

Women and Sexual violence

Case prepared by Ms. Sophie Bobillier, Master student at the Faculty of Law of the University of Geneva, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

CEDAW General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations

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[<http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>]]

I. Introduction

1. The Committee on the Elimination of Discrimination against Women decided at its forty-seventh session, in 2010, pursuant to article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, to adopt a general recommendation on women in conflict prevention, conflict and post-conflict situations. The primary aim and purpose of the general recommendation is to provide authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure full compliance with their obligations under the Convention to protect, respect and fulfil women's human rights. It also builds upon principles articulated in previously adopted general recommendations.

2. Protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding,

peacemaking, and reconstruction processes are important objectives of the Convention. The Committee reiterates that States parties' obligations continue to apply during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State party. The Committee has repeatedly expressed concern about the gendered impacts of conflict and women's exclusion from conflict prevention efforts, post-conflict transition and reconstruction processes and the fact that reports of States parties do not provide sufficient information on the application of the Convention in such situations.

3. The general recommendation specifically guides States parties on the implementation of their obligation of due diligence in respect of acts of private individuals or entities that impair the rights enshrined in the Convention, and makes suggestions as to how non-State actors can address women's rights in conflict-affected areas.

II. Scope of the general recommendation

4. The general recommendation covers the application of the Convention to conflict prevention, international and non-international armed conflicts, situations of foreign occupation, as well as other forms of occupation and the post-conflict phase. In addition, the recommendation covers other situations of concern, such as internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime, that may not necessarily be classified as armed conflict under international humanitarian law and which result in serious violations of women's rights and are of particular concern to the Committee. For the purpose of this general recommendation, the phases of conflict and post-conflict have at times been divided as they can encompass different challenges and opportunities for addressing the human rights of women and girls. However, the Committee notes that the transition from conflict to post-conflict is often not linear and can involve cessations of conflict and then slippages back into conflict – a cycle that can continue for long periods of time.

5. Such situations are closely linked to crises of internal displacement, statelessness and the struggle of refugee populations with repatriation processes. In that respect, the Committee reiterates its observation in general recommendation No. 28 (2010) that States parties continue to be responsible for all their actions affecting the human rights of citizens and non-citizens, internally displaced persons, refugees, asylum-seekers and stateless persons, within their territory or effective control, even if not situated within their territory.

6. Women are not a homogenous group and their experiences of conflict and specific needs in post-conflict contexts are diverse. Women are not passive bystanders or only victims or targets. They have historically and continue to have a role as combatants, as part of organized civil society, human rights defenders, members of resistance movements and as active agents in both formal and informal peacebuilding and recovery processes. States parties must address all aspects of their obligations under the Convention to

eliminate discrimination against women.

7. Discrimination against women is also compounded by intersecting forms of discrimination as noted in general recommendation No. 28 (2010). As the Convention reflects a life-cycle approach, States parties are also required to address the rights and distinct needs of conflict-affected girls that arise from gender-based discrimination.

III. Application of the Convention to conflict prevention, conflict and post-conflict situations

A. Territorial and extraterritorial application of the Convention

8. The Committee reiterates general recommendation No. 28 (2010) to the effect that the obligations of States parties also apply extraterritorially to persons within their effective control, even if not situated within the territory, and that States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.

9. In conflict and post-conflict situations, States parties are bound to apply the Convention and other international human rights and humanitarian law when they exercise territorial or extraterritorial jurisdiction, whether individually, for example in unilateral military action, or as members of international or intergovernmental organizations and coalitions, for example as part of an international peacekeeping force. The Convention applies to a wide range of situations, including wherever a State exercises jurisdiction, such as occupation and other forms of administration of foreign territory, for example United Nations administration of territory; to national contingents that form part of an international peacekeeping or peace-enforcement operation; to persons detained by agents of a State, such as the military or mercenaries, outside its territory; to lawful or unlawful military actions in another State; to bilateral or multilateral donor assistance for conflict prevention and humanitarian aid, mitigation or post-conflict reconstruction; in involvement as third parties in peace or negotiation processes; and in the formation of trade agreements with conflict-affected countries.

10. The Convention also requires States parties to regulate the activities of domestic non-State actors, within their effective control, who operate extraterritorially. The Committee reaffirmed in its general recommendation No. 28 (2010) the requirement in article 2 (e) of the Convention to eliminate discrimination by any public or private actor, which extends to acts of national corporations operating extraterritorially. That would include cases in which national corporations extend loans to projects in conflict-affected areas that lead to forced evictions and which call for the establishment of accountability and oversight mechanisms for private security and other contractors operating in conflict zones.

11. There may be cases in which States parties also have extraterritorial obligations of international cooperation, as set out in international law (...).

[...]

B. Application of the Convention to State and non-State actors

13. Women's rights in conflict prevention, conflict and post-conflict processes are affected by various actors, including States acting individually (e.g., as the State within whose borders the conflict arises, neighbouring States involved in the regional dimensions of the conflict or States involved in unilateral cross-border military manoeuvres) as well as States acting as members of international or intergovernmental organizations (e.g., by contributing to international peacekeeping forces or as donors giving money through international financial institutions to support peace processes) and coalitions and non-State actors, such as armed groups, paramilitaries, corporations, private military contractors, organized criminal groups and vigilantes. In conflict and post-conflict contexts, State institutions are often weakened or certain government functions may be performed by other Governments, intergovernmental organizations or even non-State groups. The Committee stresses that, in such cases, there may be simultaneous and complementary sets of obligations under the Convention for a range of involved actors.

14. State responsibility under the Convention also arises if a non-State actor's acts or omission may be attributed to the State under international law. When a State party is acting as a member of an international organization in conflict prevention, conflict or post-conflict processes, the State party remains responsible for its obligations under the Convention within its territory and extraterritorially and also has a responsibility to adopt measures to ensure that the policies and decisions of those organizations conform to its obligations under the Convention.

15. The Committee has also repeatedly stressed that the Convention requires States parties to regulate non-State actors under the duty to protect, such that States must exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention. In its general recommendations Nos. 19 (1992) and 28 (2010), the Committee has outlined due diligence obligations in protecting women from violence and discrimination, emphasizing that, alongside constitutional and legislative measures, States parties must also provide adequate administrative and financial support for the implementation of the Convention.

16. In addition to requiring States parties to regulate non-State actors, international humanitarian law contains relevant obligations that bind non-State actors, as parties to an armed conflict (e.g., insurgents and rebel groups) such as in common article 3 of the Geneva Conventions of 1949 and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. Under international human rights law, although non-State actors cannot become parties to the Convention, the Committee notes that under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights. The Committee emphasizes that gross violations of

human rights and serious violations of humanitarian law could entail individual criminal responsibility, including for members and leaders of non-State armed groups and private military contractors.

[...]

C. Complementarity of the Convention and international humanitarian, refugee and criminal law

19. In all crisis situations, whether non-international or international armed conflict, public emergencies or foreign occupation or other situations of concern, such as political strife, women's rights are guaranteed by an international law regime that consists of complementary protections under the Convention and international humanitarian, refugee and criminal law.

20. In situations that meet the threshold definition of non-international or international armed conflict, the Convention and international humanitarian law apply concurrently and their different protections are complementary, not mutually exclusive. Under international humanitarian law, women affected by armed conflicts are entitled to general protections that apply to both women and men and to some limited specific protections, primarily protection against rape, forced prostitution and any other form of indecent assault; priority in distribution of relief consignment to expectant mothers, maternity cases and nursing mothers in international armed conflict; detention in separate quarters from men and under the immediate supervision of women; and protection from the death penalty for pregnant women or mothers of dependent or young children.

21. International humanitarian law also imposes obligations upon occupying powers that apply concurrently with the Convention and other international human rights law. International humanitarian law also prohibits a State from transferring part of its own civilian population into the territory that it occupies. Under international humanitarian law, women under occupation are entitled to general protections and the following specific protections: protection against rape, forced prostitution or any other form of indecent assault; free passage of consignments of essential clothing intended for expectant mothers and maternity cases; safety or neutralized zones that may be established to shield the civilian population, including in particular expectant mothers and mothers of children under 7 years of age; and detention in separate quarters from men and under the immediate supervision of women. Women civilian internees must receive sanitary conveniences and be searched by women.

[...]

23. Under the Convention, States parties' obligations to prevent, investigate and punish trafficking and sexual and gender-based violence are reinforced by international criminal law, including jurisprudence of the international and mixed criminal tribunals and the Rome Statute of the International Criminal Court, pursuant to which enslavement in the course of trafficking in women and girls, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable

gravity may constitute a war crime, a crime against humanity or an act of torture, or constitute an act of genocide. International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender.

[...]

D. Convention and the Security Council agenda on women, peace and security

[...]

27. The Convention contains a reporting procedure, under article 18, by which States parties are required to report on measures that they have adopted to implement the provisions of the Convention, including in conflict prevention, conflict and post-conflict situations. Using the reporting procedure to include information on the implementation of Security Council commitments can consolidate the Convention and the Council's agenda and therefore broaden, strengthen and operationalize gender equality.

[...]

IV. Convention and conflict prevention, conflict and post-conflict situations

A. Women and conflict prevention

[...]

B. Women in conflict and post-conflict contexts

1. Gender-based violence (arts. 1-3 and 5 (a))

34. Violence against women and girls is a form of discrimination prohibited by the Convention and is a violation of human rights. Conflicts exacerbate existing gender inequalities, placing women at a heightened risk of various forms of gender-based violence by both State and non-State actors. Conflict-related violence happens everywhere, such as in homes, detention facilities and camps for internally displaced women and refugees; it happens at any time, for instance while performing daily activities such as collecting water and firewood, going to school or work. There are multiple perpetrators of conflict-related gender-based violence and these may include members of government armed forces, paramilitary groups, non-State armed groups, peacekeeping personnel and civilians. Irrespective of the character of the armed conflict, duration or actors involved, women and girls are increasingly deliberately targeted for and subjected to various forms of violence and abuse, ranging from arbitrary killings, torture and mutilation, sexual violence, forced marriage, forced prostitution and forced impregnation to forced termination of pregnancy and sterilization.

35. It is indisputable that, while all civilians are adversely affected by armed conflict, women and girls are primarily and increasingly targeted by the use of sexual violence, “including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group” and that this form of sexual violence persists even after the cessation of hostilities (Security Council resolution 1820 (2008)). For most women in post-conflict environments, the violence does not stop with the official ceasefire or the signing of the peace agreement and often increases in the post-conflict setting. The Committee acknowledges the many reports confirming that, while the forms and sites of violence change, which means that there may no longer be State-sponsored violence, all forms of gender-based violence, in particular sexual violence escalate in the post-conflict setting. The failure to prevent, investigate and punish all forms of gender-based violence, in addition to other factors such as ineffective disarmament, demobilization and reintegration processes, can also lead to further violence against women in post-conflict periods.

36. During and after conflict specific groups of women and girls are at particular risk of violence, especially sexual violence, such as internally displaced and refugee women; women’s human rights defenders; women belonging to diverse caste, ethnic, national, religious or other minorities or identities who are often attacked as symbolic representatives of their community; widows; and women with disabilities. Female combatants and women in the military are also vulnerable to sexual assault and harassment by State and non-State armed groups and resistance movements.

37. Gender-based violence also leads to multiple additional human rights violations, such as attacks on women’s rights defenders by State and non-State, which undermine women’s equal and meaningful participation in political and public life. Conflict-related gender-based violence results in a vast range of physical and psychological consequences for women, such as injuries and disabilities, increased risk of HIV infection and risk of unwanted pregnancy resulting from sexual violence. There is a strong association between gender-based violence and HIV, including the deliberate transmission of HIV, used as a weapon of war, through rape.

[...]

2. Trafficking (art. 6)

39. Trafficking in women and girls which constitutes gender-based discrimination, is exacerbated during and after the conflict, owing to the breakdown of political, economic and social structures, high levels of violence and increased militarism. Conflict and post-conflict situations develop particular war related demand structures for women’s sexual, economic and military exploitation. Conflict-affected regions can be areas of origin, transit and destination with regard to trafficking in women and girls with the forms of trafficking varying by region, specific economic and political context and State and non-State actors involved. Women and girls living in or returning from camps for internally displaced persons or refugees or searching for livelihoods are

particularly at risk of trafficking.

40. Trafficking may also occur when third-party countries seek to restrict migrant influxes out of conflict-affected areas through measures such as interdiction, expulsion or detention. Restrictive, sex-specific or discriminatory migration policies that limit opportunities for women and girls fleeing from conflict zones may heighten their vulnerability to exploitation and trafficking.

[...]

3. Participation (arts. 7-8)

[...]

4. Access to education, employment and health, and rural women (arts. 10-12, 14)

48. The total breakdown of State public and service provision infrastructure is one of the major and direct consequences of armed conflict, resulting in the lack of delivery of essential services to the population. In such situations, women and girls are at the front line of suffering, bearing the brunt of the socioeconomic dimensions. In conflict-affected areas, schools are closed owing to insecurity, occupied by State and non-State armed groups or destroyed, all of which impede girls' access to school. Other factors preventing girls' access to education include targeted attacks and threats to them and their teachers by non-State actors, as well as the additional caregiving and household responsibilities which they are obliged to take on.

49. Likewise, women are forced to look for alternative sources of livelihood as family survival comes to depend heavily on them. Even though during conflict women take on roles previously held by men in the formal employment sector, it is not uncommon for women, in the post-conflict settings, to lose formal-sector jobs and return to the household or to the informal sector during post-conflict settings [...].

50. In conflict affected areas access to essential services such as health care, including sexual and reproductive health services are disrupted due to inadequate infrastructure, lack of professional medical care workers, basic medicines and health care supplies. Consequently, women and girls are at a greater risk of unplanned pregnancy, severe sexual and reproductive injuries and contracting sexually transmitted infections, including HIV and AIDS, as a result of conflict-related sexual violence. The breakdown or destruction of health services, combined with restrictions on women's mobility and freedom of movement, further undermines women's equal access to health care, as guaranteed by article 12 (1). Power imbalances and harmful gender norms make girls and women disproportionately more vulnerable to HIV infection and these factors become more pronounced during conflict and post-conflict settings. HIV-related stigma and discrimination is also pervasive and have profound implications for HIV prevention, treatment, care and support, especially when combined with stigma associated with gender-based violence.

51. Rural women are often disproportionately affected by the lack of adequate health and social services and inequitable access to land and natural resources. Similarly, their situation in conflict settings presents particular challenges with regard to their employment and reintegration as it is often exacerbated by the breakdown of services, resulting in food insecurity, inadequate shelter, deprivation of property and lack of access to water. Widows, women with disabilities, older women, single women without family support and female-headed households are especially vulnerable to increased economic hardship owing to their disadvantaged situation, and often lack employment and means and opportunities for economic survival.

[...]

5. Displacement, refugees and asylum-seekers (arts. 1-3 and 15)

53. The Committee has previously noted that the Convention applies at every stage of the displacement cycle and that situations of forced displacement and statelessness often affect women differently from men and include gender-based discrimination and violence. Internal and external displacement have specific gender dimensions that occur at all stages in the displacement cycle; during flight, settlement and return within conflict-affected areas, women and girls are especially vulnerable to forced displacement. In addition, they are often subjected to gross human rights violations during flight and in the displacement phase, as well as within and outside camp settings, including risks relating to sexual violence, trafficking and the recruitment of girls into armed forces and rebel groups.

54. Displaced women live in precarious conditions in conflict and post-conflict environments due to their unequal access to education, income generation and skills training activities, poor reproductive health care, exclusion from decision-making processes which are exacerbated by male-dominated leadership structures, poor camp layout and infrastructure both in camp and non-camp settings. This situation of dire poverty and inequality can lead them to exchange sexual favours for money, shelter, food or other goods under circumstances that make them vulnerable to exploitation and violence as well as to HIV infection and other sexually transmitted diseases.

55. Refugee women have different and additional needs than men through their experience as refugees. Refugee women face similar assistance and protection concerns to internally displaced women and could therefore benefit from similar gender-sensitive interventions to address their needs. The Committee acknowledges the diversity within these groups, the particular challenges they may face and the legal, social and other implications of the context of their displacement (internal versus external), the gaps in the international assistance provided to them and the need for targeted responses to their needs.

56. Searches for durable solutions following conflict-related displacement frequently exclude the perspective of displaced women, either because they rely on decision-making by a family member or community in which women's voices are marginalized or because durable solutions are set as part of post-conflict processes that

exclude women. In addition, female asylum seekers from conflict-affected areas can face gendered barriers to asylum, as their narrative may not fit the traditional patterns of persecution, which have been largely articulated from a male perspective.

[...]

Discussion

I. Applicable law

1. (Paras 8-10; 19-23) Does the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) [available online at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>], and do international human rights law (IHRL) treaties more generally, apply in times of armed conflict? In the same way as in times of peace?
2. What is the CEDAW Committee's position on the relationship between IHL and IHRL? Do these bodies of law have the same personal scope of application? Territorial scope of application? Temporal scope of application?
3. (Para. 4) In what way does the scope of application of the General Recommendation itself differ from the scope of application of IHL?

II. Rape and Sexual Violence

1. What protection does IHL provide against rape and other forms of sexual violence? Does IHL expressly prohibit rape and other forms of sexual violence in international armed conflicts? In non-international armed conflicts? (GC I-IV, Common Art. 3; GC IV, Art. 27; P I, Arts 75(2) and 76; P II, Art. 4(2)(a) and (e); CIHL, Rules 90, 91 and 93)
2. Does IHL protect all individuals against sexual violence? Does it matter whether the rape victim is a civilian, a combatant, a fighter, a militant sympathizer, or a terrorist? Man, woman or a child? Does the IHL prohibition against sexual violence apply between members of the same military or armed group? If so, justify your answer. If not, what rules would protect in such cases? (GC I-IV, Common Art. 3; GC I, Art. 12; GC II, Art. 12; GC III, Art. 14; GC IV, Arts 27; P I, Arts 75(2), 76 and 77; P II, Art. 4(2); CIHL, Rules 93, 134 and 135)
3. Does IHL apply to sexual violence committed against men and boys? As many rules of IHL are framed in terms of women's "honour", does this mean in practice that different rules protect men and women from sexual violence under IHL? (GC I-IV, Common Art. 3; GC IV, Art. 27; P I, Arts 75(2) and 76; P II, Art. 4(2)(a) and (e); CIHL, Rules 90, 91 and 93)
4. (Paras 2, 20-21, 34-56) Despite the fact that men and boys are also victims of sexual violence in armed conflicts, why is it, in your opinion, that women are accorded special protection in armed conflicts in this respect?
5. Does IHL require specific strategies to be put in place to cater for the medical and psycho-social needs of victims and survivors of sexual violence? Can this be read into the obligation to care for the wounded and sick? Who should put these strategies in place? Does IHRL contain the same or a similar requirement? (GC I-IV, Common Art. 3; GC I, Art. 12; GC II, Art. 12; GC III, Art. 30; GC IV, Art. 16; PI,

III. Criminal Repression of violations

1. (Para. 34) What do you think of the claim that “conflict-related violence happens everywhere”? Is all sexual violence that occurs during an armed conflict a violation of IHL? Why is it important to be clear regarding acts that are linked to the armed conflict and those that are not so linked?
2.
 1. Does IHL impose an obligation on States to investigate allegations of rape and other forms of sexual violence committed in international armed conflicts? In non-international armed conflicts? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art 85; CIHL, Rules 93 and 158)
 2. Under IHL, what are the requirements for an inquiry into an alleged rape? Must the victim be involved? Must the result be made public? (GC I-IV, Common Art. 1; P II, Art. 6; GC I, Art. 49; GC II, Art 50; GC III, Art. 129; GC IV, Art. 146; P I, Art. 85; CIHL, Rule 158)
 3. Do you think that the obligation to investigate also binds armed groups?
3. (Paras 15 and 23) Does IHRL impose an obligation on States to prevent and repress rape and other forms of sexual violence? To investigate allegations of rape and other forms of sexual violence? If yes, do you think that the obligations imposed on States under IHL and IHRL are different? If different, which regime is more protective?
4. (Para. 15) Is it realistic to expect States to regulate the behavior of armed non-State actors, and if they fail in doing so, to hold the State internationally responsible for failing to “exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention”?
5. (Paras 23, 37 and 50)
 1. Can sexual violence constitute a means of warfare? A method of warfare? What would be the advantages and disadvantages of referring to it as a means of warfare rather than a systematic violation of IHL and a war crime?
 2. What rules of IHL would be violated by the employment of a policy to deliberately transmit HIV through rape? Who would be criminally responsible for the violation(s) of that/those rule(s)? Are other forms of sexual violence war crimes? (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; P I, Art. 85; ICC Statute, Art. 8(2)(b)(xxii) and (e)(vi); CIHL, Rule 156)
6. (Paras 9 and 13-14) If a member of an international peacekeeping force committed rape, to what state/international entity would the violation be attributable? Assuming the peacekeeping force were UN-mandated and run, would IHL apply to UN forces per se? Provide arguments for and against the proposition that IHL would apply to the act, and the individual(s) involved.
7. (Para. 16) Do you agree with the following statement by the Committee: “[U]nder certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights [...]” Is it a settled matter whether or not armed groups have obligations under international human rights law? What are arguments for and against the Committee’s view?
8. (Para. 15) Is the obligation to “exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention” when dealing with an armed conflict an obligation of IHL or IHRL? Of both?

