



## Joint Submission to UN Special Rapporteur on Violence against Women

### Thematic report on “Rape as a Grave and Systematic Human Rights Violation and Gender-based Violence Against Women”

21 May 2020

#### I. INTRODUCTION

In response to the call for submissions by the UN Special Rapporteur on violence against women, its causes and consequences (SRVAW), CREA, Amnesty International, RESURJ, IWRAW-Asia Pacific and the Global Health Justice Partnership of Yale Law School and the Yale School of Public Health,<sup>1</sup> submit this memorandum for consideration in the upcoming thematic report on “rape as a grave and systematic human rights violation and gender-based violence against women”, to be presented to the UN General Assembly in September 2020.

Our submission reaffirms states’ responsibility to address sexual and gender-based violence (SGBV) as a grave and systematic human rights violation but recommends that the report use a broader analytical frame that situates penal reform within more comprehensive approaches to combat SGBV, beyond prosecution and punishment. While the SRVAW rightly seeks to further elucidate states’ obligations to “prosecute and punish”, this focus would be more effective if criminal law responses were explicitly linked with other state due diligence obligations to prevent, remedy and redress SGBV.

The submitting organizations propose that the SRVAW’s report should ambitiously encompass more than an audit of criminal laws, by bringing a critical perspective to the role and the use of the criminal law as a matter of human rights, and in particular, the larger picture of the causes and consequences of SGBV; the full-range of states’ due diligence obligations (prevent, protect against, prosecute, punish, and provide redress for acts violence by state and non-state actors); the effectiveness of criminal laws in reducing incidence and prevention of SGBV; and the frequent exclusion of marginalized and criminalized individuals and groups from protection from violence. In any focus on prosecution and punishment for SGBV, a human rights consistent approach must grapple with the potential for abuse of the criminal law, as our experience has revealed a paradox: globally, there is a ratcheting up of criminal punishments for some SGBV crimes, unsupported by evidence of effectiveness, whereas in other cases, there is a lack of enforcement and punishment for SGBV.

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<sup>1</sup> CREA, <https://creaworld.org/>; Amnesty International, <https://www.amnesty.org/en/>; RESURJ, <http://resurj.org/>; IWRAW-Asia Pacific, <https://www.iwraw-ap.org/>; and Global Health Justice Partnership of Yale Law School and Yale School of Public Health, <https://law.yale.edu/ghjp>.

Thus, we encourage the SRVAW to call for accountability for punitive state actions that have abusive or other discriminatory effects: when penal acts by the state are undertaken with the aim of combating SGBV but produce other injustices, or create the conditions for SGBV and other injustices to thrive, equality for women is undermined. Broadening the scope of analysis within the SRVAW's report and more generally to approaches to preventing and halting SGBV is critical to achieving gender justice,<sup>2</sup> as well as consonant with states' non-discrimination obligations.

What follows is a brief discussion of the often uneven and discriminatory application of criminal laws and an overview of key issues that impede SGBV prevention and access to justice, along with proposed recommendations for states. The submission also contains an Annex which highlights examples of specific complementary and alternative, victim-centered measures that can be used alongside criminal laws, to ensure a comprehensive approach to preventing and redressing SGBV, that do not solely rely on penalization and punishment.

## **II. PROMOTING GENDER JUSTICE REQUIRES AFFIRMING STATES' OBLIGATIONS TO UPHOLD THE HUMAN RIGHTS OF ALL PEOPLE**

States' ongoing failure to effectively reduce SGBV, including by prosecution, is widespread. Failings in the application of the criminal law can be due to multiple factors, including lack of: capacity, including adequately trained and accountable police; independent courts capable of supporting the rights of victims of crimes, as well as rights of defendants; and the persistence of gender stereotypes (including those that intersect with race, nationality, sexuality, age, disability, and class, caste, and religion among other factors). These stereotypes reflect dominant conservative views on gender roles within families, such that SGBV may be condoned as a man's right to discipline his wife or daughters. Other barriers include lack of prioritization and political will by judges, police and prosecutors, with procedural failures often coupled with inadequate substantive law, enforcement of laws without adequate awareness raising and advocacy, impunity, and lack of focus on victim/survivor concerns, privacy, and protection. Further, as you have observed, underlying systemic violence is "unequal power gender relations, patriarchy, homophobia, sexism and other harmful discriminatory beliefs and practices."<sup>3</sup>

Criminal justice systems are also influenced by wider structures that generate inequality and sustain preexisting axes of power. Decisions around what types of conduct and how and the extent to which to punish it are not neutral, they are "guided by existing structures of economic and social inequality based on race, gender, sexuality, disability, and poverty, among others."<sup>4</sup> Research indicates that marginalized women and gender diverse people suffer from pervasive violence and yet often lack sufficient access to justice and

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<sup>2</sup> For purposes of this submission, gender justice is defined as a response to people's lived experiences of violence and oppression that legal and civil protections alone cannot tackle. Gender justice as a framework recognizes the role that state, legal, and economic systems can play in perpetuating gender-based violence and oppression. Additionally, it recognizes that while changes in law and policy are necessary, alone they are insufficient to eliminate structural inequalities and discrimination that deprives individuals or groups from accessing rights, resources and power on an equal footing due to their gender and other intersecting elements of their identities.

<sup>3</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa, UN Doc. A/HRC/32/42/Add.2, 2016, para. 7. [hereinafter Report of the Special Rapporteur on violence against women, Mission to South Africa, 2016]

<sup>4</sup> Barnard Center for Research on Women, The Crisis of Criminalization, March 2017, <http://bcw.barnard.edu/wpcontent/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf>.

services. Those who live in poverty, lack education and support networks and/or transgress social, gender and cultural norms who need the greatest protection from SGBV are also the least likely to have access to criminal justice systems.<sup>5</sup> For example, as documented by the SRVAW in South Africa, criminalization of sex work has “driven women in prostitution underground, increased stigma and discrimination, created obstacles to access services and made them very vulnerable to violence, human rights violations and corruption.”<sup>6</sup> Additionally, lesbian women in South Africa are vulnerable to “extreme forms of violence purported at ‘correcting’ their bodies, including the so-called ‘corrective rape’ often accompanied by a particularly heinous murder.”<sup>7</sup> Gender bias means, for example, that women in Egypt have reported that they often feel unable to report sexual violence to the police due to fear that they will be mocked or harassed.<sup>8</sup> In Pakistan, women who attempted to report violence have been told to go home and reconcile with their partners.<sup>9</sup> In the US state of Louisiana, the justice system fails survivors who are living in poverty and/or are people of color, by not taking violence they face seriously, arresting those who call for help, and failing to respond adequately or responding in a discriminatory manner.<sup>10</sup>

Marginalized women and gender diverse individuals also suffer under the disproportionate enforcement of laws and policies that criminalize sexuality, reproduction and gender expression (including punitive regulation of consensual sex outside of marriage, among people of the same-sex, adolescents, and for money or goods, as well as termination of pregnancy, HIV exposure, nondisclosure and transmission and actions during pregnancy),<sup>11</sup> which further impedes their access to justice and protection from violence. Criminal law enforcement in these areas has further been linked to heightened discrimination and denial of critical health services.<sup>12</sup> It also creates an environment where these groups are less likely to seek police intervention when

<sup>5</sup> See RESURJ, *Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations*, 2020, p. 14, <http://resurj.org/sites/default/files/2020-02/ENGLISH%20Beyond%20Criminalization%20A%20Feminist%20Questioning%20of%20Criminal%20Justice%20Interventions%20to%20Address%20Sexual%20and%20Reproductive%20Rights%20Violations.pdf>. [hereinafter RESURJ, *Beyond Criminalization*]

<sup>6</sup> Report of the Special Rapporteur on violence against women, Mission to South Africa, 2016, *supra* note 3, at para. 35. <sup>7</sup> *Id.* at para. 33.

<sup>8</sup> See RESURJ, *Beyond Criminalization*, *supra* note 5, at p. 14. <sup>9</sup> See RESURJ, *Beyond Criminalization*, *supra* note 5, at p. 14.

<sup>10</sup> See Amnesty International, *Fragmented and Unequal: A Justice System that Fails Survivors of Intimate Partner Violence in Louisiana, USA*, 2019 (Index: AMR 51/1160/2019), <https://www.amnesty.org/download/Documents/AMR5111602019ENGLISH.PDF>. [hereinafter Amnesty International, *Fragmented and Unequal*]

<sup>11</sup> See Amnesty International, *Body Politics: Criminalization of Sexuality and Reproduction (A Primer)*, 2018, (Index: POL 40/7763/2018), <https://www.amnesty.org/download/Documents/POL4077632018ENGLISH.PDF>; Amnesty International, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 2017 (Index: AMR 51/6203/2017), <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>; Amnesty International, *Imprisoned Women, Stolen Children: Policing Sex, Marriage and Pregnancy in Jordan*, 2019, p.21-22 (Index: MDE 16/0831/2019), <https://www.amnesty.org/download/Documents/MDE1608312019ENGLISH.PDF>. [hereinafter Amnesty International, *Imprisoned Women, Stolen Children*]

<sup>12</sup> See Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador*, 2014, <http://www.amnestyusa.org/research/reports/on-the-brink-of-death-violence-against-women-and-the-abortion-ban-in-elsalvador>; Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion*, 2014, <https://www.reproductiverights.org/sites/crr.civactions.net/files/documents/El-SalvadorCriminalizationOfAbortion-Report.pdf>; Amnesty International, *The Total Abortion Ban in Nicaragua: Women’s Health and Lives Endangered, Medical Professionals Criminalized*, 2009, <http://www.amnestyusa.org/pdfs/amr430012009en.pdf>; Open Society Foundations, *10 Reasons to Decriminalize Sex Work: A Reference Brief*, 2012,

[https://www.opensocietyfoundations.org/sites/default/files/10-reasons-decriminalize-sex-work20150410\\_o.pdf](https://www.opensocietyfoundations.org/sites/default/files/10-reasons-decriminalize-sex-work20150410_o.pdf); Canadian HIV/AIDS Legal Network, Women, Sex Work and HIV, 2012, <http://www.aidslaw.ca/site/women-and-hiv-women-sex-workand-hiv/?lang=en>; UNAIDS, Ending Overly Broad Criminalisation of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations (Guidance Note), 2013, [http://www.unaids.org/sites/default/files/media\\_asset/20130530\\_Guidance\\_Ending\\_Criminalisation\\_o.pdf](http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_o.pdf); Ipas, When their rights have been violated.<sup>13</sup> Simply the threat of punishment prevents criminalized women and gender diverse people from seeking protection from violence, as documented by research on criminalization of and violence against sex workers in Hong Kong, Buenos Aires, Norway and Papua New Guinea.<sup>14</sup> Those deemed “criminals” under the law are unable to simultaneously be victims/survivors of violence worthy of protection. The focus of law enforcement efforts on prosecuting and punishing these individuals and their sexual and reproductive “crimes”, also uses finite resources to prevent, prosecute and punish SGBV more broadly.

The human rights principle of non-discrimination provides that criminal law and policies shall apply equally to all people “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, and shall not directly or indirectly discriminate in law and practice.<sup>15</sup> In particular, this principle means that neither the content of criminal law, nor its application or non-application should have a discriminatory impact on individuals or groups of people. However criminal laws are both overused and/or misused to police and punish certain conduct and populations along race and class-lines, and under-used to prosecute SGBV across the world, or to focus prosecution on men of already marginalized groups.<sup>16</sup>

As the SRVAW’s mandate encompasses the overall lack of prevention and accountability for SGBV, it is essential to assess the shortcomings and uneven enforcement of existing criminal justice frameworks, as well as the targeted and disproportionate enforcement of laws criminalizing sexuality and reproduction against particular individuals and groups in violation of their human rights—which effectively draws resources and attention away from combatting SGBV and leads to human rights violations.<sup>17</sup> Additionally, while international due diligence standards obligate states to prevent, protect against, prosecute, punish, and provide redress for acts of violence by state and non-state actors, governments, many anti-violence

Abortion is a Crime: The Threat to Vulnerable Women in Latin America, 2013, <http://www.ipas.org/en/Resources/Ipas%20Publications/When-Abortion-is-a-Crime-The-threat-tovulnerable-women-in-LatinAmerica.aspx>; Human Rights Watch, Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities, 2012, <https://www.hrw.org/report/2012/07/19/sexworkers-risk/condoms-evidence-prostitution-four-us-cities>; Amnesty International, She is Not a Criminal: The Impact of Ireland’s Abortion Law, 2015, [http://www.amnestyusa.org/pdfs/Ireland\\_She\\_Is\\_Not\\_A\\_Criminal.pdf](http://www.amnestyusa.org/pdfs/Ireland_She_Is_Not_A_Criminal.pdf).

<sup>13</sup> See *id.*

<sup>14</sup> See Amnesty International, Sex Workers At Risk: A Research Summary on Human Rights Abuses against Sex Workers, 2016 (Index: POL 40/4061/2016), <https://www.amnesty.org/download/Documents/POL4040612016ENGLISH.PDF>.

<sup>15</sup> See Article 2 of the Universal Declaration of Human Rights (UDHR), and in different UN human rights instruments, such as Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2 of the Convention on the Rights of the Child (CRC); Article 7 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and Article 5 of Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, two of the major UN human rights treaties are established explicitly to prohibit discrimination, Convention on the Elimination of All Forms of Racial Discrimination (CERD) on the ground of race, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), on the ground of sex. See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, paras. 9, 28, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legalsubmission-1985-eng.pdf>. [hereinafter Siracusa Principles] Though these principles are focused on civil and political rights, the Limburg Principles adopted in 1987 include a similar statement of principles to assess where

limitations on economic, social and cultural rights are permissible. See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, 1987, paras. 35-41, 49. [hereinafter Limburg Principles]

<sup>16</sup> See Widney Brown, Reflections of a Human Rights Activist, in *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*, (Eds, A.M. Miller and M.J. Roseman) 2019.

<sup>17</sup> States have simultaneous obligations to both comply with their due diligence obligations, including by addressing the conditions that underlie SGBV, and refrain from criminalizing or otherwise punishing individuals for the exercise of their sexual and reproductive rights. See *Beyond Criminalization*, *supra* note 5.

advocates and other key actors have narrowly focused on prosecution with little attention given to the structural social, economic and cultural conditions which underlie SGBV.

In the end, even when “protective” laws are in place to target and punish SGBV, a range of intervening factors, gender and other stereotypes and misuse of criminal justice systems impede gender justice, and those laws can actually be used as tools to punish and police certain individuals and groups—causing more human rights harm, without achieving the laws’ intended aim. For example, women in Jordan who challenge their guardian’s authority, who transgress social norms around sex, marriage and reproduction, or who are victims/survivors of SGBV, are at risk of being administratively detained under the Crime Prevention Law of 1954, sometimes under the excuse that it is for their own “protection.” Many of the women in administrative detention have run away from abusive and violent family environments. Instead of addressing the threats to these women and respecting their autonomy to make decisions about their lives, they are punished, confined, and imprisoned.<sup>5</sup>

### III. EXISTING AND NATIONAL- AND LOCAL-LEVEL CRITIQUES OF BARRIERS AND FAILURES WITHIN STATES’ CRIMINAL JUSTICE SYSTEMS CAN BE UTILIZED TO STRENGTHEN GLOBAL PERSPECTIVES

While SGBV was not always clearly recognized as a human rights violation, since 1993<sup>6</sup> states’ human rights obligations to prevent, investigate, prosecute and punish such violations have been clearly established in international law and continue to evolve.<sup>7</sup> Yet, over the years, global and national-level efforts to combat SGBV have, to some extent, primarily focused on the adoption of criminal laws and increasing penalties.

While the foremost aims of criminal law (prevention, retribution for specific harms done, incapacitation, deterrence of future criminal activity and rehabilitation of offenders) are far-reaching, calls for criminalization of SGBV are often not accompanied by sufficient research on the efficacy of criminalized responses to end SGBV and to promote gender justice. In fact, a strong link between the reduction of SGBV and the threat of

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<sup>5</sup> See Amnesty International, *Imprisoned Women, Stolen Children*, *supra* note 11, at p.21-22.

<sup>6</sup> Since the adoption of the Declaration on the Elimination of Violence Against Women in 1993, and the World Conference on Human Rights, held in Vienna in the same year, recognition of women’s rights as human rights has been clear. In the past decades, human rights mechanisms at international and regional level have consistently explained State obligations in this regard.

<sup>7</sup> See, for example, Human Rights Committee, General Comment 36 on the right to life (2018), para 7; CEDAW, General Recommendation 35 on gender-based violence against women, updating general recommendation (2017), para. 24 (b); Human Rights Committee, General Comment 35 on liberty and security of the person (2014), para 9; Committee on the Rights of the Child, General Comment 13 on the right of the child to freedom from all forms of violence, (2011) para 5.

criminal sanctions alone is not well established.<sup>89</sup> In cases where there have been reductions in such violence, they are also associated with several other factors such as changes in attitudes, increases in education and awareness,<sup>10</sup> and emerging more equitable social gender norms with regard to women and gender diverse people.<sup>11</sup> Additionally, few questions have been asked regarding the broader impact of states' current punitive approaches—who is being punished through the application and enforcement of criminal law? Do victims/survivors feel restored following a criminal justice process? Have victims' concerns, wants, and voice been centered in the process? Which harms are invisibilized by states' criminal justice approaches? These may be questions that the SRVAW may consider for exploration in her upcoming report.

To effectively prevent and eradicate SGBV, a range of interventions and reforms in laws, policies and practices must be undertaken to address the underlying conditions that enable and perpetuate SGBV. As noted by the UN Committee on the Elimination of Discrimination against Women, states must adopt a wide range of measures to prevent and redress SGBV, as a cause and consequence of discrimination against women, in the public and private spheres.<sup>12</sup>

Set forth below are a few key issues that should be considered in the SRVAW's report, as well as proposed recommendations for states.

#### **a) Unintended Consequences of Criminal Laws Must be Examined**

Even when criminal laws and practices are reformed or multiplied, by itself, law can do little to prevent and eradicate SGBV. Take the case of Brazil, where landmark legislation on violence against women was adopted with the aim of changing both criminal and civil justice systems' responses to women's claims, but which has been largely ineffective.<sup>13</sup> Law reform advocates are now questioning approaches that simply push for more criminal laws, as they realize that practice, implementation, and resource mobilization for effective law enforcement are actually more important.<sup>26</sup> Feminists across countries and regions are also questioning the need to push for more laws and stricter punishments given that existing laws have fallen short of providing justice.<sup>27</sup> This has been the case in Egypt where advocates applauded the bottom-up approach and successful

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<sup>8</sup> See Leigh Goodmark, *Should Domestic Violence be Criminalized?* 54 *HARVARD JOURNAL OF LAW & GENDER* 40, 78, 2017; Paul H. Robinson and John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 *OXFORD J. LEGAL STUD.* 173, 9, 2004. See also Jeffrey Fagan and Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 *OHIO ST. J. CRIM. L.* 173, 181-2, 2008, ("Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment alone to deter crime appears to be quite limited.").

<sup>10</sup> See World Bank, Sarah Bott, Andrew Morrison, and Mary Ellsberg, *Preventing and Responding to Gender-based Violence in middle and low income countries (World Bank Policy Research Working Paper 3618)*, 2005. [hereinafter World Bank, Policy Research Working Paper 3618]

<sup>11</sup> See Mala Htun and S. Laurel Weldon, *The Logics of Gender Justice: State Action on Women's Rights Around the World*, CAMBRIDGE UNIVERSITY PRESS, 2018.

<sup>12</sup> See CEDAW, General Recommendation 35 (2017) on gender-based violence against women, updating general recommendation 19.

<sup>13</sup> See Cecilia M. B. Sardenberg, *Ten Years of Maria Da Penha Law: Advancements and Shortcomings in Confronting Gender Based Violence Against Women in Brazil*, *REVISTA FEMINISMOS*, Vol. 4, Np.1, Jan-Abr. 2016. <sup>26</sup> See RESURJ, *Beyond Criminalization*, *supra* note 5, at 4. <sup>27</sup> See *id.*

passing of a sexual harassment law, but who are now troubled by the law's penalties and that gender discrimination, norms, and stereotypes remain rampant, affecting all other aspects of their life.<sup>14</sup>

Criminal justice-driven responses to SGBV have also led to other harmful and discriminatory impacts. For example, efforts to encourage law enforcement responsiveness have led to compulsory interventions, such as mandatory arrests and no-drop prosecutions.<sup>15</sup> Though some advocates support those reforms, the resulting dual arrests and arrests of women who use violence in self-defense raise several concerns.<sup>30</sup> Mandatory arrest policies can lead to separation of families and increased economic and caretaking burdens on women. Migrant and refugee victims/survivors may also be reluctant to call the police for the fear of punishment and deportation. Often when victims/survivors are queried about what remedies they seek, it is simply for the violence to stop and for the underlying gender stereotypes to be addressed, not that their partner or family member be sent to jail.<sup>16</sup> Yet, instead of investing in social and health services, education, information, and awareness-raising to address the root causes of SGBV, many states spend disproportionately higher amounts of public resources on building prisons and maintaining them.<sup>17</sup>

**The SRVAW's report should call on states to:**

- **Consider the shortcomings of existing criminal justice systems and work to address their often unjust and discriminatory human rights impacts.**
- **Review existing SGBV laws and policies to determine efficacy in preventing and redressing violence and whether unintended harms result from the existence and enforcement of these laws and policies and engage in legal and policy reform accordingly.**
- **Develop and implement a range of SGBV prevention measures in consultation with SGBV victims/survivors that extend beyond criminal law and policy enforcement.**

**b) Criminal Justice Systems Recognize Certain Harms and Victims and Invisibilize Others**

Existing criminal justice systems tend to privilege addressing certain harms and certain victims/survivors over others, thus having a discriminatory impact, and large groups of people can be left unprotected from violence. Many laws, policies and practices are sex-specific and/or are enforced in a manner that presumes men are perpetrators and women are victims, leaving men and boys (and gender non-conforming/non-binary people) in precarious situations. These legal approaches can also invisibilize SGBV faced by men and boys (and potentially gender diverse individuals). Also of concern, the current framing of the SRVAW's report assumes that women are never charged as perpetrators—and yet women face specific challenges as criminal defendants.<sup>18</sup>

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<sup>14</sup> See *id.*

<sup>15</sup> See Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence*. Vol. 7. UNIV OF CALIFORNIA PRESS, 2018. [hereinafter Leigh Goodmark, *Decriminalizing Domestic Violence*] <sup>30</sup> See Amnesty International, *Fragmented and Unequal*, *supra* note 10.

<sup>16</sup> See Leigh Goodmark, *Decriminalizing Domestic Violence*, *supra* note 29.

<sup>17</sup> When prisons are privatized, as is arising in many global North countries, the prison industry stands to profit a great deal from the push for criminalization. For more information, see <http://resurj.org/post/profit-feeding-profit-childrens-homesprisons-uk>.

<sup>18</sup> See Sara E. Brown, *Female Perpetrators of the Rwandan genocide*, 16 *INTERNATIONAL FEMINIST JOURNAL OF POLITICS* 3, 2014, p. 448-469; Amnesty International, *Fragmented and Unequal*, *supra* note 10.

Lack of women’s equal legal protection can be exacerbated when law enforcement authorities fail to respond effectively when women from marginalized groups, such as ethnic minority women, lesbian or bisexual women, women with disabilities, or transgender people, sex workers and women who use drugs, report human rights violations.

As decades of analytic work on the gendered insufficiency of criminal law has revealed, there can be a complete failure or gender-biased unwillingness in the law itself to acknowledge that any rights violation has occurred at all. This is the case, for example, in countries where the criminal code fails to criminalize rape within marriage<sup>19</sup> or when sexual assault of men is not regarded as rape but prosecuted as a “crime against the order of nature.”<sup>20</sup> Sexual assault of transgender people can be invisibilized twice, when the assault is not considered gender-based violence or rape, as such crimes are often interpreted as only occurring against cisgender women, and many transgender women are not recognized as women in police or official records.<sup>21</sup>

**The SRVAW’s report should call on states to:**

- **Ensure that certain harms are not prioritized over others within criminal justice initiatives in a way that disadvantages the most marginalized women and gender diverse individuals and adolescents.**
- **Develop gender-sensitive enforcement guidance that ensures protections for all people on a nondiscriminatory and nonbiased manner.**
- **Refrain from asserting that laws criminalizing or otherwise punishing prostitution/sex work and same-sex sexual conduct are uniformly necessary for effective violence prevention, given that research has demonstrated to the contrary and that criminalized approaches can impede protection from violence.**

**c) Punishment of Perpetrators is Prioritized Over Victims’/Survivors’ Rights**

Criminal justice typically stresses punishment of perpetrators rather than restoring the safety and wellbeing of victims/survivors, and victims/survivors are often cynically used by prosecutors – with both adding more severe penalties and ignoring victim’s wishes for or against prosecution as the paradoxical result. There is often a dearth of resources or support for victims/survivors during the litigation process (e.g. lack of accommodations for survivors with disabilities and compensation for food, travel or other expenses incurred during the trial process), and some victims/survivors even suffer mistreatment during the proceedings.<sup>22</sup> Other unacknowledged harms include women declining to report violence to avoid being “retraumatized” by the process and when the burden of proof falls on their shoulders.<sup>23</sup>

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<sup>19</sup> Marital rape not being criminalized is due to the view that no harm is accrued because the personhood of the wife is subsumed under the person of her husband by virtue of their marriage; as well as the view that the wife’s obligations include the performance of sexual intercourse or conjugal relations. So while rape may be recognized as harm under the same criminal code, a wife cannot be the victim of rape by her husband, and no harm accrues.

<sup>20</sup> See generally ILGA, Lucas Ramón Mendos, *State-Sponsored Homophobia*, 2019, [https://ilga.org/downloads/ILGA\\_State\\_Sponsored\\_Homophobia\\_2019.pdf](https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf).

<sup>21</sup> See *id.* at p. 95, 63.

<sup>22</sup> See, for example, Partners in Law and Development, *A Study of Pre-trial and Trial Stages of Rape Prosecutions in Delhi (2014-15)*, 2017, <https://pldindia.org/wp-content/uploads/2017/06/A-STUDY-OF-PRE-TRIAL-AND-TRIAL-STAGES-OF-RAPEPROSECUTIONS-IN-DELHI-2017.pdf>.

<sup>23</sup> Women can be shamed, and degraded, and their personal and sexual lives and histories can be put on trial, questioned, and examined. This is true in countries like Germany where there is an extensive survivor support system in place, and in South



Criminal sanctions are also not always necessarily appropriate for victims/survivors who want physical or sexual violence to end, and their abusers to learn and reform, but who do not want to break up their family, or in some settings risk having their family member deported. In some settings, women and children have no means of economic survival if a violent partner or sexually abusive parent receives jail time.<sup>24</sup>

**The SRVAW's report should call on states to:**

- **Ensure that criminal laws and policies and their implementation prioritize the needs and desires of victims/survivors, not simply punishment of perpetrators.**
- **Provide victims/survivors who are participating in criminal justice processes with psychological and financial support, paying special attention to the needs and rights of victims/survivors with disabilities.**

**d) Lack of Resources for Effective Implementation**

A foremost issue that impedes accountability for violence is states' failure to adequately resource implementation of criminal SGBV laws and cross-sectoral collaboration, as well as violence prevention measures beyond criminal justice responses. For example, in Pakistan, lack of resources impedes the collection of evidence to convict perpetrators.<sup>25</sup> In Brazil, a landmark law passed in 2006 on violence against women has been found to be inefficient largely due to a lack of resources for proper implementation and an uneven distribution of resources.<sup>26</sup> Even further back, when the rape law was introduced in Brazil and included in the Heinous Crimes Law, a weak infrastructure and a prominent judicial culture resistant to change, led to fewer successful prosecutions.<sup>27</sup>

**The SRVAW's report should call on states to:**

- **Ensure that implementation of SGBV laws and policies is prioritized and resourced, including for all policies and programmes directed at the underlying social, economic, and cultural conditions that lead to violence.**
- **Allocate sufficient resources to ensure that victims/survivors can access the criminal justice system and are supported in seeking legal redress through effective and fair interventions.**

**e) Increasing Penalties Can Lead to Decreased Accountability**

As ongoing calls for criminalization and punishment of SGBV are made, legislators continue to increase penalties, often without regard for human rights principles of necessity and proportionality. Yet ever

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Africa which has special prosecution units and courts for sexual assault. See Mary Koss and Mary Achilles, Restorative Justice Responses to Sexual Assault, APPLIED RESEARCH FORUM, 2008.

<sup>24</sup> See World Bank, Policy Research Working Paper 3618, *supra* note 22.

<sup>25</sup> See RESURJ, Beyond Criminalization, *supra* note 5, p. 14 (citing Interview with Sheena Hadi, March 5, 2019 over BOT).

<sup>26</sup> See Cecilia M. B. Sardenberg, Ten Years of Maria Da Penha Law, *supra* note 25.

<sup>27</sup> See Fiona Macaulay, Private conflicts, public powers: Domestic violence in the courts in Latin America, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (edited by Rachel Sieder, Une Schjolden, and Alan Angell) 2005, p. 211. <sup>43</sup> See RESURJ, Beyond Criminalization, *supra* note 5, p. 14. <sup>44</sup> See *id.*

increasing penalties can simply lead to reduced prosecution. For example, in Pakistan, penalties have been increased for various sexual violations, but judges have since found it difficult to convict when the penalties are so steep, including the death penalty.<sup>43</sup> In Egypt, the women who pushed for the country's new sexual harassment law are now reluctant to report sexual violence because they do not want men imprisoned as it is considered cruel and imprisonment will not change their attitudes or behaviour towards women.<sup>44</sup> To this end, lack of clarity on the limits of criminalization and specifically penalties, can produce unfair and discriminatory outcomes, as well as fail to prevent SGBV or to provide the redress and healing that victims/survivors seek.

**The SRVAW's report should call on states to:**

- **Ensure that existing criminal laws (as well as the adoption of new criminal laws) comply with international human rights law which requires that punitive regulation of SGBV be legal, necessary, proportionate, and nondiscriminatory.**
- **Ensure that penalties for SGBV are proportionate as required under international law.**

**f) States' Nondiscrimination and Other Obligations in Undertaking Criminal Justice Endeavors**

Human rights principles of non-discrimination provide that criminal law and policies shall apply equally to all people "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", and shall not directly or indirectly discriminate in law and practice.<sup>28</sup> In particular, this principle means that neither the content of criminal law, nor its application or non-application should have a discriminatory impact on individuals or groups of people. At present, states' criminal law enforcement has been both ineffective at preventing and eradicating SGBV as a whole and has specifically failed to protect all people who suffer SGBV. Rather, as noted throughout this submission, states' SGBV criminal laws tend to be selectively enforced against marginalized individuals and groups who transgress social, cultural and gender norms. (See Section II for further discussion)

**The SRVAW's report should call on states to:**

- **Acknowledge and address the discriminatory impact of existing criminal justice systems, both in terms of lack of access to justice and protection from marginalized and gender diverse individuals, and the disparate impact of laws criminalizing sexuality, reproduction and gender expression on the same people.**
- **Collect disaggregated data on the human rights impact of criminalizing SGBV and sexuality, reproduction, and gender expression, and use this data to reform existing criminal laws, policies, and practices.**

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<sup>28</sup> See Article 2 of the Universal Declaration of Human Rights (UDHR), and in different UN human rights instruments, such as Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2 of the Convention on the Rights of the Child (CRC); Article 7 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and Article 5 of Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, two of the major UN human rights treaties are established explicitly to prohibit discrimination, Convention on the Elimination of All Forms of Racial Discrimination (CERD) on the ground of race, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), on the ground of sex. See also Siracusa Principles, *supra* note 15, at paras. 9, 28. Though these principles are focused on civil and political rights, the Limburg Principles adopted in 1987 include a similar statement of principles to assess where limitations on economic, social and cultural rights are permissible. See Limburg Principles, *supra* note 15, at paras. 35-41, 49.

#### IV. STATES' BROAD DUE DILIGENCE OBLIGATIONS MUST BE HIGHLIGHTED, NOT SOLELY STATES' PROSECUTION PRACTICES

States' due diligence obligations to prevent, protect against, prosecute, punish, and provide redress for acts of SGBV are comprehensive. While punishment is a component of those obligations, all too often this component is over-prioritized which can exacerbate and perpetuate interconnected forms of SGBV, as well as broader inequalities, particularly for racial, ethnic, religious, and sexual minorities, and for other marginalized communities, such as Indigenous, refugee and migrant, and victims/survivors with disabilities. This is particularly the case in contexts where structural forms of discrimination are embedded within criminal justice systems.

The former SRVAW highlighted that due diligence requires an examination of “structural inequalities and the complex and intersecting relations of power in the public and private spheres of life that lie at the heart of sex discrimination.”<sup>29</sup> In practice, this requires examining and addressing the wider web of laws and policies and socio-economic and cultural conditions that enable and perpetuate SGBV (*i.e.* economic and labor policies which keep women dependent on abusive spouses); family and personal status laws which fail to provide for women's agency outside roles as daughters or wives; citizenship and inheritance law, as well as other conditions putting women at risk of violence. Additionally, SGBV cannot be effectively eradicated without combatting gender stereotypes and inequalities that take away women's and girls' agency over decision making and ownership over their bodies. States failures to reduce economic inequalities and prevent climate change (by driving impoverished communities further into economic hardship)<sup>30</sup> also contribute to the decisions within impoverished and marginalized communities to prioritize boys' education over girls, and to marry girls off at an early age, which puts them at greater risk of SGBV.

More broadly, gender inequality cannot be tackled without also addressing systemic challenges including poverty, classism, racism, lack of education, and violations against migrants, amongst others. Respect for the rights of women, girls and diverse individuals will not come with the force of law alone; instead, an integrated comprehensive approach is needed. One that will address the lack of awareness and information around women's and girls' rights and gender and other stereotypes, as well as inequality, marginalization and poverty issues which often compound the oppression of women and girls.<sup>48</sup>

#### **The SRVAW's report should call on states to:**

- **Focus greater efforts on and resources toward the prevention component of their due diligence obligations, which requires addressing the underlying conditions and structural and social, economic, and cultural inequalities and gender stereotypes that enable and perpetuate SGBV.**

#### V. CONCLUSION AND RECOMMENDATIONS

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<sup>29</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of the Human Rights of Women and the Gender Perspective: Violence against Women – the Due Diligence Standard as a Tool for the Elimination of Violence against Women, UN Doc. E/CN.4/2006/61, 2006, para. 56, (citing Asian Pacific Forum on Women, Law and Development, Draft report of the Asia-Pacific Regional Consultation, “Access to Justice: Holding the State accountable for violence against women,” 5-6 October 2005, Bangkok, Thailand, p. 14).

<sup>30</sup> See Ana Agostino, Gender Equality, Climate Change and Education for Sustainability, Newsletter for Beyond Access: Gender, Education and Development, Issue 24, February 2010. <sup>48</sup>

See RESURJ, Beyond Criminalization, *supra* note 5, p. 23.

The SRVAW's upcoming report presents an important opportunity to call for comprehensive and transformative change to prevent and eradicate SGBV. This requires looking beyond criminalization and punishment of perpetrators and using a wider gender justice analytical frame that accounts for the underlying social, economic, and cultural conditions that enable and perpetuate violence. It also entails addressing the socio-cultural biases of all people, including men, women, boys and girls and gender diverse individuals, and avoiding presumptions around perpetrators and victims/survivors of violence.

In addition to the proposed recommendations to states presented throughout this submission, the undersigned organizations further call on the SRVAW to recommend that states:

- Avoid the discriminatory application of criminal laws and policies and ensure all people are protected from SGBV and have access to criminal justice systems.
- Address the root causes of and structural inequalities that lead to SGBV.
- Ensure that criminal justice responses to SGBV include accessible, affordable, acceptable and quality mechanisms that deliver justice and redress on survivors' terms, and effectively address the inequality, stereotypes and discrimination that create the environment for these violations to occur in the first place.
- Adopt more comprehensive and complementary measures to combat SGBV, which will increase access to justice and support for victims/survivors, break cycles of impunity, and promote states' compliance with their legal obligations to respect, protect, and fulfil the human rights of all people, in line with the principles of universality and indivisibility.

**Signatories:**

CREA

Amnesty International

IWRAW-Asia Pacific

Realizing Sexual and Reproductive Justice (RESURJ)

Global Health Justice Partnership of Yale Law School and the Yale School of Public Health

## **ANNEX**

### **A COMPREHENSIVE APPROACH – COMPLEMENTARY MEASURES**

As evidence demonstrates, strategies to prevent SGBV by addressing its structural causes, including attitudes, values, beliefs and inequalities that underpin gendered forms of abuse and vulnerability are most effective and should be prioritized above approaches that simply intervene with groups deemed 'at risk' of

perpetrating or experiencing violence, and/or after a violent act has been committed, either to support the victim or to sanction the perpetrator.<sup>31</sup> In particular, SGBV prevention measures must be comprehensive, addressing systemic challenges related to poverty, class, race, education, and disability, as well as raising awareness and capacity among women, girls, and gender diverse individuals to know and realize their rights to be free from violence and to access justice. Proactive measures must also be undertaken to shift changing mindsets and attitudes. In situations where non-criminalized approaches can better achieve the aim of preventing, remedying, and redressing SGBV, they should be considered, particularly given the range of shortcomings of criminal justice systems worldwide.

**Some examples of complementary measures that have shown to be effective in this regard include:**

#### **Addressing Root Causes of SGBV**

- Rural and urban development and investment in disadvantaged and isolated communities which bolster economic security and, in turn, reduce SGBV, such as undertaken in Medellín, Colombia.
- Programs targeting girls out of school living in poor neighborhoods to work to change gender norms and community perceptions about girls' roles in society, as well as bringing them safely and confidently into the public sphere, through the provision of literacy classes, a life skills program, and sports, such as undertaken in Caritas, Egypt.<sup>32</sup>
- Shift incentives and traditions that support early marriage by altering local opportunity structures and addressing motivations for arranged marriages for girls, such as undertaken in rural Ethiopia.

#### **Comprehensive Sexuality Education**

- Shift attitudes among young men and women and raise awareness about SGBV by implementing curriculum during early teenage years that emphasizes the laws and consequences for perpetrators of dating violence and harassment, social constructions of gender roles, and health relationships, as well as “building-based” interventions (*i.e.* school building-based restraining orders, higher levels of faculty/security presence in safe/ unsafe “hot spots” mapped by students, and posters to increase awareness about violence and harassment and reporting), as done in middle schools in New York.
- Reduce physical dating violence and increase condom use by introducing sexual health information in schools to combat partner violence, by implementing curriculum that provides training on dating violence and healthy relationships, relationship skills, sexual health, and substance use prevention, using interactive exercises, as done in Southwestern Ontario, Canada.

#### **Community mobilization and advocacy, including by working with Civil Society Organizations**

- Develop and implement interventions to reduce intimate partner violence that are participatory, engage multiple stakeholders, support critical discussion about gender relationships and the acceptability of violence, and support greater communication and shared decision making among

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<sup>31</sup> See *generally*, Wendy Lacombe, Limits of the Criminal Law for Preventing Sexual Violence, *in* PREVENTING SEXUAL VIOLENCE, (Eds, N. Henry and A. Powell), 2014.

<sup>32</sup> See The Population Council, Martha Brady, Ragui Assaad, Barbara Ibrahim, Abeer Salem, Rania Salem, Nadia Zibani, Providing New Opportunities to Adolescent Girls in Socially Conservative Settings: The Ishraq Program in Rural Upper Egypt, 2017.

family members, as well as non-violent behavior, as documented to be effective by comprehensive research.

- Recruit and train community advocates to work with women victims/survivors of intimate partner violence, and ensure ongoing support over time, which has been correlated to decrease the likelihood that victims/survivors will experience SGBV.<sup>33</sup>

#### **Restorative Justice Measures**

- Consider restorative justice and other alternative, victim-centered measures that can repair harm, provide for rehabilitation, and have a preventative effect in the broader community, when such measures are undertaken with community involvement. Explore whether such measures can complement existing criminal justice measures.<sup>52</sup>

The proposed highlighted complementary measures have been taken from RESURJ's publication, **Beyond Criminalization: A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations** (2020). Additional measures and research can be found in this publication.

AI Index: IOR 40/ 2390/2020

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<sup>33</sup> See Cris Sullivan and Deborah Bybee, Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners, 67 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, 43, 1999. <sup>52</sup>

See RESURJ, *Beyond Criminalization*, *supra* note 5, p.38-41.