comprehensively address the sexuality, gender and rights aspects of violence that is yet to be comprehensively addressed in international human rights standards.<sup>1</sup> In particular CREA recommends the following:
  - a. ***Recognise the forms of violence, including sexual and sexuality related violence in a more comprehensive way***, including rape, child sexual abuse, forced marriage, female genital mutilation, coercive practices within health services, such as forced sterilization and forced abortion, reparative therapy for lesbian women and girls, violence committed against women because of their real or perceived sexual orientation, gender expression and sexual practices behaviour and expression, such as sex outside of marriage that often leads to hate crimes and honour killings.<sup>2</sup> It should recognise that various forms of violence takes place in intimate personal environments, such as marriage and domestic settings, and is also used as a weapon of war in conflict settings. Often it is committed by people who are in a position of authority and responsibility for the safety and well-being of others, for example in detention facilities and in health-care settings.
  - b. ***Comprehensively address the legal and accountability framework of rape***. The General Recommendation should specifically challenge the traditional understanding of rape, that is till reflected in the legislation of many countries as unlawful sexual intercourse by a man with a woman who is not his wife, through force and against her will and involving vaginal penetration by a penis. Under such a definition, women who have been raped by their husbands, women who have been raped anally, transgender individuals cannot legitimately claim to have been raped. The General Recommendation should specifically recognize that rape can take place within marriage and is a crime in all circumstances. It should recognise that the broader definition of rape should cover coercive invasion or conduct resulting in penetration,

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<sup>1</sup> Count Me In! Research Report on Violence against disabled, lesbian and sex-working women in Bangladesh, India and Nepal

<sup>2</sup> Sexual Health, Human Rights and the Law. World Health Organisation. 2015.

however slight, of any part of the body of the victim/survivor, with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The definition of rape should also be broad enough to be gender-neutral victim/survivor, meaning that it can apply to any person of whatever sex or gender. It should reaffirm that immunity cannot be granted to husbands. It should specifically state that rape should no longer require corroboration of a victim's testimony by third parties<sup>3</sup>.

- c. ***Comprehensively address the concept of gender*** and recognize that gender, gender expression, especially as it relates to sexuality and reproduction is connected as societal, cultural and religious norms and stereotypes, that often perpetuates violence against women, in particular lesbian, women, women living with disabilities, transgender and intersex people and sex workers. The capacity for self-determination, autonomy and bodily integrity needs to be located and examined within this social, cultural, religious contexts, so they can not constrain the enjoyment of human rights. In this context the importance of taking an intersectional approach between violence and discrimination including based on race, age, sexual orientation, gender identity and expression, disability, and ethnic identity, needs to be recognized. State obligations to eliminate harmful gender stereotypes that often lead to violence requires changing the systems that privilege certain gender expressions, and conventionally deem women to remain in their culturally assigned gender roles. For example, through legitimizing violence in the home, discipline women if they express their gender beyond the binary understanding of gender (woman and man) or criminalizing same sex sexual expression. Clear links must be made between *these* violations and the mainstream institutions, practices and customs that reinforce generally applicable gender stereotypes, in order to ensure equal enjoyment of human rights for all.<sup>4</sup>
- d. ***Recognise and comprehensively address vulnerabilities to violence that are often exacerbated by discrimination*** due to their sex, socio-economic status, minority, ethnic and health status, religion, race, sexual orientation, gender identity and expression, disability and bodily diversities of intersex people.<sup>5</sup> In particular, specifically address the nature of violence and State obligations in relation to violence faced by women living with disabilities and violence against women because of their sexual orientation, gender expression and because of their intersex status.

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<sup>3</sup> Rules of procedure and evidence. New York (NY): International Criminal Court Assembly of States Parties. (2002) (Official Records ICC-ASP/1/3); Elements of Crimes. International Criminal Court Assembly of States Parties. (2010) (Official Records ICC-PIDS-LT-03-002/11\_Eng); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Maputo: African Union; 2003; C.R. v. the United Kingdom. Application Nos. 20166/92 and 20190/92. Strasbourg: European Court of Human Rights; 1995. Decided on 22 November 1995.

<sup>4</sup> Alice M. Miller, JD, \*Co-Director, Global Health Justice Partnership of the Yale Law School and School of Public Health, Yale University (USA) Dianne Otto, \*Francine V McNiff Chair in Human Rights Law at the University of Melbourne (Australia) Inclusion and identity: why the UN needs a broad concept of gender to protect human rights. Submission to the UN Human Rights Council. June 2016. (Unpublished)

<sup>5</sup> Report of the Working Group on the issue of discrimination against women in law and in practice - Mission to Chile, A/HRC/29/40/Add.1, 20/05/2015 and Mission to Peru, A/HRC/20/40/Add.2, 25/06/2015; Realizing sexual and reproductive rights. Amnesty International:2012;

*Women living with disabilities* often face multiple and intersecting forms of violence women, as it is described in the recently adopted General Comment No. 3 on Article 6 by the Committee on the Rights of Persons with Disabilities. They are often forcefully institutionalized and abused in institutional settings, face a confluence of gender and disability-based violence,<sup>6</sup> are subjected to forced, involuntary abortions, and sterilization, as well as invasive medical interventions, such as electroshock therapy, without their consent.<sup>7</sup> Their decision making capacity is often substituted by legal representatives.<sup>8</sup> National laws and policies that address the legal capacity of women with disabilities (particularly for persons with intellectual and psychosocial disabilities) provide the system of substitute decision making rather than supported decision making, that is contradictory to CRPD's principles on the recognition of legal capacity and often results in violence, for example in the case of forced institutionalization, sterilization or other forced medical practices.<sup>9</sup> Women with disabilities have a right to make decisions in various areas of their lives, including in relation to their sexual and reproductive choices, marriage and accessing justice, remedies and redress.<sup>10</sup> The responsibility of the State to ensure that the bodily integrity and autonomy of women living with disabilities should be addressed in the document. It shall include the provision of legal guarantees for full, free and informed decision-making and the elimination of forced, coercive and otherwise involuntary interventions and the amendment of laws, regulations and policies in this regard.<sup>11</sup>

*There is increasing documentation of targeted violence against women because of their sexual orientation and gender expression* homophobic and transphobic violence can take many forms, including harassment and bullying in schools, "street" violence and other spontaneous attacks in public settings. Homophobic and transphobic violence can involve a high degree of cruelty and brutality, including beatings, murder, torture, rape and other types of sexual assault. Severe violence and torture occurring in health-care settings has been documented, including denial of medical treatment, use of verbal abuse and public humiliation, and a variety of forced procedures such as

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<sup>6</sup> Report of the Special Rapporteur on violence against women. 2011. A/HRC/17/26.

<sup>7</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. 2013. A/HRC/22/53

<sup>8</sup> World Health Organization: Eliminating forced, coercive and otherwise involuntary sterilization. An interagency statement OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (2014); CRPD General Day of Discussion on Women and Girls with Disabilities (2013).; Art. 12 CRPD and CRPD General Comment No 1, paragraph 31; Art. 15 CEDAW.

<sup>9</sup> See, e.g., National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act (1999), Sec. 14; "Indian Registration Act, 1908," undated, <http://lawcommissionofindia.nic.in/1-50/report34.pdf>; Bhargavi V. Davar, Legal Frameworks for and against People with Psychosocial Disabilities in ECONOMIC & POLITICAL WEEKLY 47, 123-31 (2012), available at [http://www.academia.edu/2457828/Legal\\_frameworks\\_for\\_and\\_against\\_people\\_with\\_psychosocial\\_disabilities](http://www.academia.edu/2457828/Legal_frameworks_for_and_against_people_with_psychosocial_disabilities)

<sup>10</sup> CRPD Committee, General Comment No. 1: Article 12: Equal recognition before the law, U.N. Doc. CRPD/C/GC/1 (2014).

<sup>11</sup> Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. World Health Organization 2014; World Health Organization and the World Bank. (2011) World Report on Disability. Geneva: World Health Organization; 2011. ([http://www.who.int/disabilities/world\\_report/2011/en/](http://www.who.int/disabilities/world_report/2011/en/))



psychiatric evaluation and sterilization. Other types of violence perpetrated by health personnel and other state officials include forcible anal examination for the prosecution of suspected homosexual activities, invasive virginity examination, hormone therapy and genital-normalizing surgery and so called “reparative therapy”. These procedures are medically unnecessary, and can cause serious consequences. Criminalization of same-sex sexual behaviour, and gender expression that does not conform to societal norms can create and intensify discrimination and violence, all of which have direct effects on lesbian, gay, transgender, gender variant and intersex people’s health and well being.

*Transgender and gender variant people* are often subjected to compulsory medical interventions in law and practice without an opportunity for informed decision-making and choice.<sup>12</sup> Their gender identity is pathologized in many countries and they are often subjected to mental and physical examinations, treatments and forced to undergo conversion therapies. Even when they seek health services, they often experience abuse or mistreatment by health care providers.<sup>13</sup> In many countries, they are denied transition related health services.<sup>14</sup> Transgender children often face increased bullying in schools and experience various forms of violence.<sup>15</sup>

*Intersex children and adults* are routinely subjected to multiple forms of discrimination grounded on bodily diversity, due to patriarchal enforcement of binary gender on them.<sup>16</sup> It includes medically unnecessary, often irreversible interventions and genital mutilations throughout their lifetimes – many of these interventions are performed before they are able to provide their informed consent, causing severe physical and psychological suffering, including permanent termination of all or some of their reproductive and sexual capacity.<sup>17</sup> In most cases, there is lack of redress and compensation for such human rights violations, since the practice is considered a medical, rather than a human rights matter.<sup>18</sup> Medical interventions are often proposed to parents of intersex children and conducted on the basis of weak evidence, without

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<sup>12</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. New York (NY): United Nations; 2010 (A/HRC/14/20). United Nations Development Programme. Discussion paper: Transgender health and human rights. New York (NY): United Nations Development Programme; 2013. WHO 2015

<sup>13</sup> Blueprint, 2015

<sup>14</sup> Blueprint, 2015

<sup>15</sup> Herman, Jody. Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>. The State Decides Who I Am: [https://www.es.amnesty.org/uploads/media/The\\_state\\_decide\\_who\\_I\\_am\\_Febrero\\_2014.pdf](https://www.es.amnesty.org/uploads/media/The_state_decide_who_I_am_Febrero_2014.pdf)

<sup>16</sup> (Karkazis 2008; Parens 2006; United Nations 2013a). WHO 2015

<sup>17</sup> Report of the Special Rapporteur (SR) on torture and other cruel, inhuman or degrading treatment or punishment(A/HRC/22/53) para 76-77 (2013)

([http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf))

<sup>18</sup> (Karkazis 2008; Parens 2006; United Nations 2013a). WHO 2015

discussing and considering alternative solutions and without respecting the child's right to informed decision making, bodily integrity and autonomy.<sup>19</sup>

Criminal laws, public decency regulations and policing surveillance systems have all been used in many countries to harass, arrest, torture, rape and abuse people perceived as belonging to these groups.<sup>20</sup>

The General Recommendation should clearly condemn violent crimes perpetrated on persons because of their sexual orientation, gender expression and intersex status, including by law enforcement officials and health care providers, as well as the failure of states to address such crime in their legislation. It should urge states to ensure that these acts are investigated and their perpetrators brought to justice. It should call for the implementation of special measures – including appropriate training of law enforcement and judicial officials – to protect persons in prison against bias-motivated crimes related to their sexual orientation or gender identity.<sup>21</sup>

- e. ***Consider that addressing the accountability of State and non-State actors only at the legislative, executive and judicial level is very limiting.*** Other “levels” shall be included, including at the health sector, media and community level. In addition, recognise that not all women and girls who face violence and discrimination are willing to approach the formal justice system. The informal justice delivery system as well as community level workers, healthcare providers and alternate dispute resolution mechanisms such as mediation can often be the first point of reference for women and girls who are victims/survivors of violence. Their role needs to be recognised and strengthened through capacity building, funding and accessibility. The definition of justice for victims/survivors may vary from person to person and a sanction based approach cannot be the only form of acknowledged redressal.

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<sup>19</sup> (CAT 2011; Cools et al. 2006; Crouch 2007; Goran et al. 2008; Intersex Society of North America 2012; Karkazis 2008; Karkazis and Rossi 2010; Tamar-Mattis 2012; United Nations 2013a). (CAT 2011; Deutscher Ethikrat 2012; Karkazis 2008; OHCHR 2011; Tamar-Mattis 2012; United Nations 2013a; Wisniewski and Mazur 2009).

<sup>20</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. New York (NY): United Nations General Assembly; 2013 (A/HRC/22/53).; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. New York (NY): United Nations; 2010 (A/HRC/14/20).; Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights. New York (NY): United Nations General Assembly; 2011 (A/HRC/19/41).; United Nations Development Programme. Discussion paper: Transgender health and human rights. New York (NY): United Nations Development Programme; 2013

<sup>21</sup> Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights. New York (NY): United Nations General Assembly; 2011 (A/HRC/19/41).; Resolution adopted by the Human Rights Council. Human rights, sexual orientation and gender identity. New York (NY): General Assembly, United Nations; 2014 (A/HRC/RES/27/32).; General Comment No. 2: Implementation of Article 2 by States Parties. Geneva: United Nations Committee Against Torture; 2007 (CAT/C/GC/2)