



To: The Committee on the Elimination of All Forms of Discrimination against Women

From: Global Justice Center

RE: CEDAW General Recommendation on Women's Rights in Conflict and *Jus Cogens* Rules

Dear CEDAW committee members,

The Global Justice Center (the "GJC") is a legal organization whose mission is to promote justice and gender equality using international law. The GJC seeks to create legal precedents and legal tools by advocating for the progressive interpretation, and aggressive enforcement, of international law, including treaty based law, Security Council resolutions ("SCRs"), and customary international law including international humanitarian law ("IHL") and the laws of state responsibility.

The GJC has launched a new legal initiative, the "Geneva Project" which is directly relevant to the work of the Committee on the Elimination of All Forms of Discrimination against Women (the "Committee") to ensure the rights of women in conflict and post-conflict situations. The key to this initiative is our forthcoming White Paper on the obligations of states and the UN system, including treaty monitoring bodies to enforce *jus cogens* rules (including those relating to genocide). The GJC believes that the limited monitoring structure currently in place has led to a failure of these actors to "take all possible measures" to ensure the rights of women in conflict and post-conflict situations.

This is a largely unexplored area of law; specifically, how state mandates under IHL and the customary laws of state responsibility interact with Security Council mandates on peace and security. For example, treaty monitoring bodies retain the same procedures for reviewing and reporting on conflict and non-conflict states, though the framework of applicable international law varies for these two categories of states. The GJC believes that changes are necessary in order to safeguard the rights of women in conflict and post-conflict situations.

The GJC welcomes this opportunity to share some of our relevant legal analyses and we ask that the Committee take the following points into consideration when drafting the General Recommendation on women's rights in conflict and post-conflict situations (the "General Recommendation").

- I. The critical need for the General Recommendation and why it must include re-thinking treaty monitoring procedures

Over the last fifteen years the Security Council has repeatedly acknowledged that the protection of civilians in armed conflict is central to its mandate to address threats to peace. This has led to historic resolutions focused on ending impunity for perpetrators of crimes against civilians during conflict, including sexual violence as a weapon of war and the conscription of child soldiers. These resolutions impose new obligations on all states and on the UN, including all UN treaty bodies.

In particular, the GJC is concerned by the failure of UN monitoring and reporting guidelines to mention the immediate and absolute duties of states and of the UN under IHL and the laws of state responsibility to respond to gross violations of IHL during conflict. UN agencies must ensure that international obligations are met during conflicts and in post-conflict situations, which requires assessments relating to the non-derogable mandates of international law.

The GJC believes that it is imperative that all treaty monitoring bodies, including the Committee, treat the review of states in armed conflict distinctly from the reviews of all other states. For example, what are the questions the Committee must posit when monitoring a state in armed conflict and/or one of the states acknowledged to be at a “high risk of genocide,” such as Burma/Myanmar? Further, what are the obligations of the Committee under relevant international law? If women of ethnic minorities are being raped and enslaved as part of an ongoing genocide in Burma/Myanmar, is there an obligation for the Committee to go further than simply making recommendations?

The GJC appreciates the work of the Committee on this important issue and believes that the General Recommendation is an opportunity to take leadership on this issue and ensure that international mechanisms fully enforce *jus cogens* rules of international law.

II. Relevant international law for the Committee to incorporate into the General Recommendation

Where the Committee engages, in any context, with conflict, post-conflict or transitional situations, the Committee must necessarily engage not only with relevant provisions of CEDAW, but also with the broader framework of international law, which informs interpretation of CEDAW in these contexts. This includes, but is not limited to, international humanitarian law, the Convention on the Prevention and Punishment of the Crime of Genocide, the Responsibility to Protect doctrine, Security Council resolutions and the Rome Statute of the International Criminal Court.

Accordingly the GJC’s written submission is focused on the framework of international law under which the CEDAW committee must situate the General Recommendation, so as to ensure that girls and women of all ages are ensured their complete set of rights under international law.

CEDAW can be used as a tool to implement and enforce the rights of women in situations of armed conflict and beyond. According to Article 2 (c) of the Convention states are to establish legal protection of the rights and women on an equal basis with men. General Recommendation 28 on the obligation of Member States under Article 2 recognizes that “the obligation of States parties do not cease in periods of armed conflict or in states of emergency...[and that] States should adopt strategies and take measure addressed to the particular needs of women in times of armed conflict and states of emergency.”¹

1. International humanitarian law

¹ General Recommendation No. 28 on the core obligations of State parties, ¶ 11, UN Doc. CEDAW/C/GC/28.

As the Concept Note affirms, IHL “establishes the rules applicable in times of armed conflict.” Accordingly, where the Committee engages with countries facing determined or established conflict or post-conflict situations, the Committee must operate within a framework that takes account of relevant IHL in addition to relevant CEDAW provisions. During times of conflict IHL is the *lex specialis* and accordingly the enforcement of human rights needs to be informed by the standards of humanitarian law.²

The Committee recognized this principle in General Recommendation 19 on Violence against women. The Committee stated that among the freedoms protected by the definition of non-discrimination under Article 1 of CEDAW was “the right to equal protection according to humanitarian norms in time of international or internal armed conflict.”³

The Committee is not alone in its recognition of the simultaneous and complementary applicability of IHL and international human rights protections - the treaty body monitoring structure has begun to shift towards incorporating principles of IHL into interpretation of treaties. The Human Rights Committee (the “HRC”) has often relied on human rights instruments in making recommendations and defining the rights of the parties.⁴ Moreover, the HRC’s General Comment 29 specifically addressed the overlap between the ICCPR and IHL during situations of armed conflict,⁵ suggesting that “in situations of armed conflict, both the Covenant and international humanitarian law apply and ‘both spheres of law are complementary, not mutually exclusive.’”⁶ Furthermore, the Committee on Economic, Social and Cultural Rights has directly incorporated IHL obligations as a part of states obligations “to respect” a particular right (“The Committee notes that during armed conflicts, emergency situations and natural disasters the right to water embraces those obligations by which States parties are bound under international humanitarian law”).⁷

For example, girls and women impregnated by rape in armed conflict are entitled to abortions under the non-discrimination mandates of IHL, including Geneva Conventions, its Additional Protocols and customary international law.⁸ This understanding of non-discrimination in the provision of medical care is underscored by CEDAW General Recommendation 24 which states that “[i]t is discriminatory for a State part to refuse to

² International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 I.C.J. 226 (July 8) at para. 25 (“The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, though the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself” (emphasis added)).

³ CEDAW General Recommendation No. 19, 11th Session, 1992.

⁴ David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31:4 U. Pa. J. Int’l L. 1185, 1231 (2010).

⁵ CCPR/C/21/Rev.1/Add.11, ¶ 3.

⁶ Weissbrodt, *supra* note 4, at 1208.

⁷ CESCR, General Comment No. 15 (2002) on the Right to Water.

⁸ Global Justice Center, *The Right to an Abortion for Girls and Women Raped in Armed Conflict: States’ positive obligations to provide non-discriminatory medical care under the Geneva Conventions*, available at: <http://globaljusticecenter.net/publications/Reports/GJCbrief-final.pdf>.

legally provide for the performance of certain reproductive health services for women”⁹ and that “[t]he obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals...other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”¹⁰

Accordingly, the Committee must ensure that when reviewing states in conflict, they specifically request information relating to the provision of non-discriminatory medical care, including abortions, to female victims of rape using both the framework of IHL and CEDAW.¹¹ Where States aren’t ensuring the provision of abortions under both their obligations under CEDAW and IHL, the Committee should recommend that this denial be included in any reparations and remedy framework for violations, including, as noted in the concept note, under the Basic Principles and Guidelines on a Right to a Remedy and Reparations for Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.¹²

Furthermore, when such information isn’t provided in a report by a state party in conflict, then the Committee should utilize its follow up procedure¹³ and request that the state provide this information to the Committee in an exceptional report to be due before the next periodic report. The Committee must exercise extra diligence when dealing with a non-compliant state in conflict.

2. The Genocide Convention

The norm prohibiting genocide is a *jus cogens* norm,¹⁴ and accordingly, the risk of genocide triggers the legal obligations of all States,¹⁵ the United Nations generally, and the Security Council under the framework of the Convention on the Prevention and Punishment of the Crime of Genocide. Under Article 1 of that Convention, this is a dual duty to both prevent and punish the crime of genocide.¹⁶

In examining the content of the obligation to prevent Genocide, the International Court of Justice (“ICJ”) has held that this is best described as a “due diligence” obligation and that States must “employ all means reasonably available to them, so as to prevent genocide as far

⁹ CEDAW General Recommendation No. 24 on women and health, ¶ 11.

¹⁰ CEDAW General Recommendation No. 24 on women and health, ¶ 14.

¹¹ The Committee has requested this information before, for example in their concluding observations to Myanmar/Burma in 2000, ¶ 129 (“The Committee is concerned that there is no information on a women’s right to terminate a pregnancy resulting from sexual violence”).

¹² CEDAW Committee, Concept Note for the General Discussion on the protect of women’s human rights in conflict and post-conflict contexts, pg. 20 [hereinafter “Concept Note”]. Also to be noted here is the Report of the Special Rapporteur on Violence Against Women, Reparations for Women subjected to violence, UN Doc. A/HRC/14/22.

¹³ CEDAW, Annex III, art. 23, UN Doc. CEDAW/C/2009/II/4.

¹⁴ ICJ, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), ¶ 64 (Feb. 3, 2006).

¹⁵ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Mont.), ¶431 (Feb. 26, 2007).

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, (Dec. 9, 1948).

as possible.”¹⁷ The Committee should also employ this due diligence standard when monitoring state compliance. Where the Committee is made aware of a serious risk that genocide will be or is being committed, the General Recommendation should define the means available to the Committee to act to prevent genocide. For example, the Committee should be instructed to act through UN organs and CEDAW member states.

In 2008, the top five independent global genocide indices were aggregated by the Genocide Prevention Project into what they term the Mass Atrocity Crimes Watch list 2008-09.¹⁸ Per this list, Myanmar/Burma is ranked as one of the top two “Red Alert” countries of highest risk, second only to Sudan. Accordingly, the General Recommendation should specify special standards for review of a country like Myanmar/Burma. Further, the General Recommendation should set guidelines for “due diligence” if the Committee receives information regarding the risk of genocide from any source, including NGO shadow reports or reports from other UN organs or mechanisms.

3. The Responsibility to Protect Doctrine

The World Summit Outcome noted the role that the international community must play in order to implement and enforce states duties under the Responsibility to Protect (R2P) doctrine.¹⁹ This duty has been reaffirmed by the UN Security Council as a means “to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁰ Paragraph 139 of the World Summit Outcome held that “the international community through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means...to help protect populations from genocide, war crimes, ethnic cleansing & crimes against humanity.”²¹ Accordingly, when a state fails to act to protect its citizens, R2P dictates that the international community must act collectively.

Accordingly, if the Committee receives information in the course of its state reviews which may invoke R2P, the Committee must work through the UN to address any potential threats to civilian populations. For example, the General Recommendation could strengthen the existing relationships between the Committee and relevant UN entities, including the Security Council, the Office of the High Commissioner for Human Rights (OHCHR), the Human Rights Council (HRC), and the General Assembly (GA) by creating an avenue for the Committee to report to those bodies information obtained during state reviews.

4. Security Council Resolutions

It is essential that the General Recommendation explicitly define the link between the Committee’s work in conflict states and relevant SCRs, including 1325, 1820, 1888, 1889 and

¹⁷ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Mont.), ¶430 (Feb. 26, 2007).

¹⁸ Genocide Prevention Project, *Mass Atrocity Crimes Watch List*, available at:

http://www.preventorprotect.org/images/documents/mass_atrocity_watchlist.pdf (December 9, 2008).

¹⁹ World Summit, Sept. 14-15, 2005, *2005 World Summit Outcome*, ¶¶ 138-139, U.N. Doc. A/60/L.1 (Sept. 15, 2005).

²⁰ Security Council Resolution 1674, ¶ 4, U.N. Doc. S/RES/1674 (April 28, 2006).

²¹ World Summit, Sept. 14-15, 2005, *2005 World Summit Outcome*, ¶ 139, U.N. Doc. A/60/L.1 (Sept. 15, 2005).

1960, especially since almost all of those resolutions explicitly reaffirm states obligations under CEDAW. The Concept Note importantly “recognizes that the various thematic resolutions of the Security Council are important political frameworks for advancing advocacy on women, peace and security, particularly as reference is repeatedly made to the legal obligations on all parties to armed conflict under the Convention, in addition to other international instruments...Furthermore, all the areas of concern addressed in the numerous thematic resolutions of the Security Council find expression in the substantive provisions of the Convention as the binding source of international law.” We urge that the General Recommendation be more explicit in its incorporation of Security Council resolutions.

Given that the Security Council is the ultimate enforcer of its resolutions, and the only entity with the power to address criminal violations of IHL, the Committee must not be limited to simply making recommendations to the state under review. Rather, the Committee must engage with the UN system as a whole where there are violations of overlapping obligations under CEDAW and Security Council resolutions. There must be an expeditious and direct pipeline established whereby the Committee can report to the Security Council, whether directly, or through related offices such as the OHCHR of the Secretary General. Furthermore, current CEDAW reporting guidelines should be amended to request information under guideline I.3 regarding the implementation of all thematic Security Council resolutions on women, peace and security, not just SCR 1325.

5. Rome Statute of the International Criminal Court

States in conflict and post-conflict must ensure accountability for violations of women’s rights under both domestic and international law. While the Concept Note addresses the necessity for justice in post-conflict and transitional situations,²² it fails to recognize the importance of pursuing accountability during conflict. It is imperative that the Committee clarify that the General Recommendation applies to states in conflict.

The General Recommendation should encourage states to enact laws codifying the definitions of war crimes, crimes against humanity and genocide enshrined in the Rome Statute of the International Criminal Court (ICC),²³ which is commonly accepted as a codification of customary international criminal law.²⁴ State parties to the Rome Statute must pass domestic laws in conformity with the Statute as part of its requirement of complementarity. Thus, when reviewing states that are party to the Rome Statute, the Committee should request information on domestic provisions for accountability, in particular for gender crimes, to ensure that states are operating under the relevant framework for access to justice for crimes that constitute war crimes, crimes against humanity or genocide.

Where a state party is not a party to the ICC, the Committee should still encourage the passage of domestic legislation that codifies the definitions of the Rome Statute, because, as the Concept Note states “the adoption of the Rome Statute...is recognized as a significant

²² Concept Note, pg. 18.

²³ <http://www.coalitionfortheicc.org/?mod=romeimplementation>

²⁴ ROBERT CRYER, ET. AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 126 (2007).

development in international criminal law since depending on the circumstances of the case, sexual violence can constitute a war crime,, a crime against humanity, an act of torture or a constituent act of genocide.”²⁵ Incorporation of the standards of the Rome Statute can help ensure that domestic legislation is in line with international standards on prosecutions of these crimes.

The General Recommendation should consider how to best ensure criminal accountability for crimes against women that occur during conflict. If the Committee receives information detailing sustained impunity for gender crimes, the Committee should establish procedures for notifying the Security Council and recommending the offending state’s referral to the ICC or collective Security Council action. For example, where the Committee reviewed Myanmar in 2008, the Committee “expresse[d] its deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women.”²⁶ The Committee then went on to express its concern over impunity for such crimes²⁷ and recommended that Myanmar take all steps possible to ensure accountability for these crimes. The Committee should go further than mere recommendations to end impunity in such situations. Where it receives such information, the Committee should provide the information to relevant organs, include the Security Council, OHCHR or Special Representatives of the Secretary General, so that those organs can act on the information – including through referrals to the ICC.

III. Conclusion

The GJC views the forthcoming General Recommendation as an important tool for addressing violations of women’s rights, both during and after conflicts. We urge the Committee to take a leadership role in proposing creative new solutions to ensure a holistic approach to women’s rights under international law and take all possible measures to end impunity for perpetrators of gross crimes wherever the perpetrators or victims reside. The GJC commends the CEDAW Committee on the Concept Note for the General Recommendation and looks forward to providing any further comments or assistance requested by the Committee.

²⁵ Concept Note, pg. 8.

²⁶ Committee on the Elimination of Discrimination against Women, *Concluding Observations Myanmar*, ¶ 24, UN Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

²⁷ Committee on the Elimination of Discrimination against Women, *Concluding Observations Myanmar*, ¶ 24, UN Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).