

Framework for submissions to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women

INTRODUCTION

This framework has been developed by CREA, RESURJ, Global Health Justice Partnership and Amnesty International, to support allies submitting their response to the call for submissions¹ by the UN Special Rapporteur on violence against women, its cause and consequences, on rape as a grave and systematic human rights violation and gender-based violence against women (SRVAW). The framework we provide below outlines a set of key considerations that offer a critical perspective on the role and use of the criminal law as the primary tool to address gender-based violence, including sexual violence. It covers key areas of concern highlighted in the questionnaire. Please feel free to use any of the information below. We consider this a public document. It is not necessary to include it as a citation, unless you wish to do so.

As noted in the call, the SRVAW is preparing a thematic report to be presented to the UN Human Rights Council in June 2021. The report will address *'States' responsibility to criminalize and prosecute rape as a grave and systematic human rights violation and a manifestation of gender-based violence against women, in line with international human rights standards.'* The call is a process to gather data for the report. In her report, the SRVAW *'intends to provide recommendations to States and other stakeholders on key international human rights standards that should be integrated in national criminal justice responses in order to harmonize them with accepted international standards; to provide access to justice and support for victims of rape; to break the cycle of impunity; and to prosecute perpetrators, ensuring that they are not protected by hidden domestic norms that are still part of criminal law or criminal procedure.'*

The call for submissions is an opportunity for civil society to engage with the SRVAW on laws and policies on gender-based violence, including sexual violence and state accountability. The broader explanation below is intended to offer a tool for civil society to encourage the SRVAW to consider and address the full scope of gender-based violence, including the disproportionate and heightened risk of violence against women, girls, sexual and gender diverse persons and gender non-confirming persons, including by the State, and their lack of access to redress.

- 1. We call for the SRVAW to reaffirm states' responsibility to address gender-based violence, including sexual violence as a grave and systematic human rights violation, but suggests that the report use a broader analytical frame that situates the criminal justice response and penal reform within more comprehensive approaches to combat gender-based violence, including sexual violence, beyond prosecution and punishment.**

¹ <https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRVAW.aspx>

2. **We suggest that it is critical that the report highlight the importance of proactive measures to be taken to shift changing mindsets and attitudes. In situations where non-criminalized approaches can better achieve the aim of preventing, remedying, and redressing gender-based violence, including sexual violence, they should be considered, particularly given the range of shortcomings of criminal justice systems worldwide.**
3. **Toward this end, we especially encourage colleagues to make reference to specific experiences of using 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, and other measures to prevent violence in the first place, and that center the needs of survivors.**
4. **We urge the SRVAW to recognize the harms associated with unjust use of criminal law and criminalization, and a growing over-reliance on penalization and punishment.**

We hope these considerations will be helpful in supporting organizations and activists in their submissions to the call by the SRVAW. Please note that we have intentionally provided broad principles which can be used in full or in part in individual/organizational submissions. **The last date for submission is 31st December 2020.**

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, IRAW Asia Pacific and the Global Health Justice Partnership of Yale Law School and the Yale School of Public Health, [submitted this memorandum](#) for consideration in the upcoming thematic report.

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CONCERNS FOR CONSIDERATION

1. Shift from over reliance on criminal laws and punitive policies to a more comprehensive approach

While criminal law is an important avenue to address gender-based violence, including sexual violence, there is a need to encompass more than just a binary audit of coded criminal law and look at criminal law through a critical lens. Criminal law exists within social-cultural realities which are often patriarchal, racist, xenophobic, casteist, ableist and gendered power structures. These structures are founded on a control of bodies and sexuality under the garb of 'protection', and as crimes against morality, public decency or honor, rather than on autonomy and human rights. Despite its claims to protect, criminal justice typically stresses punishment of perpetrators rather than restoring the safety and wellbeing, and centering the needs of survivors.

An over reliance on criminal law as the only means to a certain understanding and idea of justice, results in demands for stricter sentencing rather than approaching justice through a holistic lens and

acknowledging States' failures, the role of existing power structures and lack of accountability in cases of gender-based violence, including sexual violence. Yet, over the years, global and national-level efforts to combat gender-based violence, including sexual violence, has, to some extent, primarily focused on the adoption of criminal laws and increasing penalties. Calls for criminalization of gender-based violence, including sexual violence are often not accompanied by sufficient research on the efficacy of criminalized responses to end violence and to promote gender justice. In fact, a strong link between the reduction of gender-based violence, including sexual violence and the threat of criminal sanctions alone is not well established. Gender-based violence, including sexual violence is deeply rooted in social-cultural structures and grounded in discriminatory – and often exclusionary – beliefs, attitudes and practices.

Therefore, we encourage colleagues to stress that criminal law in and by itself does not address the root causes of gender-based violence, including sexual violence and structural inequalities, nor does it bring resources and attention to the need for prevention. Addressing gender-based violence, including sexual violence requires a systemic change of culture, attitudes, norms and practices. It also requires stricter accountability of the State, including providing adequate resources and prevention measures. In addressing gender-based violence, including sexual violence there is a need to shift the narrative from stronger sentencing to recognition of the needs of the victims/survivors and holding the State and duty bearers to account when failing on its due diligence obligations to respond to and address gender-based violence, including sexual violence. In many cases, criminal law does not provide a remedy that effectively responds to the needs of the victims/survivors.

2. Gender-based violence including sexual violence beyond rape

Gender-based violence, including sexual violence is part of a spectrum of violence women, girls, sexual and gender diverse persons and gender non-conforming persons face on a daily basis within and outside of their homes. Gender-based violence, including sexual violence also includes both mental and physical violence and in most cases is perpetrated on an ongoing basis. The criminal justice systems recognize some harms while initializing others and stresses harms against some women (“good women”) and not others (“bad women”). GBV including sexual violence is recognized as a means of asserting power, direct or indirect, and is often used as a threat in family disputes and property disputes. Gender-based violence, including sexual violence includes any harmful act conducted against an individual, including sexual and gender diverse persons and gender non-conforming individuals, based on their gender or their perceived gender.

It is important that this report encompass the full range of sexual violence, including domestic and intimate partner violence, forced marriage as well as harmful practices.² It is impossible to address an aspect of gender-based violence, including sexual violence without addressing the larger social, cultural reality and the root causes behind it.

² Beyond Criminalization - A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations by Resurj

3. Intersectional analysis of criminal law

It is important to recognize that criminal justice systems are influenced by wider socio-cultural structures that generate inequality and sustain pre-existing 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.”³ Addressing gender based violence, including sexual violence requires an intersectional lens that takes account of the complex and dynamic interplay of gender, class, caste, race, sexual orientation, ethnicity, religion, and other factors. This dynamic plays an important role in how those at the margins experience violence as well as circumscribing their access to justice.⁴ Research indicates that marginalized women and gender diverse people suffer from pervasive violence and yet often lack sufficient access to justice and services.⁵ Those who live in poverty, lack education and support networks and/or transgress social, gender and cultural norms who need the greatest protection from gender-based violence, including sexual violence are also the least likely to have access to criminal justice systems, and more likely to be subject to punishment by them.⁶

The Special Rapporteur should suggest a framework that reflects the full context and realities of those at the margins would be ineffective in addressing gender-based violence, including sexual violence.

4. Feminist movements experience of working on gender-based violence, including sexual violence

Recognition of gender-based violence, including sexual violence as a grave human rights violation has been a result of decades of activism and advocacy by feminist movements at the national level. This feminist analysis of criminal law led by local movements is the cornerstone of justice in cases of gender-based violence, including sexual violence. In India, for example, the overhauling of sexual assault laws in 1983 and 2013 were a result of the feminist movements coming out on the streets and consistently advocating with stakeholders. In Denmark, it took many years of campaigning by women’s rights and survivors’ groups to finally achieve the victory this year of the government proposing legislation to move to a consent-based definition of rape in the Criminal Code.⁷ Local and national level feminist movements are usually the first responders to cases of gender-based violence including sexual violence.

³ Barnard Center for Research on Women, The Crisis of Criminalization, March 2017, <http://bcrw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf>.

⁴ CEDAW General recommendation No. 33 on women’s access to justice

⁵ Count Me In! By CREA

⁶ Beyond Criminalization - A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations by Resurj

⁷ Amnesty International, ‘Denmark: Cross-party agreement to amend rape law puts historic victory within reach’ <https://www.amnesty.org/en/latest/news/2020/09/denmark-cross-party-agreement-to-amend-rape-law-puts-historic-victory-within-reach/>

Feminists in many countries who fought for stricter punishments for rape and other forms of sexual violence are now finding that they are troubled by the implementation of the law. For instance, evidence increasingly confirms the extent of unjust imprisonment (reflecting which groups have power and which ones do not). Research and advocacy also points to the lack of appropriate services in prisons, amplifying the impact of unjust imprisonment (e.g. mental health services), not to mention imprisonment of people living with HIV who need treatment, care and support not punishment. Some of these consequences are intended, and some argue that the criminal justice system is a discriminatory system designed to reinforce existing patterns of structural exclusion. Some unintended, such as setting sentencing rules too harshly, thereby reducing the ability of the justice system to consider what is the most appropriate response, including non-carceral alternative sentencing.⁸

These movements include the sex workers' rights movements, women with disabilities movements and the queer movements. These movements are struggling to ensure holistic justice, not restricted to legalistic red tape. For the SRVAW to draft a comprehensive report on prosecution of rape, these feminist learnings, strategies, and analysis, and should be important recommendations to include.

5. States' broad due diligence obligations

States' have comprehensive due diligence obligations to prevent, protect against, prosecute, punish, and provide redress for acts of gender-based violence, including sexual violence. All too often, however, punishment is over-prioritized. Among other things, this results over-reliance leads to inattention away from comprehensive due diligence obligations in international human rights law. This lack of attention, in turn can exacerbate and perpetuate interconnected forms of gender-based violence, including sexual violence, 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.

There is a need to adopt more comprehensive and complementary measures to combat gender-based violence to 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. This means less attention to punitive measures and more attention and resources to the full range of social and economic support mechanisms that form an important part of what due diligence encompasses. For instance, the due diligence standard calls for governments to enact civil remedies including protection/restraining and/or expulsion orders. It also calls for campaigns to raise awareness about and push for action to address the extent of gender-based violence and the many forms it can take, programs to engage men and boys as partners for gender equality, and national action plans to reduce and respond to gender-based violence. Finally, the due diligence standard call for training of various groups including police, prosecutors, and members of judiciary.

⁸ Beyond Criminalization - A Feminist Questioning of Criminal Justice Interventions to Address Sexual and Reproductive Rights Violations by Resurj

Human rights principles recognize that gender-based violence, including sexual violence is a result of a patriarchal systems and mere criminalization of particular offences is not enough to address systemic problems. There is a need to shift focus on forms of justice which take into account the needs of the victim/survivor rather than relying solely on a carceral approach.

SRVAW Questionnaire on criminalization and prosecution of rape

NOTE: We encourage allies to answer as many of these as possible, including by grouping some of the questions together. It is not necessary to answer each question individually, nor simply answer “yes” or “no” to questions that are posed in that way.

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.
2. Based on the wording of those provisions, is the provided definition of rape:
 1. Gender specific, covering women only YES/NO
 2. Gender neutral, covering all persons YES/NO
 3. Based on the lack of consent of victim YES/ NO
 4. Based on the use of force or threat YES/ NO
 5. Some combination of the above. YES / NO
 6. Does it cover only vaginal rape? YES /NO
 7. Does it cover all forms of penetration? YES/NO. If yes, please specify.
 8. Is marital rape in this provision explicitly included? YES / NO
 9. Is the law silent on marital rape? YES/NO
 10. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/NO
 11. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /NO
3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.
4. What is the legal age for sexual consent?
5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.
6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.
7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?
 1. Is rape by more than one perpetrator an aggravating circumstance? YES/NO
 2. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) YES/NO
 3. Is rape by spouse or intimate partner an aggravating circumstance?
9. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.
10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/NO If so, at what stage and what are the consequences?
 1. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?
11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify.
 1. if the perpetrator marries the victim of rape? YES/NO
 2. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO
13. Is rape reported to the police prosecuted ex parte (private prosecution)? YES/NO
14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? YES/NO
15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/NO
16. Please provide information on the statute of limitations for prosecuting rape.
17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES/NO
18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.
19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES/NO
20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.

War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity? YES/NO
22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/NO
23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/NO
24. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES/NO

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.