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Is it time for a UN Treaty on Violence against Women?

Abstract

Violence against women is one of the most prevalent human rights abuses at the global level. However, no specific mention of this issue is made in any of the UN treaties. This article begins by discussing why any express reference to violence against women was excluded from the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and then proceeds to examine existing efforts at the UN level in this area. The key focus of this article however is on the new and important question of whether it is now time for a specific treaty on violence against women to be adopted at the UN level. The article analyses the arguments surrounding the adoption of a global treaty on violence against women, and aims to provide a detailed examination of this highly significant area of law, while seeking to offer original insights on this issue.

Keywords

Violence against women; United Nations; UN Convention on the Elimination of All Forms of Discrimination against Women; UN Special Rapporteur on violence against women, its causes and consequences; Domestic violence.

Violence against women occurs in every state worldwide and constitutes one of the most prevalent human rights abuses at the global level. However, none of the UN treaties refers specifically to violence against women. This fact is all the more surprising given that since 1979 a ‘women’s convention’, the UN Convention on the Elimination of All Forms of Discrimination against Women (also known as CEDAW), has been in existence. This article will begin by discussing why any express reference to violence against women was excluded from CEDAW, and will then proceed to examine how the monitoring body of CEDAW, the UN Committee on the Elimination of Discrimination against Women (also known as the CEDAW Committee) has nevertheless sought to include the issue of violence against women within its remit by interpreting various provisions of the Convention in such a manner as to encompass this issue. Other UN bodies have also addressed the subject of violence against women, for example the UN General Assembly has passed Resolutions on the topic, including the very important Declaration on the Elimination of Violence against Women (also known as DEVAW). Most notably the office of the UN Special Rapporteur on violence against women, its causes and consequences was created in 1994.

The key focus of this article is on the question of whether it is now time for a specific treaty on violence against women to be adopted at the UN level. This issue has been brought particularly to the fore due to comments made by Rashida Manjoo, who held the office of UN Special Rapporteur on violence against women from 2009 until 2015. In a number of statements made both during and after her tenure as Special Rapporteur, Manjoo has vociferously expressed her strong belief that a UN treaty on violence against women is essential to addressing this issue sufficiently. Although Manjoo's successor to the office of Special Rapporteur, Dubravka Šimonović, has in her reports to date expressed no personal views on this issue, she has nevertheless called for submissions from stakeholders on the question of whether there is a need for a separate legally binding treaty on violence against women with a separate monitoring body.¹ This article will examine in detail the arguments surrounding the adoption of a global treaty on violence against women.

The omission of violence against women from CEDAW

CEDAW was adopted in 1979 by the UN General Assembly, and entered into force in 1981. The Convention essentially defines what constitutes discrimination against women and sets out what national action should be taken to end such discrimination.² In article 1 of CEDAW, discrimination against women is defined as,

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although CEDAW has been described as an international bill of rights for women, it is important to remember that the Convention is primarily focused on combating discrimination against women, as opposed to securing the rights of women in a more substantive manner. The aim of the Convention is to ensure that women are treated equally to men across a wide range of areas, such as political and public life, education and employment.

Violence against women has now been recognised by other authorities on international human rights law as an issue falling within the ambit of equality and anti-discrimination provisions. For example, in a number of recent cases, the European Court of Human Rights (ECtHR) has found breaches of the article 14 equality provision of the European Convention on Human Rights (ECHR) in situations involving female victims of domestic violence.³ However, an anti-discrimination framework is perhaps not the first discourse which comes to mind when considering violence against women, and indeed to approach this issue purely as one of discrimination would not capture the essence of the

problem. Instead, more substantive rights, such as the right to bodily integrity; the right to be free from inhuman and degrading treatment; the right to be free from torture; and in some cases even the right to life itself, seem to be more appropriate. Nevertheless, the focus of CEDAW was not primarily on any of these rights, but on the anti-discrimination discourse. Given this approach, it is perhaps less remarkable that this instrument does not expressly encompass the issue of violence against women.

Another reason for the omission of violence against women from CEDAW lies in the simple fact that this instrument was adopted almost four decades ago. It seems that during the drafting process there was relatively little discussion of the possible inclusion of violence against women. Although the Belgian delegation proposed that the provision which later became Article 6⁴ should be drafted to include ‘attacks on the physical integrity of women’, this proposal was withdrawn due to a lack of support.⁵ Understandings of various aspects of the phenomenon of violence against women have nevertheless developed enormously since 1979. For example, although one of the most prevalent forms of violence against women is violence taking place in the home, it was only in the 1970s that domestic violence was even recognised as constituting a significant social problem,⁶ let alone an issue which needed to be tackled by legal measures at the domestic level. As Burton remarks, ‘Until the 1970s there was little recognition of domestic violence as an issue that ought to be tackled by the legal system’.⁷ It took even longer for violence against women to be recognised as an issue for international law. As Edwards states, ‘Prior to the 1990s...violence against women was not seen as a major issue, and if it was recognised as an issue at all, it was considered an issue for national governments (and criminal law) rather than international law.’⁸ It is therefore unsurprising that no express reference to violence against women is to be found in CEDAW.

The approach of the CEDAW Committee to violence against women

Despite the omission from CEDAW of any express provisions on violence against women, the CEDAW Committee has nevertheless interpreted the Convention in such a manner as to encompass this issue. In 1989 the CEDAW Committee issued its General Recommendation No. 12.⁹ Although this Recommendation was very short, it asserted that states parties to CEDAW should include in their periodic reports to the CEDAW Committee information relating to the legislation in force to protect women from all types of violence in everyday life;¹⁰ other measures in place to eradicate such violence;¹¹ the existence of support services for women who are victims of aggression or abuses;¹² and statistical data on the incidence of violence of all types against women.¹³ It is nonetheless notable that General Recommendation No. 12 did not actually explain precisely how violence against women was encompassed by CEDAW.¹⁴ It merely stated that articles 2, 5, 11, 12 and 16 of the Convention required states parties ‘to act to protect women against

violence of any kind occurring within the family, at the work place or in any other area of social life'. However, given that none of these provisions contain any express mention whatsoever of violence against women, this statement was vague to say the least.

Three years after its issuing of General Recommendation No. 12, the CEDAW Committee produced General Recommendation No. 19, which was a great deal more precise. General Recommendation No. 19 asserted that, 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men',¹⁵ and that, 'The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.'¹⁶ The General Recommendation went on to state that,

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.¹⁷

General Recommendation No. 19 then proceeded to set out how various provisions of CEDAW, although not expressly mentioning violence against women, should nevertheless be interpreted in such a manner as to encompass this issue.¹⁸ The document concluded by making a number of specific recommendations to states regarding their responses to violence against women. For example, states parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private acts; they should ensure that laws against gender-based violence give adequate protection to all women, and respect their integrity and dignity; and they should ensure that appropriate protective and support services are provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials should also be implemented. In addition, states parties should encourage the compilation of statistics and the carrying out of research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and address such violence. States parties should also adopt effective measures to overcome attitudes, customs and practices that perpetuate violence against women.¹⁹

Using the interpretation of CEDAW put forward in General Recommendation No. 19, the CEDAW Committee frequently makes recommendations relating to violence against women in its Concluding Observations on the reports submitted by states under CEDAW's monitoring procedure.²⁰ In addition, under the individual communications procedure found in the Optional Protocol to CEDAW, the Committee has found states to be in breach of the Convention in situations relating to violence against women and has in

these instances made recommendations as to how the states in question should respond to these findings and rectify the situations in question.²¹ The CEDAW Committee works very much from the assumption that, given the interpretation put forward in General Recommendation No. 19, CEDAW without doubt applies to violence against women.

Other work at the UN level on violence against women

In addition, it is notable that consideration of the issue of violence against women is not limited only to the CEDAW Committee. It is undoubtedly the case that a substantial amount of activity occurs at the UN level on the issue of violence against women. For example, the UN General Assembly has passed Resolutions on this subject, including the very important UN Declaration on the Elimination of Violence against Women, in which the General Assembly referred to the rights to life; to equality; to liberty and security of person; to equal protection under the law; to be free from all forms of discrimination; to the highest standard attainable of physical and mental health; to just and favourable conditions of work; and not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.²² Resolutions relating to violence against women were also issued by the Commission on Human Rights,²³ and have been issued by the Human Rights Council which replaced the Commission on Human Rights in 2006.²⁴ In addition, violence against women was addressed in the Vienna Declaration and Programme of Action which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993. Indeed the importance which is accorded by the UN bodies to this subject is seen in the very existence of the office of the Special Rapporteur on violence against women. Since the inception of this post in 1994, those who have held the office have issued a multitude of detailed reports. In addition, the Beijing Declaration and Platform for Action which was issued following the fourth world conference on women organised by the UN, which took place in 1995, contained detailed recommendations on the measures which states should adopt to address violence against women.²⁵

Given the extensive consideration of violence against women which is afforded by the CEDAW Committee and also other UN bodies, the question arises of whether a treaty on violence against women is really needed?

The non-binding nature of current UN statements on violence against women – problems of principle

Violence against women is one of the most widespread human rights abuses at the global level. As Edwards comments, ‘The statistics are staggering and indicate that the phenomenon of violence against women is universal in scope.’²⁶ The responses of states to this issue are in many cases extremely problematic. The report of a comprehensive study carried out by the UN in 2015 stated that, ‘Not all countries have laws on violence against

women, and when they do, they are often more concerned with responding to the violence that has already occurred than with preventing it in the first place.²⁷ A 2016 report issued by the current UN Special Rapporteur on violence against women stated that national implementation of existing international standards on violence against women ‘has generally been fragmented, and often without a coordinated or comprehensive system to combat and prevent violence against women on the basis of a solid legal and institutional framework.’²⁸ In its Concluding Observations on state reports, the CEDAW Committee regularly highlights problems with state responses to gender based violence.²⁹ Research carried out on how a sample of states have responded to the comments of the CEDAW Committee on the issue of domestic violence found that the majority of the states surveyed were complying with only some of the Committee’s recommendations.³⁰ The enormity of the issue of violence against women, together with the immense deficiencies which are currently characteristic of state responses and the fact that in reality there are no legally binding treaty provisions at the international level which address this issue, appears to constitute the over-riding argument in favour of the adoption of a UN treaty on violence against women.

Even though a multitude of statements have been issued by the CEDAW Committee and by other UN bodies, these all fall within the category of ‘soft law’ which is non-binding on states. Even General Recommendation No. 19 itself, on which the CEDAW Committee bases much of its work on violence against women, is in strict legal terms only a non-binding interpretation of CEDAW. It appears unacceptable from the perspective of principle that there are no legally binding international provisions on this issue. Rehman remarks that, ‘A serious criticism of the Women’s Convention has been the absence of specific provisions condemning violence against women, an omission which is unacceptable in the light of everyday instances of violence against women in every region of the world.’³¹ When CEDAW was adopted in 1979 the prevalence and nature of violence against women was not understood to any great extent. However, since then there have been enormous developments in the understanding of this phenomenon, and it now seems no longer tenable for the lack of international treaty provisions on violence against women to remain unaddressed.

At present it appears that one almost has to twist CEDAW in order to attempt to make this instrument encompass the issue of gender-based violence. In an interview which Rashida Manjoo gave in May 2015, she commented that,

The functioning of the (CEDAW) Committee regarding violence against women is to try and fit this pervasive human rights violation under the discrimination label, and to then find ways to justify the Committee’s jurisdiction by using other provisions in the CEDAW. When it receives a complaint, or when it interrogates the state parties reports, it does what I call jurisdictional gymnastics to address the issue of violence against women. It has to ask questions such as: Is violence against

women discrimination? Is the violence due to stereotyping? Is it due to family relations?³²

Of course, it must be remembered that the stretching of human rights instruments is not uncommon. For example, although the ECHR was originally designed for use by adults in resisting state power, this instrument is now frequently applied in instances in which the rights of one individual have been violated by another private entity.³³ Nevertheless, it appears that the adoption of a global treaty on violence against women would add substantially more force to the statements made by the CEDAW Committee and the other UN human rights bodies as regards this issue.

The non-binding nature of current UN statements on violence against women – problems in practice

It is relatively easy to see why the absence of international legally binding treaty provisions on violence against women is problematic from a perspective of theory or principle, as discussed above. Nevertheless, arguably the even more crucial question is whether the omission of such provisions is also problematic from a practical perspective. The CEDAW Committee currently requires that all states parties to CEDAW report on their laws, policies and practices in the area of violence against women and is fairly consistent in making recommendations to states that hold them accountable to General Recommendation 19. If a treaty on violence against women were adopted, it is very possible that the monitoring body of such a treaty may produce similar statements to those currently being made by the CEDAW Committee. As the recommendations of any new treaty monitoring body would still constitute ‘soft law’, would the fact that the actual standards themselves would be legally binding make a difference in practice? It is true that no definitive answer can be given to the question of whether the rate of compliance of states would necessarily improve if there were a treaty in place, and in the absence of such a treaty any discussion must be speculative only. It must also be remembered that all of the existing UN human rights treaties suffer from substantial problems as regards their implementation and enforcement.³⁴ In addition, it is notable that the CEDAW Committee is of the view that the existence of General Recommendation 19 is sufficient and that there is thus no necessity for a treaty on violence against women.³⁵

Conversely however, the former UN Special Rapporteur on violence against women, Rashida Manjoo, makes a compelling case for the need for legally binding standards on gender-based violence, based upon her own experiences as Special Rapporteur. In a report of May 2014 she stated that, ‘although soft laws may be influential in developing norms, their non-binding nature effectively means that states cannot be held responsible for violations’. She proceeded to note that ‘none of the soft law developments on violence against women has moved into the realm of customary international law as

yet.³⁶ Since then Manjoo has made various statements in which she strongly expresses her view that the adoption of a legally binding treaty at the international level is an absolute necessity in order for states to be held accountable as regards their responses to violence against women. For example, in a report of September 2014 she stated that,

Although many States have acknowledged violence against women as a widespread and systematic human rights violation and are working on eradicating it, to differing degrees at the national level, the normative gap within international human rights law as regards violence against women is a barrier to holding States accountable for the failure to respect, protect and fulfil the human rights of women.³⁷

In a similar vein, the primary focus of Manjoo's final report as Special Rapporteur was on the necessity for the adoption of a UN treaty on violence against women. In this report she asserted that,

The normative gap under international human rights law raises crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence, its causes and consequences... Given the systemic, widespread and pervasive nature of this human rights violation, which is experienced largely by women because they are women, a different set of normative and practical measures to respond to, prevent and ultimately eliminate such violence is crucial.³⁸

Such strong statements on the need to adopt a UN treaty on violence against women should not be lightly disregarded, however does it truly make a difference whether standards are 'soft law' or legally binding?

The utility of 'soft law', relative to legally binding standards, is an issue which has attracted some debate.³⁹ It seems that although soft law can certainly be beneficial,

it is also clear that, from earliest times, states and other social actors have found it useful to draw a relatively sharp distinction between norms and normative arrangements that are meant to be binding, backed up by the organized community's authority, and those that are not.⁴⁰

O'Connell states that, 'despite all of its utility, soft law is not confused with hard law; the aim of most in global governance is to get enforceable hard law obligations.'⁴¹ Cassel comments that, 'Formally obligatory international norms can legitimize and fortify the organizing and consciousness-raising efforts of non-governmental organizations.'⁴² As Bilder remarks, 'there remains a widely-held and long understood assumption in all societies that there *is* a meaningful difference between norms that are intended to be legally binding and those that are not, and that people may rely on this difference' (original italics).⁴³ Shelton comments that, 'In the long run... non-binding norms in human rights are generally not as effective as binding commitments and the enforcement possibilities that come with them for victims and their representatives.'⁴⁴ Simmons states that,

Treaties are the clearest statements available about the content of globally sanctioned decent rights practices...Treaties serve notice that governments are *accountable* – domestically and externally – for refraining from the abuses proscribed by their own mutual agreements. Treaties signal a seriousness of intent that is difficult to replicate in other ways.⁴⁵

It seems that it does therefore make a difference whether the standards applicable to a particular issue are legally binding, as opposed to being ‘soft law’.

The merits of an international approach

However, is the issue of violence against women best dealt with at the global level or is a regional approach more advantageous? In 2011 the Council of Europe adopted a Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention). In addition, within the Inter-American system of human rights protection, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará), was adopted as far back as 1994. Also, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol), which was adopted by the African Union in 2003, contains provisions relevant to violence against women. Is this issue therefore best addressed by regional instruments such as these?

The existence of regional standards on violence against women is certainly meritorious, and it is possible that regional instruments may have advantages over international treaties as regards enforcement. As Smith remarks, ‘There may be a greater political will to conform to regional texts as they are sometimes seen as being of more immediate concern than the international initiatives.’⁴⁶ However, the fact that there are a number of legally binding provisions on violence against women within the context of regional systems of human rights protection does not in itself automatically eliminate the need for a UN treaty on violence against women. Firstly, there are huge swathes of the globe which do not fall within any of the regional systems of human rights protection which encompass treaty provisions on this issue. Also, the regional provisions on violence against women which are currently in existence vary dramatically in terms of scope. For example, the Istanbul Convention places extremely extensive and detailed duties on states parties. As a new instrument, this treaty was formulated with the benefit of the substantial amount of research which has been carried out on violence against women in recent years. By contrast, the Convention of Belém do Pará, which was adopted over two decades ago, places far less detailed obligations on states parties.⁴⁷ In the context of the African Union, violence against women is just one of the many issues encompassed by the Maputo Protocol, and as such is addressed fairly briefly. It seems that there is thus a need for a uniform set of obligations to be adopted.

It is true that the specific issues relating to violence against women can vary to some extent between regions and indeed between states, for example, as regards the prevalence of particular types of violence. As Merry comments, ‘Gender violence occurs throughout the world, but it takes quite different forms in different social contexts.’⁴⁸ However, gender-based violence, no matter what form it takes, tends to be rooted in the same concepts – those of power and control. Also, to argue that violence against women is an issue which it is more appropriate to address at a regional level runs a substantial risk of straying into the problematic realms of cultural relativism. ‘Arguments about preserving culture become the basis for defending male control over women.’⁴⁹ Human rights are universal, and universal standards on violence against women must therefore be applied. This set of standards could of course be supplemented if necessary by further regional instruments if there are issues which are particularly problematic in certain areas.

What form should be taken by a global treaty on violence against women?

If it is accepted that legally binding standards on violence against women are needed at the global level, the next question which arises relates to the form which such standards should take. Two options appear to present themselves. The first is the adoption of an Optional Protocol to CEDAW on violence against women.⁵⁰ The second is the adoption of a stand-alone treaty on violence against women. As regards the first option, the adoption of an Optional Protocol to CEDAW on this issue to be monitored by the CEDAW Committee may have certain attractions, in that this course of action is likely to be substantially less costly than the adoption of a stand-alone treaty and the establishment of a separate monitoring body. In addition, this approach would carry less of a reporting burden for states, in that states parties to such a Protocol could include information on compliance within their reports to the CEDAW Committee on compliance with CEDAW more generally. This may in turn have the advantage of encouraging more states to ratify such an instrument. It is also notable that the CEDAW Committee has expressed concern that a new instrument with its own monitoring body would increase the burden on states and would also have cost implications.⁵¹ Adopting an Optional Protocol to CEDAW, as opposed to a stand-alone treaty, would assist in alleviating such concerns.

However, the adoption of an Optional Protocol to CEDAW, as opposed to a stand-alone treaty, may also have significant disadvantages. All of the UN treaty bodies, including the CEDAW Committee, already work under substantial pressure. It does not seem realistic to expect the CEDAW Committee to take on the additional monitoring burdens which would be entailed by the adoption of a Protocol on violence against women. Indeed it is possible that such a course of action could result in the responses of states to their obligations under such a Protocol being under-scrutinised, due simply to a lack of capacity on the part of the CEDAW Committee. By contrast, the adoption of a stand-alone

treaty on violence against women with its own monitoring body would allow for much more detailed scrutiny of state responses.

In terms of the substantive provisions which such an instrument should contain, as with any treaty, this would clearly be a matter for extensive debate. Nevertheless, the provisions of the Istanbul Convention could act as a beneficial starting point, given their extensive and detailed nature.⁵² It is likely that the monitoring mechanisms of a UN treaty on violence against women would follow broadly the same form as those of the other UN human rights treaties, with a reporting mechanism constituting the primary method of monitoring compliance, along with a (potentially optional) communications mechanism and inquiry procedure. There are however a number of innovative measures relevant to monitoring which have been adopted under the more recent UN human rights treaties, such as the UN Convention on the Rights of Persons with Disabilities (CRPD),⁵³ which may also be advantageous in the context of a treaty on violence against women. For example, under article 36(2) of the CRPR, if a report is ‘significantly overdue’, the Committee on the Rights of Persons with Disabilities may give the state party a three-month notice to submit a report. Another innovation relates to the Conference of States Parties. Article 40 of the CRPD provides for periodic meetings of states parties to assess the implementation of the Convention. While previous human rights treaties do refer to meetings of states parties, these mechanisms are intended to be used for purposes relevant to the election of Committee members or amendments to the treaties in question, as opposed to wider functions. Such meetings in the context of the CRPD are meant to facilitate implementation by drawing together a broad range of actors, including states parties, non-governmental organisations and relevant UN agencies, in order to discuss how best to ensure the implementation of the CRPD.⁵⁴

A gendered approach versus gender neutrality

A possible argument which could be mooted against a global treaty on violence against women may lie in the very nature of such an instrument. Could it be claimed that a treaty addressing violence against women would in itself constitute discrimination against men? In recent years there has been a move towards gender neutrality in relation to the approaches adopted by some jurisdictions, for example England and Wales, to issues such as domestic violence. For instance, the current cross-governmental definition of domestic violence which was adopted by the Home Office in March 2013 is entirely gender neutral.⁵⁵ The concept of a UN treaty on violence against women does not fit easily with such approaches and this may indeed deter states which prefer to adopt a gender neutral perspective from ratifying such a treaty.

Nevertheless, are gender neutral approaches sufficient or does the specific nature of violence against women call for a different response? Gender neutral approaches in this area have received strong criticism from Rashida Manjoo. For example, in her September 2014 report to the UN General Assembly, she stated that,

The concept of gender neutrality is framed in a way that understands violence as a threat to which all are potentially vulnerable and from which all deserve protection. This suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination, and also that it is neither systemic nor pandemic in the way that violence against women indisputably is.⁵⁶

The issue of whether approaches to issues such as domestic violence should be based on a gendered or gender neutral perspective has been debated extensively.⁵⁷ However, it seems that a strong case can be made for the merits of a gendered approach. For example, as regards violence taking place in the home, Dobash and Dobash argue that priority should be given to policies which address men's violence against women, given that women's violence against men differs substantially from men's violence against women in terms of the context and the consequences.⁵⁸ Women's violence frequently occurs in the context of self-defence and the consequences of women's violence against men are less severe. As Burton comments, 'Women's violence towards male intimate partners does not occur with the same frequency or ferocity as men's violence towards female intimate partners.'⁵⁹ In a similar vein, Chinkin remarks that, 'while men also experience domestic violence, it is more frequently inflicted upon women and has disparate economic and social consequences'.⁶⁰

Notably, it is unlikely that the UN bodies would have any difficulty with a treaty on violence against women on the grounds of potential gender-based discrimination. CEDAW itself is focused only on discrimination against women – discrimination against men is not contemplated by this treaty. Likewise the treatment of, for example, domestic violence by the UN bodies conceptualises this issue simply as a form of violence against women – violence against men in the home has not been considered by any of the UN bodies to any substantive extent. This of course does not assume that the correct approach has been adopted by the UN in this regard. Domestic violence against men is an important issue and one which should not be forgotten.⁶¹ Although the focus of this article is essentially on violence against women, it is accepted that UN treaty provisions on domestic violence could encompass male victims also.⁶²

Would states ratify a UN treaty on violence against women?

Perhaps one of the most fundamental questions relating to whether a UN treaty on violence against women should be adopted, is the very practical issue of would a significant number of states choose to ratify such an instrument?⁶³ It is of course impossible to reach a definitive answer to this question, and any analysis of the likelihood of states ratifying such a treaty can only be speculative. Nevertheless, it is notable that the large majority of states within the Council of Europe have to date either ratified the Istanbul Convention or have indicated their intention to do so by signing this instrument.⁶⁴ In addition, the Convention of Belém do Pará is the most widely ratified convention within the Inter-American system.⁶⁵ The favourable responses by states to both of the regional conventions on violence against women seems to indicate that a large number of states may in fact be willing to ratify a global treaty on violence against women.

The degree of willingness among states to ratify a UN treaty on violence against women would clearly depend greatly on the nature of the obligations to be found therein. The more onerous these obligations, the less likely it is that states would ratify. However, it would of course be necessary to ensure that the provisions of such an instrument were not too weak as to be ineffective. In drafting any such treaty, a very careful balance would therefore need to be struck in this regard.

Another important issue is that of resources. Addressing violence against women effectively clearly requires expenditure of state resources. For example, a number of the measures found in the Istanbul Convention, such as those relating to the support services which should be made available to victims,⁶⁶ require states to expend substantial levels of resources. However many of the wealthiest states globally can be found in Europe. Including similar obligations in a global treaty on violence against women may result in low rates of ratification. The governments of many states may feel that they simply do not have sufficient resources to comply with such duties. It was an understanding of the low levels of resources of many states globally which led to the concept of ‘progressive realisation’ being included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which ratification does not mean that states must immediately comply with all of the provisions of this instrument. Instead, states are under a duty to realise their obligations progressively, in accordance with available monetary resources.⁶⁷ Nevertheless, as regards an issue such as violence against women, would a treaty which did not, for example, place duties on states to provide sufficient social support measures for victims be meaningful? In relation to violence against women taking place in the home, it is often measures of social support which are of most importance to victims.⁶⁸ Likewise, if such obligations were encompassed in a global treaty and the concept of progressive realisation were also included, would this dilute these duties to such an extent as to make

them ineffective? These are difficult questions to which there are no straightforward answers.

Another issue relating to the likelihood of states ratifying a UN treaty on violence against women lies in the question of what approach would be taken towards reservations in any such treaty. Although CEDAW is one of the most widely ratified of the UN treaties, it is also the treaty to which the most reservations, and indeed the most extensive reservations, have been entered by states parties. These reservations are widely regarded as being immensely problematic, but the approach which was adopted in this regard was that it was preferable to allow states to ratify CEDAW with extensive reservations rather than such states not ratifying the Convention at all.⁶⁹ If a substantial number of states were only persuaded to ratify CEDAW due to the fact that they were permitted to enter extensive reservations, it may be unlikely that such states would ratify a treaty on violence against women without similarly being allowed to enter substantive reservations. Nonetheless, would the permitting of such reservations again dilute such an instrument so as to make it of little practical value? Again this is a key question which would necessitate detailed consideration prior to the adoption of any global treaty on violence against women.

Potential problems with duplication

From the perspective of states parties to the UN human rights treaties, it is undeniable that the reporting requirements are time-consuming and costly. If a state is party to a number of such instruments, and is required to provide a report on compliance to each of the relevant treaty monitoring bodies every four years, this constitutes a substantial obligation. This may raise the question of whether states should therefore be placed under greater pressure in this regard by the addition of yet another treaty in respect of which reports must be provided. If a UN treaty on violence against women were to be adopted, questions would also be raised as to how the obligations to be undertaken by states under such an instrument would relate to the work of the CEDAW Committee on this issue. States include information on the steps which they take to combat violence against women in the reports which they submit to the CEDAW Committee, which in turn makes recommendations on this issue in its Concluding Observations. If a state ratified a UN treaty on violence against women, would the state be obliged to provide information on violence against women to a new treaty monitoring body and also, perhaps in a less detailed format, to the CEDAW Committee? Conversely, if such an instrument were to be adopted by the UN, would this encourage states which choose not to ratify it but which are parties to CEDAW to argue that they should not be subject to scrutiny by the CEDAW Committee on the issue of violence against women as they have chosen not to ratify the UN treaty on this matter? In its response to the current Special Rapporteur's call for submissions on whether there is a need for a separate legally binding treaty on violence against women,

the CEDAW Committee itself stated that, ‘A new instrument and its new monitoring body would certainly increase the burden of States parties and reinforce the trend of fragmentation.’⁷⁰

It is certainly true that the CEDAW Committee makes valiant attempts to address the issue of violence against women. As discussed previously, the Committee regularly makes recommendations to states on this matter in its Concluding Observations on state reports. Nevertheless, the problem is that violence against women is only one of a multitude of issues which need to be addressed by the CEDAW Committee in relation to each state report which is presented. As was also mentioned previously, the Committee works under extreme time pressures and has only a relatively short time to consider each report. This means that the time which can be spent on the consideration of violence against women is very limited, a situation which is particularly problematic given the complex and multi-faceted nature of this issue. In her report of May 2014 to the UN Human Rights Council, Manjoo commented that,

Despite the existence of interpretative guidelines and monitoring by human rights treaty bodies...the limitations of large and varied mandates, coupled with time constraints when examining State party reports, result in insufficient interrogation concerning the information relating to violence against women, its causes and consequences, and insufficient assessment of responses.⁷¹

One of the key advantages of a global treaty on violence against women would be that it would enable the monitoring body of such an instrument to focus in an exclusive and in-depth manner on this particular area, and to make detailed recommendations to states on this issue. Although it is probable that states which are parties to both a UN treaty on violence against women and to CEDAW would still be required to include information on their responses to violence against women in their periodic reports to the CEDAW Committee, it is very unlikely that this would constitute any real inconvenience for such states.⁷² Also, it is arguable that a *lex specialis* approach should be adopted in such a case, whereby a state party to both CEDAW and a UN treaty on violence against women should be allowed to focus on its obligations under the latter, before having to think about complying with overlapping obligations under a *lex generalis* such as CEDAW.

Other Options

Although this article has focused on the adoption of new legally binding provisions at the UN level on violence against women, should such a course of action lack the requisite level of support, it is recognised that there are other options which could also contribute to improved rates of compliance in this area. As referred to previously, the majority of women’s experiences of violence are constituted by domestic abuse, therefore a new

convention addressing even this issue alone would have the potential to be beneficial. Such an instrument could encompass all victims of domestic violence, including male victims, an approach which may be preferred by states and which would recognise the important issue of domestic violence against men.

Although there are no specific legally binding standards on issues such as domestic violence at the global level, the Human Rights Committee has referred to domestic abuse in relation to Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which states that, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.⁷³ It has been argued that domestic violence can constitute a form of torture,⁷⁴ and the Committee against Torture has expressed concern in relation to domestic abuse.⁷⁵ Rather than adopting a set of issue-specific treaty provisions, an alternative option may be a convention establishing a UN committee on domestic violence and providing for the submission of complaints on this issue within the ambit of the ICCPR, the Convention against Torture (CAT) or CEDAW to this committee. Such a body would still be relying on interpretations of the relevant treaty provisions and so technically this would not solve the problem of a lack of legally binding treaty provisions in this area. However, ratifying such a convention would demonstrate a commitment on the part of states to taking steps to address the issue of domestic abuse. The members of such a committee would be experts in this area and the exclusive focus on domestic violence would mean that the committee would have sufficient time to consider complaints in an in-depth manner.

Another option may be a convention on domestic violence comparable to the model of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Such an instrument would not create new standards but would establish an inspection system and allow a new committee to publish reports evaluating how well a state is matching up to what is expected of it in the field of domestic violence. The system established by the CPT is aimed at protecting those deprived of their liberty from breaches of their rights to be free from torture and inhuman or degrading treatment or punishment under Article 3 of the ECHR. Although the CPT does not contain any new standards and is simply based on the general Article 3 provision, there is nevertheless evidence that this system has had a very beneficial effect on the way criminal justice systems treat persons in custody. As was stated in a paper presented at a conference marking 25 years of the operation of the CPT, ‘there are numerous examples of...states parties taking CPT reports seriously and implementing concrete measures to remedy the problems found.’⁷⁶ The establishment of a UN committee on domestic violence under this model may likewise have a beneficial impact on the responses of states to this issue.

Should there be insufficient support for a new treaty however, it would be important for the UN Special Rapporteur on violence against women to continue with the approach

of conducting detailed investigations of the laws, policies and practices of each state.⁷⁷ Such an approach serves to draw attention to the importance of the issue of violence against women in each state in question, but without placing any additional reporting or cost burdens on states. Also, such reports by the Special Rapporteur are of particular value as, given their sole focus on the issue of violence against women, the recommendations and analysis contained therein can be substantially more detailed than the consideration which the CEDAW Committee can afford to this issue in the context of Concluding Observations on state reports.

Conclusion

When CEDAW was drafted in 1979, violence against women was simply not an issue on the agenda for international human rights law. However awareness of the extent of this issue and of its complex nature has grown enormously in recent years. If an instrument focusing on the rights of women were to be adopted in the present day, it would be inconceivable for an issue such as violence against women to be omitted. Although this issue is now clearly on the agenda of UN bodies such as the CEDAW Committee, it seems unjustifiable from the perspective of principle that there are still no legally binding provisions at the global level on violence against women, and it is submitted that a treaty on violence against women would be a desirable development.

It is acknowledged that the development of such an instrument would not be an easy process. Indeed, there are many issues which would require painstaking examination. As referred to previously, all of the UN human rights treaties suffer from substantial problems as regards implementation. This raises the question therefore of how difficulties of this nature could be avoided in respect of a UN treaty on violence against women. It is almost certain that the answer is that they could not. The question which therefore would necessitate extensive consideration is how such problems could be minimised as far as possible. Other issues which would require substantial examination include how best to strike a balance between on the one hand, making state obligations under such an instrument as effective and detailed as possible, and on the other, not making such duties so onerous that states would be discouraged from ratifying the treaty. Nevertheless, although there would certainly be many difficult issues to be addressed in the process, it seems that a UN treaty on violence against women would have the potential to make a significant contribution to the movement to combat such abuse. Should a new treaty lack the requisite level of support however, it is important that existing work at the UN level on violence against women be developed and strengthened, such as by the continuation by the UN Special Rapporteur on violence against women with the approach of conducting detailed investigations of the laws, policies and practices of each state as regards this crucial issue.

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³ See *Opuz v Turkey*, application no. 33401/02, judgment of 9 June 2009; *Mudric v Moldova*, application no. 74839/10, judgment of 16 July 2013; *Eremia and Others v Moldova*, application no. 3564/11, judgment of 28 May 2013; *T.M. and C.M. v Moldova*, application no. 26608/11, judgment of 28 January 2014; *M.G. v Turkey*, application no. 646/10, judgment of 22 March 2016; *Halime Kılıç v Turkey*, application no. 63034/11, judgment of 28 June 2016; and *Talpis v Italy*, application no. 41237/14, judgment of 2 March 2017.

⁴ Article 6 provides that, 'States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.

⁵ See Commission on the Status of Women, U.N. Doc. E/CN.6/SR.638 (1976), at para. 40. See also Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dordrecht: Martinus Nijhoff Publishers, 1993), 91.

⁶ Mandy Burton, *Legal Responses to Domestic Violence* (Abingdon: Routledge-Cavendish, 2008), 11.

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⁸ Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2013), 7.

⁹ Committee on the Elimination of Discrimination Against Women, U.N. Doc. A/44/38 (1989).

¹⁰ At para. 1.

¹¹ At para. 2.

¹² At para. 3.

¹³ At para. 4.

¹⁴ Dubravka Šimonović, 'Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions' *Human Rights Quarterly* 36 (2014): 590, 600.

¹⁵ Committee on the Elimination of Discrimination Against Women, U.N. Doc A/47/38 (1992), at para. 1.

¹⁶ At para. 4.

¹⁷ At para. 6.

¹⁸ Articles 2, 3, 5, 6, 10(c), 11, 12, 14 and 16 of CEDAW.

¹⁹ U.N. Doc A/47/38 (1992), at para. 24.

²⁰ For example, see paras. 34-35 of the Concluding Observations of the CEDAW Committee on the seventh periodic report of the United Kingdom, 30 July 2013, CEDAW/C/GBR/CO/7.

²¹ See for example, *AT v Hungary* (Communication No.: 2/2003, 26 January 2005, CEDAW/C/32/D/2/2003); *Goekce v Austria* (Communication No.: 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005); *Yildirim v Austria* (Communication No.: 6/2005, 1 October 2007, CEDAW/C/39/D/6/2005); *VK v Bulgaria* (Communication No.: 20/2008, 17 August 2011, CEDAW/C/49/D/20/2008); *Jallow v Bulgaria* (Communication No.: 32/2011, 28 August 2012, CEDAW/C/52/D/32/2011).

²² General Assembly Resolution A/RES/48/104, 20 December 1993, Article 3. See also for example, the Resolutions of the General Assembly on intensification of efforts to eliminate all forms of violence against women which were adopted on 19 December 2006 (A/RES/61/143); 18 December 2007 (A/RES/62/133); 18 December 2008 (A/RES/63/155); 18 December 2009 (A/RES/64/137); 21 December 2010 (A/RES/65/187); 20 December 2012 (A/RES/67/144).

²³ See for example Commission on Human Rights Resolution E/CN.4/RES/2001/49, 23 April 2001; Commission on Human Rights Resolution E/CN.4/RES/2004/46, 20 April 2004.

²⁴ The Human Rights Council was created on 15 March 2006 by a Resolution of the General Assembly (A/RES/60/251). As regards Resolutions of the Human Rights Council on violence against women, see for example Resolution 7/24 (2008) ‘Elimination of violence against women’; Resolution 11/2 (2009) ‘Accelerating efforts to eliminate all forms of violence against women’; Resolution 14/12 (2010) ‘Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention’.

²⁵ Beijing Platform for Action, U.N. Doc.A/CONF.177/20 (1995).

²⁶ Edwards, *Violence Against Women under International Human Rights Law*, xi.

²⁷ UN Statistics Division, ‘The World’s Women 2015 – Trends and Statistics’ (2015), 160, available at http://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_chapter6_t.pdf For discussion of the development of indicators and guidelines for the collection of data on violence against women, see Sally Engle Merry, *The Seductions of Quantification – Measuring Human Rights, Gender Violence and Sex Trafficking* (Chicago: The University of Chicago Press, 2016), 44-111.

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²⁹ For recent examples, see paras 20-21 of the Concluding Observations of the CEDAW Committee on the seventh periodic report of Argentina, 18 November 2016, CEDAW/C/ARG/CO/7; paras. 18-19 of the Concluding Observations of the CEDAW Committee on the eighth periodic report of Bangladesh, 18 November 2016, CEDAW/C/BGD/CO/8; and paras. 22-23 of the Concluding Observations of the CEDAW Committee on the eighth periodic report of Belarus, 18 November 2016, CEDAW/C/BLR/CO/8.

³⁰ Ronagh McQuigg, ‘The Responses of States to the Comments of the CEDAW Committee on Domestic Violence’, *International Journal of Human Rights* 11 (2007): 461.

³¹ Javaid Rehman, *International Human Rights Law*, 2nd ed. (Harlow: Pearson Education Limited, 2010), 551.

³² Rashida Manjoo and Daniela Nadj, ‘“Bridging the Divide”: An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women’, *Feminist Legal Studies* 23 (2015): 329, 343.

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³⁴ For discussion of the difficulties surrounding the implementation and enforcement of human rights standards, see Hanna Beate Schopp-Schilling, 'Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women', *Human Rights Law Review* 7 (2007): 201; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology* 110 (2005): 1373; Andrew Byrnes, 'Enforcement Through International Law and Procedures', in *Human Rights of Women – National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994), 189-227; James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?', in *The Future of UN Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 1-12; Suzanne Egan, *The UN Human Rights Treaty System: Law and Procedure* (Dublin: Bloomsbury Professional, 2011); Ronagh McQuigg, 'The Responses of States to the Comments of the CEDAW Committee on Domestic Violence', *International Journal of Human Rights* 11 (2007): 461; and Ronagh McQuigg, *International Human Rights Law and Domestic Violence* (Abingdon: Routledge, 2011), 10-13.

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³⁶ Report of the Special Rapporteur on Violence against Women, its causes and consequences, U.N.Doc.A/HRC/26/38, 28 May 2014, at para. 68.

³⁷ Report of the Special Rapporteur on Violence against Women, its causes and consequences to the UN General Assembly, U.N.Doc.A/69/368, 1 September 2014, at para. 68.

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³⁹ See for example, Fabian Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', *European Law Journal* 21 (2015): 68. The literature surrounding the effectiveness of human rights law is also of note. Although this discussion goes beyond the scope of this article, see further Oona Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal* 111 (2002): 1935; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (New York: Oxford University Press, 2013); Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?', *Journal of Peace Research* 36 (1999): 95; James M. McCormick and Neil J. Mitchell, 'Human Rights Violations, Umbrella Concepts, and Empirical Analysis', *World*

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⁴⁰ Richard B. Bilder, 'Beyond Compliance: Helping Nations Cooperate' in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: Oxford University Press, 2003) 65-73, 71.

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⁴⁷ For further discussion, see McQuigg, 'A Contextual Analysis of the Council of Europe's Convention on Preventing and Combating Violence against Women'.

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⁵⁰ Edwards suggests the adoption of a protocol. See Edwards, *Violence Against Women under International Human Rights Law*, 338-343.

⁵¹ See further the response of the CEDAW Committee to the current Special Rapporteur's call for submissions on whether there is a need for a separate legally binding treaty on violence against women. The CEDAW Committee's response is available at

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⁵⁴ For further discussion, see Michael Ashley Stein and Janet E. Lord, ‘Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential’, *Human Rights Quarterly* 32 (2010): 689.

⁵⁵ Under this definition, ‘domestic violence and abuse’ is constituted by ‘any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to psychological, physical, sexual, financial (and) emotional.’ See <https://www.gov.uk/guidance/domestic-violence-and-abuse>

⁵⁶ Report of the Special Rapporteur on Violence against Women, its causes and consequences to the UN General Assembly, U.N.Doc.A/69/368, 1 September 2014, at para. 51. Similar comments were made by Manjoo in her report to the UN Human Rights Council of 28 May 2014 (U.N.Doc.A/HRC/26/38, at para. 61).

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⁶³ For discussion of why states ratify human rights treaties, see for example, Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 57-111.

⁶⁴ At the time of writing, 22 states have ratified the Istanbul Convention, with another 22 states having signed but not yet ratified this instrument.

⁶⁵ There are currently 32 states parties to the Convention of Belém do Pará.

⁶⁶ See Istanbul Convention, Chapter IV- Protection and Support.

⁶⁷ See article 2(1) of the ICESCR.

⁶⁸ Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* (New Haven: Yale University Press, 2000), 196-197.

⁶⁹ For discussion of the issue of reservations to CEDAW, see for example, Rebecca J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', *Virginia Journal of International Law* 30 (1989-1990): 643.

⁷⁰ The response of the CEDAW Committee is available at <http://www.ohchr.org/Documents/Issues/Women/SR/Framework/CEDAW.pdf> (Office of the High Commissioner for Human Rights).

⁷¹ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, U.N.Doc.A/HRC/26/38, 28 May 2014, at para. 76.

⁷² Indeed it is noteworthy that the CEDAW Committee itself now regularly urges states within the Council of Europe which have not yet ratified the Istanbul Convention to do so, thereby encouraging such states to take on a similar reporting obligation as that which would be entailed by becoming party to a global treaty on violence against women.

⁷³ See for example, Report of the Human Rights Committee, U.N.Doc. A/59/40 (Vol. I), 2004, at pp. 34, 37, 41, 45, 49, 54. See also Edwards, *Violence Against Women under International Human Rights Law*, 216-217.

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⁷⁶ Council of Europe, ‘The CPT at 25: taking stock and moving forward’, presented at a conference on 2 March 2015, Strasbourg, France, at p. 2.

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