

# **CEDAW's General Recommendation No. 35: A Quarter of a Century of Evolutionary Approaches to Violence against Women**

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## **1. Introduction**

After a twenty-five year lapse in time, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) returned to the issue of gender-based violence, issuing General Recommendation No. 35 on 14 July 2017. Despite focusing on the issue of violence against women three times among the currently 37 general recommendations (General Recommendations Nos. 12, 19 and 35) (CEDAW Committee 1989, 1992, 2017), the Convention on the Elimination of Discrimination against Women ('CEDAW') fails to mention violence against women. As Margaret Keck and Kathryn Sikkink point out, none of the 30 articles of the otherwise comprehensive CEDAW contain a single word about rape, domestic or sexual abuse, female genital mutilation or any other instance of violence against women (Keck and Sikkink 1998, 166). Nor is violence mentioned in the CEDAW's preamble.<sup>1</sup>

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<sup>1</sup> It is arguable that Article 6 of the Convention, aimed at stopping all forms of trafficking and the exploitation of prostitution of women, encapsulates two aspects of violence against women: women's forced and exploitative labour and instances where women's engagement in sex work is non-consensual and forced.

Despite this lack of attention to the issue of violence in CEDAW, the only human rights treaty globally focused on women's rights and one that has received almost universal ratification, the CEDAW Committee, the treaty body formed to monitor its implementation, has demonstrated a substantial and noteworthy evolution in its treatment of the issue. Such an emphasis on the issue of violence against women is undoubtedly justified given that General Recommendation No. 35 describes violence against women as "one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotypical roles are perpetuated" (CEDAW Committee 2017, para. 2).

The Committee itself has described the latest recommendation as a "milestone" (CEDAW Committee 2018). In light of the CEDAW Committee's own view of its General Recommendation, the purpose of this article is to evaluate the contribution made by the Committee to international women's rights law through General Recommendation No. 35. In order to do this, I take a two-step approach. First, I ask, in what ways an update was necessary, analysing the two earlier General Recommendations No. 12 (1989) and No. 19 (1991) and placing them in their historical context. How did they come about? What were the challenges? What value did they add to international law? This section includes a discussion on the extent to which they were evolutionary for their time; the limitations imposed on the CEDAW Committee at those moments in history to be more expansive in its framing of violence from a human rights perspective; and the weakest parts of the 1989 and 1992 recommendations. For instance, Elizabeth Evatt, herself a former committee member, has shed important light on the impact of ideological differences among Committee members (particularly in the 1980s) on the progress and effectiveness of the Committee in its early years (Evatt 2002, 520).

Second, if such an update was required, I assess whether the CEDAW Committee made the most of the opportunity to advance soft law on the issue of violence. This analysis is set against the standards established through feminist debate and thinking on violence against women at particular moments in CEDAW's history. On the basis of this analysis, I identify several significant areas where the CEDAW Committee could have done more. I identify a number of trends that could explain those shortcomings, giving credence, for instance, to the efforts of the CEDAW Committee to make the drafting process more inclusive of civil society which in turn, makes the recommendation more reactive to current trends and possibly dated in the years to come.

I have chosen the instrument of the General Recommendation as the focus of this article for a number of reasons. Article 21 of the Convention provides for the Committee "to make suggestions and general recommendations based on the examination of reports and information received from the States Parties" (United Nations General Assembly 1979, Art. 21). While such "suggestions" are not binding, as instruments of soft law, General Recommendations allow Committee members to produce progressive jurisprudence on the Convention; in the words of former CEDAW Committee members, general recommendations allow the Committee to remain relevant (Baldez 2014, 112).

General Recommendations interpret treaties and aid States Parties to understand their responsibilities. General Recommendations seek to resolve areas of ambiguity, provide guidance on issues that have presented multiple countries with implementation difficulties, direct all States Parties on how to report on issues not fully specified in convention as well as guide governments on general issues of compliance and interpretation (Baldez 2014, 112). Moreover, according to the CEDAW Committee's drafting process, General Recommendations allow for detailed deliberation on issues, including contributions by other stakeholders, namely other entities of the United Nations

system, non-governmental organisations and other civil society bodies (Division for the Advancement of Women 2009).

Nonetheless, it is important to acknowledge the limitations of general recommendations to be both progressive and a tool for accountability. As a form of soft law, the ability of the CEDAW committee to maintain legitimacy vis-à-vis States Parties depends on careful drafting of its general recommendations, balancing this with its need to represent a high standard for women's rights. This is a challenge that has confronted other treaty bodies, such as the Human Rights Committee who needed to "tone down" the drafting of General Comment No. 33 on the obligations of states parties under its Optional Protocol, to preserve legitimacy among States Parties (Grover 2012, 173). It is important to acknowledge this balancing act as a limit on the CEDAW Committee's ability to develop progressive jurisprudence that reflects the demands of women's rights movements while maintaining the likelihood of States Parties' compliance. Without such implementation at the national level, indeed, recommendations have limited, if any, value.

In practice, assessing the impact of general recommendations is a challenging and untested task. One commendable effort specifically on the issue of violence against women, research by Neil Englehart (2014, 265), suggests that there was a time-lag when it came to General Recommendations No. 12 and No. 19 actually influencing the enactment of new laws and the establishment of institutions to support compliance. This is explained by the obvious interval needed to formulate programmes, for public awareness to spread and for people to change their behaviour. Nonetheless, Englehart's research, albeit with inconsistent evidence, shows some reduction in instances of violence as a result of both General Recommendations No. 12 and 19 (2014, 273).

As we move into this critique, therefore, I take the position that first, the general recommendations are a fundamental tool in the hands of the human rights treaty bodies. Alongside the CEDAW Committee's work under its Optional Protocol and the Concluding Observations issued to individual countries by the Committee, General Recommendations offer a space for progressive advancements on women's rights. Moreover, research shows that they contribute to legal and policy change on the ground. Nonetheless, their very drafting reflects a cautious balance between politics and activism.

In undertaking this analysis, this article contributes to the existing body of literature in a number of ways. First, the article investigates the process of drafting and the potential impact of treaty bodies' general recommendations, a generally under-analysed form of soft law that nonetheless play a pivotal role in shaping jurisprudence and in turn, influencing not only other human rights treaties bodies but also national and international courts, tribunals and quasi-judicial institutions (Mechlem 2009, 929–30). Second, this article provides a critical analysis of the most recent recommendation, attempting to offer a more balanced evaluative approach when compared to the extensive praise that General Recommendation No. 35 has received to date (Chinkin 2017; Nousiainen 2017; European Women's Lobby 2017). At the same time, I provide readers a perspective on the historical evolution of CEDAW's approach to the topic given the passage of time under consideration.

The value of the General Recommendation is not to be dismissed in this more critical account. In the words of one academic, “[i]n times of backlash, even taking stock and writing down positive developments of human rights law in the form of a recommendation helps to create more coherent and effective state practice in combating gendered violence against women” (Nousiainen 2017). However, in this account, I

identify gaps and areas of concern that can form future terrain for the CEDAW Committee to consider in the years to come.

## **2. Time for an Update? An Historical and Contextual Assessment of the CEDAW Committee's Approach to Violence against Women**

In this section, I analyse the contents and contributions of General Recommendations No. 12 and No. 19. First, however, it is important to place the Recommendations in their historical context. Both of these general recommendations built on earlier and ongoing international dialogues on violence against women. This notably included the World Conference of the United Nations Decade for Women in Copenhagen in 1980 (United Nations 1980) and the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women in 1985 in Nairobi (United Nations 1985). Despite this historical context, some academics have nonetheless noted how the CEDAW Committee's decision to take on the issue of violence still added weight to those global declarations and in some respects called for "more aggressive" action (Englehart 2014, 268).

### ***A first step: General Recommendation No. 12 (1989)***

While there was a noted absence of language on violence against women in CEDAW, evidence reflects the recognition it has been accorded by members of the CEDAW Committee. During the Committee's first few sessions, questions on violence against women were addressed to States Parties regardless of whether it was covered in States Parties' reports (Evatt 2002, 544). By the sixth session in 1987, a number of forms of violence had been discussed with States Parties, including domestic violence, rape and sexual offences, trafficking, prostitution, sex tourism, sexual harassment, abuse of

women prisoners, acid attacks, dowry deaths, and pornography and related advertising (framed by the Committee as a form of violence) (Evatt 2002, 544–45). This is a commendable and relatively broad list. Female Genital Mutilation (termed female circumcision by the CEDAW Committee) was raised in 1988 at the 7th session in dialogue with Senegal (Baldez 2014, 112).

Yet, as of the 8<sup>th</sup> session in 1989, only 12 out of fifty-two state reports considered by the CEDAW Committee had provided information about the issue of violence (Evatt 2002, 544–45). The limited attention in States Parties' reports to violence against women explains both why General Recommendation No. 12 was issued and its relatively limited nature. There appears to have been understandable reticence among Committee members to expand via a General Recommendation on an issue that was neither explicitly included in CEDAW nor was necessarily one that was recognised as an obligation. In fact, the first thirteen general recommendations have been described by the academy as both brief and vague (Baldez 2014, 112), often merely urging governments to heed to existing guidelines (Baldez 2014, 113). In many respects, General Recommendation No. 12 was no different. It contained only one substantive recommendation, entirely focused on advising states on what *information* should be included in their periodic reports: (a) legislation in force to protect women against the incidence of different types of violence in various spaces e.g. in the family, in the workplace; (b) information on other measures adopted to eradicate violence; (c) the existence of support services for women victims; and (d) statistical data on incidence (CEDAW Committee 1989, 12). In hindsight, this limited elaboration on the issue of violence against women was a missed opportunity to elaborate more fully on how violence against women is an issue that sits squarely within the scope of CEDAW and hinders women's enjoyment of their rights and progress towards equality.

Moreover, it is arguable that the Committee was slow to recognise the significant potential behind its ability to produce general recommendations. At its inception, the Committee was “seriously divided” on whether it could or should express interpretive views on the contents of CEDAW (Evatt 2002, 535). One review of the Committee’s work (just shy of a decade after CEDAW’s enactment but prior to the issuing of General Recommendation No. 12) is more forgiving. Andrew Byrnes has noted a number of factors that undermined but also explained the CEDAW Committee’s slow progress, including the limited number of annual meetings the Committee was able to conduct and its limited resources, including secretarial support, for even basic functioning (Byrnes 1989, 60).

Furthermore, the Committee’s funding source was distinct from some of the other Geneva-based treaty bodies, undermining cross-learning between them (Byrnes 1989, 60–61). This in part explains why the Committee was comparatively less progressive than its fellow treaty bodies. For instance, at the time the Committee was debating its powers under Article 21, the Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee) had already adopted six general recommendations, regarding reporting obligations with respect to several articles of the Convention on the Elimination of Racial Discrimination (CERD) and on overdue reports. Admittedly CERD had entered into force substantially earlier (in 1969), but its process of issuing general recommendations was a solid precedent given that CERD contains almost identical wording as Article 21 of CEDAW regarding the power of treaty bodies to develop general recommendations. The CEDAW Committee had tried and tested experiences from other human rights treaty bodies from which to learn.

### ***Acceleration in Progress: General Recommendation No. 19 (1992)***



The CEDAW Committee's slow progress and the brief nature of General Recommendation No. 12 were resolved in 1992 by General Recommendation No. 19. In fact, by the time the Committee had issued General Recommendation No. 14 on 'female circumcision' in 1990, its recommendations had begun to offer more specific direction to States Parties and incorporate the Committee's accumulated knowledge (Baldez 2014, 113). General Recommendation No. 19 was a further turning point, demonstrating a new level of depth of analysis.

This General Recommendation was fundamental for two reasons. First, it accorded a proper status in international law to violence against women by inferring violence as a form of discrimination which could be captured by Article 1 of CEDAW. Violence against women was framed as being for the purpose of impairing women's enjoyment of their human rights (Šimonović 2014, 599). Second, General Recommendation No. 19 offered a global definition for what is meant by the phrase "violence against women":

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence (CEDAW Committee 1992, para. 6).

Notably, despite CEDAW's silence on the issue of violence, the enactment of General Recommendation No. 19 was not seen as particularly contentious. To the contrary, Dubravka Simonović, the 4<sup>th</sup> UN Special Rapporteur on Violence against Women, its causes and consequences has contended that General Recommendation No.

19 was merely an effort to make clear a link between violence and discrimination that was already embedded in CEDAW (Simonovic 2014, 601). The CEDAW Committee has never been called upon to defend its decision to enact a general recommendation on the topic. Arguably, this reflects the universal recognition of the gravity of the problem. Englehart too notes both the positive reception, as well as the subsequent high level of compliance by States Parties with both General Recommendations No. 12 and No. 19 (Englehart 2014, 268).

The drafting process of General Recommendation No. 19 is also worth commenting on and commending. For the first time, the CEDAW Committee invited non-governmental organisations to contribute information to prepare background studies for Committee members to review (Evatt 2002, 546). This came at an opportune moment when women's movements were pushing for gender-based violence to be seen as a state responsibility and "brought [it] into the very public arena of international human rights" (Evatt 2002, 550).

In this vein, General Recommendation No. 19 was a fundamental advancement. It placed within CEDAW's reach violence by private (CEDAW Committee 1992, para. 9) as well as State actors (CEDAW Committee 1992, para. 8) and allocated responsibility to States for private acts if States Parties failed to act with due diligence to prevent, investigate, punish and provide for compensation (CEDAW Committee 1992, para. 9). Violence was named a human rights violation that threatened the right to life, the right to freedom from torture and the right to liberty and security, among other globally recognised human rights.

Moreover, despite being a recommendation not specifically focused on women's health – which was to come several years later in 1999 (General Recommendation No. 24 on Women and Health) – the Committee nonetheless used the opportunity of the 1992

General Recommendation to speak to the issue of abortion. Specifically, General Recommendation No. 19 encouraged States Parties to ensure that women “are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control” (CEDAW Committee 1992, para. 24(m)). Given the absence of any mention of abortion in CEDAW, this was clearly ground-breaking. It was the first mention of abortion in writing by the CEDAW Committee. This was followed by several concluding observations in 1997 where the Committee critiqued punitive abortion legislation and denied services in countries such as Morocco, Namibia, Luxembourg and Venezuela (Cook, Dickens, and Bliss 1999, 581–582). The reference to abortion in General Recommendation No. 19 helped open the door to the Committee’s dialogues with states on the issue.

Overall, General Recommendation No. 19 offered further fuel for the existing momentum towards eliminating violence against women. For instance, the Declaration on the Elimination of Violence against Women was adopted by the UN General Assembly one year later (United Nations General Assembly 1993), recognising violence as a human rights violation and in several respects utilising language from General Recommendation No. 19 on the scope of acts as well as spaces of violence to be considered. In 1994, the UN Commission on Human Rights established the mandate of the Special Rapporteur on Violence, a role that has been commended by the Committee as complementary to its own work (CEDAW Committee 2017, para. 2). This is despite some debate suggesting competition between the work of UN Treaty Bodies in general and the Special Procedures established by the then Human Rights Commission (now Human Rights Council) (Rodley 2003, 882).

Since issuing General Recommendation No. 19, violence against women has been a “cornerstone” of the Committee’s scrutiny of States Parties’ reports (Zwingel 2016,

220). At one point, it was the most frequently invoked of all the Committee's General Recommendations at both the international and national levels (Byrnes and Bath 2008, 519). The Committee itself has praised the 1992 General Recommendation as a "key catalyst" for the evolution of a prohibition of gender-based violence as a central principle of customary international law (CEDAW Committee 2017, para. 2). General Recommendation No. 19 has indeed proved worthy of its reputation as a landmark evolution in international women's rights.

### ***Shortcomings with General Recommendation No.19***

Despite this well-deserved praise, I would argue that there are two substantial flaws with the drafting of General Recommendation No. 19. The first relates to the scope of women described as falling within its ambit. The second relates to the inadequate gravity with which violence against women and its consequences are discussed.

General Recommendation No. 19 recognises "intersectional discrimination" – a concept introduced into human rights discourse as early as the 1980s (Crenshaw 1989, 139; hooks 1981). Importantly it speaks to the limitations of "gender" as an overarching category (McCall 2005, 1771) and how multiple social identities, like gender, race, disability and sexual orientation, intersect at the micro level in individual experiences and reflects systems of privilege and oppression at the macro level (like racism, sexism or classism) (Bowleg 2012, 1267).

However, General Recommendation No. 19 only does this as far as the vulnerability to violence experienced by rural women is concerned (CEDAW Committee 1992, paras 21, 24(o)(q)). There was a failure to consider women of colour, women living with disabilities or violence perpetrated against a woman because of her sexual orientation. This is despite the fact that CERD came into force in January 1969, that 1981

to 1992 was the UN Decade of Disabled Persons, with the Standard Rules on Equalization of Opportunities for Persons with Disabilities adopted by the General Assembly in December 1993 as a result (United Nations 1994). The latter notably speaks to the need to collect gender-specific statistics concerning the living conditions of persons with disabilities (United Nations 1994, sec. Rule 13(1)). The CEDAW Committee, therefore, would have been exposed to the ways in which other identities intersect with gender and exacerbate vulnerability to violence. It is not difficult to imagine how, for some of these “invisibilised” groups, General Recommendation No. 19 would have been a disappointment. Even if the structural separation of the treaty bodies noted by Byrnes and described above acts as some justification, the failure to include other vulnerable groups, or, at least, an open clause that would recognise their potential vulnerability, undermined the opportunity to accelerate dialogue by the CEDAW Committee on these intersecting identities in subsequent years.

Second, in many respects, General Recommendation No. 19 failed to grapple with the gravity of the impact of violence on women’s lives. For example, among its recommendations, the Committee stated that different forms of violence in the family “put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality” (CEDAW Committee 1992, para. 23). Yet, for many women who experience intimate partner violence – and there are countless efforts to document the magnitude of such violence (Watts and Zimmerman 2002; Venis and Horton 2002; Garcia-Moreno et al. 2006) – it profoundly inhibits women’s enjoyment of *all* of their human rights, with consequences that go beyond physical and mental health and “impaired” participation in family and public life. Christine Chinkin, in sustaining a similar critique, has challenged General Recommendation No. 19 for emphasising the

impact of violence on women's physical and mental health rather than all rights at large (Chinkin 2017).

In hindsight, we may want to forgive the Committee for its inability in those early years to articulate the gravity of gender-based violence and its impact on human rights. However, it was only one year later that feminist activists advanced the argument that domestic violence was a form of torture. In 1993, Rhonda Copelon persuasively argued that the battering and sexual abuse of women by their partners must be understood as torture, whereby the private nature of the act neither diminishes the atrociousness of the act nor the need for international sanction (Copelon 1993, 299), giving rise to obligatory national and international responsibilities. Copelon recognised in that piece that she was not the first woman activist to make this point (Copelon 1993, 296).

By putting forward this thesis, Copelon, a human rights lawyer, activists and eminent scholar, was a key player in the development of global jurisprudence on a gendered perspective to violence, torture and the public/private divide. In a similar vein, the advancement of new critical thinking in the field of international human rights is a role that we hope – or should expect – a human rights treaty body to play. Surely this is the way in which the Committee can make a real contribution to the topic of gender-based violence. In this context, General Recommendation No. 19 reads as a somewhat weak statement on an issue that warranted greater status as a globally intolerable crime.

### **3. Strengths and Limitations: An Assessment of General Recommendation**

#### **No. 35**

In its title, General Recommendation No. 35 named its purpose as providing an update to General Recommendation No. 19. The Committee goes on to state that the Recommendation is aimed at “providing States parties with further guidance aimed at

accelerating the elimination of gender-based violence against women” (CEDAW Committee 2017, para. 3). In this section, I analyse the ways in which General Recommendation No. 35 can be considered an update on the earlier recommendation. I consider the extent to which General Recommendation No. 35 builds on an already fairly comprehensive framework and therefore makes a significant contribution to international law. I discuss whether the text goes far enough in terms of how we understand violence against women and the realities of how violence permeates women’s lives today. I note, too, the ways in which the Committee drew on its own learning from its jurisprudence over the last quarter of a century.

Overall, General Recommendation No. 35 is indeed an advancement on the 1992 instrument and in several ways, a significant one. It was also certainly needed given the passage of time. Nonetheless, I identify a number of shortcomings.

### ***Diplomatic Drafting Versus Women’s Movement Activism***

I begin by considering what I have described elsewhere in this article as the balancing exercise of the drafting process. At its 34<sup>th</sup> session, the Committee invited interested parties to submit comments in writing on the “Draft update of General Recommendation No. 19”. The Committee added a disclaimer: “After a thorough and due consideration of comments provided, only the Committee will decide on the contents of the final version of the update of General Recommendation No. 19.” Yet with a significant number of contributions – according to the General Recommendation itself, numbering in this case more than one hundred (CEDAW Committee 2017, Preamble)<sup>3</sup> – the Committee was presented with the challenging task of drafting a recommendation that in some way

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<sup>3</sup> On the website of the Office of the High Commissioner for Human Rights, 64 NGO submissions and 18 submissions from ‘Other stakeholders’ are made available CEDAW Committee and have been reviewed for the purposes of this article <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/DraftUpdateGR19.aspx>> visited on 13 July 2018.

recognised the contributions – and therefore the potentially differing priorities – of these stakeholders.

Given the high number of stakeholders interested in the issue of gender-based violence overall – far greater than just the number of submissions – it is unsurprising that the General Recommendation begins by going through the protocol of acknowledging the efforts of the global community to combat violence over the previous decades. This includes the work of the UN Special Rapporteur on Violence against Women, its Causes and Consequences and countless civil society organisations as well as governments. Acknowledgement by the CEDAW Committee of both efforts and progress, despite the reality of such progress being slow and the problem of violence still being rife, is necessary and reassuring.

These opening paragraphs act as a reminder that we are reading a UN document – the drafting of which is a balancing exercise. On the one hand, the CEDAW Committee recognises the contributions of individuals and organisations who lobbied for the inclusion of particular language with the hope of a final document that would be both expansive and progressive. On the other hand, the reserved nature of the drafting reminds readers that the Committee has to contend with those voices – particularly States Parties – who may be concerned about a human rights treaty body's use (or mis-use) of the opportunity to expand on already established interpretations of women's rights in international law through the issuance of a general recommendation.

Indeed, if States Parties feel somehow compelled to comply with general recommendations as “authoritative interpretations” of the treaty, treaty bodies should feel a sense of responsibility to ensure methodically sound legal drafting of such recommendations (Mechlem 2009, 929). In the case of General Recommendation No. 35,



arguably the Committee engages in this balancing exercise at the expense of being able to filter through these submissions and develop a statement of its own.

### ***‘Gender-based’ Violence against Women***

The Committee’s use of the language of “gender-based violence” as opposed to “violence against women” is a significant advance on the previous recommendation. The Committee explicitly states that the General Recommendation is about “gender-based violence against women” i.e. these recommendations are not intended to cover gender-based violence against men (CEDAW Committee 2017, para. 6). General Recommendation No. 35 in fact makes repeated use of the phrase “gender-based violence”, including in its title (this language also appears in General Recommendation No. 19, but not in the title). Given that this phrasing appears in the earlier recommendation, we could assume its usage is non-contentious. However, the implications are significant. The choice of language is deliberate: the language of “gender-based violence” frames the issue “as a social rather than an individual problem” (CEDAW Committee 2017, para. 9). It also acts as a reminder to States Parties, advocates and other readers that gender-based violence against women is a gendered structural problem, embedded in unequal power relationships between men and women.

The Committee also makes an important statement about what drives but also sustains gender-based violence, including the “ideology of men’s entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour” (CEDAW Committee 2017, para. 19). These factors “contribute to explicit or implicit social acceptance of gender-based violence against women” (CEDAW Committee 2017, para. 19). In turn, the more deliberate and repeated

use of “gender-based violence” reflects the reality that combating such violence requires much more fundamental change than may have been stipulated in previous recommendations. Ending gender-based violence is not merely about services for victims, prosecuting perpetrators, quantifying prevalence – all of which are extremely important – but about “deeper social transformation of gender orders and gender relations” (Kelly 2005, 491).

### *An Expansive List of Violence-Related Concerns*

The Committee elaborates on the multiple forms that gender-based violence may take (CEDAW Committee 2017, para. 14) and the various external factors that affect and often exacerbate violence, from cultural or economic factors to increased globalization to conflict and terrorism (CEDAW Committee 2017, para. 14). In contrast to the 1992 document, the Committee acknowledges the expansive jurisprudence indicating that gender-based violence may amount to torture and specifically in the context of international criminal law, notes that violence may constitute a crime against humanity or war crime, namely rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization (CEDAW Committee 2017, para. 16). It is globally accepted that violence today transcends national boundaries (CEDAW Committee 2017, para. 6). The Committee also notes how violence occurs today in previously less-considered domains such as “technology-mediated settings” (CEDAW Committee 2017, para. 20).

Moreover, certain issues are dealt with in significant detail. For example, the Committee elaborates substantively on the use of mediation and conciliation in violence. It recommends strict regulation of practices such as mediation and conciliation, including their use only after evaluation by a specialised team, with guarantees of free and informed

consent by the affected victim. The Committee explicitly states, “These alternative procedures should not constitute an obstacle to women’s access to formal justice” (CEDAW Committee 2017, para. 45). To offer another example, the financial inequalities facing many women are explicitly acknowledged with the Committee recommending access to financial aid and free or low-cost high quality legal aid, medical, psychosocial and other services for women survivors and their family members (CEDAW Committee 2017, para. 41(c)).

The Committee’s General Recommendation in many respects makes a powerful statement about the indivisible nature of women’s human rights. It emphasises how gender-based violence is intimately linked with forced marriage, the performance of medical procedures on women with disabilities without their informed consent, and the criminalisation of abortion or being lesbian, bisexual or transgender, being in prostitution or committing adultery (CEDAW Committee 2017, para. 31(a)).

### ***Intersectional Discrimination***

General Recommendation No. 35 makes clear, and does so unapologetically, that different women are more vulnerable to violence and suffer violence more gravely based on intersecting identities, including but certainly not limited to race, marital status, age, disability and sexual orientation. General Recommendation No. 35 therefore elaborates substantially on what is a very limited treatment of intersectional discrimination in the earlier General Recommendation No. 19 as noted above.

While the 1992 General Recommendation spoke largely to the heightened vulnerability of women to violence based on their rural status, the 2017 recommendation provides a non-exhaustive and extensive list of intersections that have an “aggravating negative impact” on particular women and notes how gender-based violence affects

women to different degrees and in different ways. This includes based on a woman's ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy and the list goes on (CEDAW Committee 2017, para. 12).

This approach to intersectionality is certainly in line with the CEDAW Committee's own evolving jurisprudence, as well as that of the Committee on the Elimination of Racial Discrimination on the gendered aspects of racial discrimination and its discussions concerning Roma people and the jurisprudence of the Committee on Economic, Social and Cultural Rights on the right to health (Truscan and Bourke-Martignoni 2016, 111–21; Chow 2016, 467–70). By recognising in such expansive form intersectional discrimination, General Recommendation No. 35 is a significant advance on the previous recommendation. It also highlights how identity and dignity together sit at the heart of discrimination (Chow 2016, 481).

While the treatment of intersectional discrimination is comparably noteworthy, in a number of respects, the Committee has not gone beyond rectifying the previous gap in the identities listed in its earlier recommendation. For instance, there is an absence of clear analysis concerning how these multiple identities actually affect different women's levels of vulnerability to violence, or experiences as survivors of violence. This problem once again speaks to the overarching issue of the lack of depth of analysis in this Recommendation.

It is also important to note that that intersectionality as a concept has been as much critiqued as it has been praised. For instance, several authors note its excessive focus on subgroups and their inequality and its limited ability to speak to how overarching

structures like patriarchy, racism, capitalism and sexism sustain inequality (Conaghan 2009; Chow 2016, 455, 472–73). Yet, these are in fact common drivers of gender-based inequality, discrimination and marginalisation across all the identities named in General Recommendation No. 35. Recognition by the Committee of these conceptual limitations with the notion of intersectionality are absent from the General Recommendation.

***“Modern-Day Concerns”: Too Reactive or Adaptive to Today’s Advocacy?***

General Recommendation No. 35 names a number of issues as modern-day concerns in its attempt to bring the recommendation into the 21<sup>st</sup> Century, an important consideration given the lapse in time since the previous recommendation. These include the impact of austerity measures on women’s access to state services, as well as so-called “shrinking democratic spaces”, that is, heightened regulation of political protests and public debates in the name of state security (CEDAW Committee 2017, para. 7).

Another issue that has gained increasing traction since the early 2000s (ActionAid 2016; UN Women 2017) is the issue of women’s safety in public spaces. Improvements to physical infrastructure such as lighting in urban and rural settings, and particularly in and around schools has been demanded (CEDAW Committee 2017, para. 35). The Committee has done well to bring these issues to the fore.

These references in the General Recommendation reflect much of the present-day discussion at the time of its drafting (see for instance the origins behind ‘Feminist Dissent’ 2017). However, the Committee’s response to current debates is uncritical, without offering necessary and potentially useful insights into the relationship between, for example, the so-called shrinking political spaces and its impact on discrimination against women, let alone gender-based violence against women. There is a startling lack of evidence or examples (or citations) to back the Committee’s narrative on these points.

For instance, the Committee argues that there is a “consequent deterioration of the rule of law” (CEDAW Committee 2017, para. 7) and concludes its limited analysis by then presuming a link between the concerns raised and the pervasiveness of gender-based violence and a persistent culture of impunity.

Readers are left to either accept the singular stance that the Committee takes on these points or to question the knowledge base on which these recommendations were drafted. To the contrary, the Committee had readily available examples at hand that would make clear the links between State and non-State based controls and the limitations placed on women’s political action, such as the documented assaults on female protesters and journalists during and immediately after the Arab Spring in Tunisia, Egypt and Libya, in 2010 (Hafez 2012, 37; Johansson-Nogués 2013, 393) or how reductions in spending on public services in Europe, for instance, limited the support available for women survivors of violence between 2010 and 2012 (Towers and Walby 2012) or the limitations posed on civil society space for debate and dissent (Silliman 1999; Transnational Institute 2017). While the Committee may have been restricted in their drafting on this issue – not wanting to offer sporadic examples but also knowing that a comprehensive list was not feasible – the lack of concrete examples to evidence the argument severely undermines the Committee’s claims.

While efforts by the CEDAW Committee to incorporate these present-day drivers in some ways heightens the Committee’s *current* relevance, without supporting evidence the Committee appears selective in its drafting. Moreover, while it is important to recognise that these issues are indeed directly relevant to the issue of gender-based violence, the Committee fails to frame the issues in a way that enables the Committee to either be forward thinking - i.e. what *could* be the direct impact on violence against women in the years to come as a result of these developments – or substantive in

providing recommendations to States Parties. The broad-brush naming of tradition, culture, religion, fundamentalist ideologies, austerity measures and shrinking political spaces therefore fails to speak to the stated goal of the General Recommendation of “providing states parties with further guidance” (CEDAW Committee 2017, para. 20) aimed at accelerating the end of gender-based violence.

Moreover, each of these issues is presumed to be a substantial barrier to women’s rights. However, one could question, for instance, whether we are in fact facing a reduction in democratic political space in light of far-reaching access to the internet (albeit by no means universal) and the proliferation and recognition of blogging as a form of acknowledged and legitimate writing. In places where access is not limited, on the one hand, online technology has created new digital spaces for violence, as the CEDAW Committee recognises (CEDAW Committee 2017, para. 20) but on the other hand, it creates new spaces for women’s rights activists to safely document and report their experiences of violence and proposition for change.

#### **4. Untouched Terrain: Future Work of the CEDAW Committee**

The CEDAW Committee, like all human rights treaty bodies, has the authority – as established in its own Article 21 – to interpret the convention in a way that has facilitated some significant conceptual advances in our understanding of human rights. General Recommendation No. 35 offered the potential to be such an advance and it delivers in several respects. It is a detailed recommendation that reaffirms global statements on gender-based violence and how it impedes women’s enjoyment of their rights. It also draws on evolving jurisprudence in relation to women’s access to justice, forms of torture, due diligence of governments, abortion, sex education and sexual orientation, to name just a few examples.

However, in many ways, it is arguable that General Recommendation No. 35 reads as a shopping list of examples of gender-based violence and related contextual issues. As noted above, this partly reflects the Committee's attempt to respond to the very high number of contributions it received from NGOs and agencies when the update to General Recommendation No. 19 was proposed. All of these contributors understandably wanted to see their concerns – or even their proposed language – reflected in the final text. What results, however, is somewhat of a cut and paste exercise rather than a particularly insightful new way of thinking about the topic.

Another perspective, however, is to appreciate the inclusive nature of the General Recommendation. It addresses – to some degree – a multitude of issues that have come to the fore as having some relationship with violence against women. This spans a number of issues from sexual and reproductive health to online violence to forced mediation among women survivors of violence after divorce or separation. It could be argued that there is little missing. For example, the Committee should be commended for once again using the opportunity posed by General Recommendation No. 35 to defend the position that reservations to Articles 2 and 16 of CEDAW are considered incompatible with the Convention and thus impermissible (CEDAW Committee 2017, para. 13). This is one instance where the cursory mention of an issue is nonetheless positive.

Unfortunately, however, we cannot ignore the fact that many issues are dealt with in too a cursory manner and therefore fall short of providing concrete guidance to States Parties on their obligations and how to fulfil them. Non-refoulement and refugee status on the basis of gender-based violence is one such issue. In light of the CEDAW Committee's extensive jurisprudence on the issue on the extra-territorial obligations of States parties regarding gender-based violence, more attention might have been expected (CEDAW Committee 2013). In contrast, in a few brief phrases, the Committee affirms



that protection and support measures and services should be available irrespective of a woman's residence status or their willingness to cooperate in proceedings against an alleged perpetrator, reiterating that States Parties should respect the principle of non-refoulement (CEDAW Committee 2017, para. 41).

The passing – albeit clear – reference to gender-based violence as related to criminalised abortion is another example, as is the statement that vulnerability to gender-based violence is heightened in states where being bisexual, lesbian and transgendered is criminalised. Given the CEDAW Committee has been criticised by several influential academics (Nussbaum 2016, 608) on its cursory treatment of such issues, these passing references may create a need for a follow-up recommendation in a much shorter span of time than the 25 years that passed between the second and third recommendations on gender-based violence against women.

However, as the Committee itself notes, the General Recommendation cannot be read in isolation. It builds upon General Recommendation No. 19. It also complements other General Recommendations related to women migrant workers, older women, women in conflict, women refugees, asylum seekers and stateless women, rural women and on women's access to justice (CEDAW Committee 2017, para. 11). It joins a more comprehensive and complete body of soft and hard law on women's human rights.

There is hope therefore. General Recommendation No. 35, although a document with some flaws, may help to further reduce the incidence of gender-based violence and to guide governments on the necessary legislative, policy and practical reforms needed to support victims and address impunity. At the very least, it is an opportunity to remind the international community that although violence against women went from being a marginalised to a mainstreamed issue (Kelly 2005, 473), it is still an issue that demands ongoing attention.



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