

**Closing the normative gap in international law: the need for
specific binding obligations through an international treaty on
violence against women**

**By Prof Rashida Manjoo
Law Faculty, University of Cape Town, South Africa
Former UN Special Rapporteur on violence against women,
its causes and consequences**

4th World Conference of Women's Shelters

**Organised by the Global Network of Women's Shelters and
hosted by the Garden of Hope Foundation**

Kaohsiung, Taiwan

7 November 2019

Distinguished Delegates, colleagues and friends

It is an honour for me to participate in this conference and to provide a perspective on international developments in respect of violence against women. Thank you to the organisers, The Global Network of Women's Shelters; the hosts, The Garden of Hope Foundation; and the sponsors, the Ministry of Health and Welfare. The input by the Director General of the Department of Protective Services on the government's shelter policy reflects the importance of codifying state responsibility to provide accommodation for abused women, as reflected in the Domestic Violence Prevention Act. The obligation of the local government to provide short, mid or long-term shelter is a positive example of how state responsibility is incorporated into the law. The challenge of the low uptake rate by women of shelter accommodation (about 5%) is a reflection of how much more work is necessary to address the personal, institutional, cultural and societal factors that influence and shape the decisions of women, about moving into shelters.

Introduction

Violations of women's human rights, whether linked to civil, political, economic, social, cultural or development aspects, is a widespread problem globally. Violence against women and girls is acknowledged as one of the most pervasive human rights violation that we face today. The forms, prevalence, causes and consequences of violence experienced by women has led to numerous reports which analyse the legal and institutional developments, including on the effectiveness of, or lack thereof, of access to remedies for this violation of human rights. Currently, an important conversation is taking place about how to achieve a more effective international response to violence against women. The questions are broadly framed as: should we strengthen the existing legal frameworks; should we adopt a stand-alone international treaty focused solely on violence against women; or should we adopt a new optional protocol to CEDAW with its own monitoring body that is focused solely on violence against women and girls? Supporters of a new international treaty recognize the urgent need to establish uniformity, specificity and State accountability through a binding global instrument, rather than maintaining the status quo with various inadequate standards and obligations for different regions of the world. It is argued that the vast knowledge that has developed over decades, about practices and lessons learned at the national and regional levels, needs to be drawn upon in the development of an international legally binding treaty.

The importance of accountability derives from concerns about the failure of States in their responsibility to act with due diligence in responding to and preventing violations of women's human rights. The principles of dignity, equality, freedom, justice and peace underpin the Universal Declaration of Human Rights (UDHR). Article 2 notes that everyone is entitled to all the rights and freedoms set forth, without distinction of any kind. The right to life, liberty and security of the person is included in article 3, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment in article 5. In linking articles 2, 3 and 5, it is clear that these rights apply to all women and girls, without distinction - which is crucial for a life free of all forms of violence.

Developments in the international sphere

There is global recognition that violence against women is a pervasive and widespread human rights violation that exists across the world. It has been labelled as an epidemic by the World Health Organisation and the indicators are that violence against women is the foremost cause of death and disability among women (WHO 2013 report). UN Women notes that malaria, cancer, traffic accidents and war combined kill fewer women than violence against women – and this is most often at the hands of people they know (UNiTE). As I noted in a report to the General Assembly, on the subject of gender-related killings of women, the death of a woman is the ultimate act of violence in a continuum of violence that women experience. It is not a new act and is in fact a reflection of the failure in the responses of States' to other acts of violence that have been experienced.

For more than four decades, the global movement to combat violence against women has strived to ensure that the issues relating to women and gender-based violence are discussed within a human rights discourse. However, it was not until the Second World Conference on Women in Copenhagen in 1980 that a resolution was adopted on battered women and violence within the family. As positive a development as this was, violence against women was not characterised as a human rights violation but rather as a social problem within the ambit of health policies. In 1985, at the Third World Conference on Women in Nairobi violence against women emerged as an issue of serious global concern that needed the attention of the international community. Subsequent UN World Conferences, including Beijing, Cairo and Vienna, have reinforced and expanded on the issue of violence against women as a human rights violation.

Unfortunately, the text of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), does not explicitly address violence against women. Article 2 of CEDAW refers to the obligation of States to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, but there are no provisions which deal specifically with the issue of violence against women or the State's responsibility to act with due diligence to eliminate all forms of violence against women. The only article linked to violence against women is Article 6 which deals with sex trafficking and prostitution. To address this shortcoming, the CEDAW Committee has issued interpretative guidelines in the form of General Recommendations 12, 19, 30 and 35, specifically linked to violence against women. Other general recommendations also make references to violence against women, where relevant.

The Optional Protocol to CEDAW allows for the submission of individual and collective petitions alleging discrimination. In respect of the individual complaints mechanism, approximately 120 cases have been registered since the Optional Protocol came into effect in 2000, with approximately 50% being admissible. The Committee has finalised 14 communications focusing on violence against women. Such decisions cover forced sterilization, domestic violence, rape, sexual harassment, stalking, threats to life and security of the person and abusive conditions in detention, among others. These low statistics are worrying, considering the widespread and pervasive problem that we are dealing with.

In 1993, the General Assembly adopted, by consensus, a Declaration on the Elimination of Violence against Women. The Declaration reflects some provisions found in CEDAW General Recommendation 19, but provides a more thorough and explicit statement on violence against women. But the Declaration does not give rise to legally binding obligations. In addition, the General Assembly, the Human Rights Council and the Security Council have adopted numerous non-binding resolutions specifically dealing with violence against women. The numerous Security Council Resolutions emanating from the Women, Peace and Security agenda, are another example of soft law developments in the UN system. These resolutions have increasingly identified inequality, discrimination, and gender-based violence, as violations of the human rights of women and girls and have referred to the heightened risk of gender-based violence for women who suffer multiple forms of discrimination. Despite all these developments, violence against women remains a pervasive, widespread and

unacceptable reality throughout the world, with the World Health Organisation stating that it is a ‘global public health problem of epidemic proportions, requiring urgent action’.

Developments in the Regional Human Rights Systems

At the regional level, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará, 1994), is the first legally binding instrument in which State Parties agree to a series of concrete measures and programmes to address this human rights violation. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol 2003) aims to protect women’s rights in a comprehensive manner. Although not exclusively dedicated to violence against women, the Protocol includes definitions, as well as crucial provisions including female genital mutilation, rape and provisions on the abuse of women in advertising and pornography. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force in 2014, provides a comprehensive regional legal framework to protect women against all forms of violence, and to prevent, prosecute and eliminate violence against women and domestic violence. The Inter-American Convention is the only violence against women human rights treaty which includes an individual complaints mechanism. The consequence of the absence of formal regional human rights systems in the rest of the world, reflects a lack of normative frameworks for those regions.

State Obligations to Act with Due Diligence

Under international human rights policy developments, it is argued that States’ are obliged to prevent and respond to all acts of violence against women. Cases and practice indicate that the basic interpretative elements in respect of State responsibility to act with due diligence include, among others: recognizing the problem; reviewing current policies to identify problem areas; modifying laws and policies to prevent harm or protect a right; ensuring both state and non-state actor accountability; addressing root causes of violence and the sources of discrimination that intersect in the actual experiences of women; punishing and/or rehabilitating the perpetrator; providing compensation and other remedial measures to the victim; reporting to an international body in respect of measures taken towards compliance with human rights obligations; and generally monitoring cases and evaluating practices, in efforts to improve.

In addition, in my reports, I have argued that there is a need to create a framework for discussing the responsibility of States to act with due diligence, through separating the due

diligence standard into two categories: individual due diligence which States owe to individual victims of violence, and systemic due diligence which requires States to create a functioning and responsive system to eliminate violence against women. The obligation to act with due diligence also requires States to hold accountable not only those who perpetrate violations of human rights of women, but also those who fail to protect against and prevent these violations from occurring. There continues to be a lack of response to addressing individual, communal, structural and institutional factors that are a cause and a consequence of violence against women. Thus, we need State responsibility to include both individual and systemic due diligence obligations.

Moving from soft law standard-setting to legally binding obligations

There is growing concern that women and girls who are victims of violence are inadequately protected and served by current human rights law and practice. There is a gap between the human rights standards set out in soft law policy documents at the international level and the adoption of such standards by national governments. For example, more than six hundred million women live in countries where domestic violence is not a crime (UNW Endviolence website). As mentioned, currently an important conversation is taking place about how to achieve a more effective international response to violence against women. My final reports to Human Rights Council and the General Assembly in 2015 reiterate my view of the normative gap and the need for a new international convention, whether a stand-alone treaty or an optional protocol to CEDAW.

During my tenure as the UN Special Rapporteur I initiated a process of consultations and dialogues on numerous issues, including the normative gap in international law in respect of violence against women. The submissions received include information on research and advocacy efforts of civil society broadly, including academics who shared a draft treaty that could be useful to initiate discussions on how to close the normative gap. Proponents of a treaty stress that a legal framework that relies on creative interpretations of general human rights law is inadequate to address the nuance and specificity required to combat violence against women. CEDAW is inadequate because it lacks legally binding provisions on violence against women, including explicit definitions and articulations of state's obligations. Proponents argue that conflating violence against women and discrimination against women results in an inadequate or incomplete description of the legal concept of violence against women as a human rights violation in and of itself. Proponents also argue that addressing impunity is a crucial step to

ending violence against women, and a new treaty could give activists and advocates a tool they need for accountability as well as for State actors to adopt and implement laws. In addition, the argument is made that there is insufficient dialogue within the mandates of legally binding treaty mechanisms specifically on violence against women, and insufficient assessment of State parties' responses.

The current UN Special Rapporteur on VAW has recognized the need to address the gap between international human rights norms and standards and their implementation at the national level. In her first report to the Human Rights Council in 2016, she stated that 'the main task is to close that gap and to accelerate the full incorporation and implementation of international, regional and national instruments, policy documents and recommendations to combat and prevent violence against women.' Subsequently, she has sought views on whether the current legal framework is adequate. She received 291 responses to her request from civil society organizations. A majority of the organizations argued for the adoption of a new treaty, which would be 'specifically on violence against women, comprehensive and legally binding' and reflect 'uniformity, specificity and state accountability.' Some respondents expressed concern about the soft law, and therefore non-binding, nature of the current legal framework. Others recognized the need for a separate treaty monitoring body consisting of experts in violence against women. A few civil society submissions opposed a new stand-alone treaty; others supported a new optional protocol under CEDAW and some offered other suggestions such as creating a sub-committee of the CEDAW committee with specific expertise on violence against women, as we need to work within existing frameworks.

To sum up, proponents of a new international treaty recognize the urgent need to establish uniformity, specificity and State accountability through a binding global instrument, rather than maintaining the status quo with various, incomplete and inadequate standards and obligations for different regions of the world. They argue that there is a need for a binding legal instrument and an expert monitoring body with authority to hold governments accountable for their failure to protect against and prevent harm. Proponents of a treaty also argue that non-binding instruments are insufficient, particularly soft law instruments like DEVAW and CEDAW General Recommendations. They also raised concerns about the inconsistent approach to violence against women across regional systems. The benefit of a legally binding treaty is that it would require States to adopt formal measures (both laws and implementing mechanisms) on the issue of violence against women.

In her conclusions and recommendations, the current Special Rapporteur noted, ‘A significant number of submissions pointed out that the lack of a specific global treaty on gender-based violence against women had important symbolic value and further indicated that a new treaty could have an important role in galvanizing implementation at the State level.’ Although the Special Rapporteur opposed a new stand-alone convention, she seemed persuaded that a new optional protocol to CEDAW should be considered. She recommended that an open-ended working group be established to analyse the adequacy of the existing international framework, and that the decision related to the necessity of any new instrument should be assessed and discussed through proper inclusive consultations carried out by UN Member States and other relevant role-players.

Conclusion

Despite the values and rights that are included in the UDHR, a document that is over seventy years old, the normative developments to date on the issue of violence against women have been slow, with non-binding soft law developments within the UN system being the practice. There is no comprehensive specific legally binding UN framework on violence against women, with the non-binding 1993 Declaration being the only internationally accepted consensus document. The interpretative work of treaty bodies has contributed to providing standard-setting in the violence against women sphere. Unfortunately, this has not been sufficient to change national level practices, through the acceptance of international standards.

The first Special Rapporteur in her 1996 report noted ‘The international community should consider the possibility of adopting an international convention on the elimination of violence against women. There does not at present exist a comprehensive international legally binding instrument on violence against women, and the position of the Special Rapporteur is only an ad hoc mechanism with no avenue of redress.’ My view remains that there is a normative gap in international law in respect of violence against women. My conclusion is based on my work as reflected in my thematic reports which have interrogated both international and regional standards, and my country mission reports which have interrogated national level developments. I believe that a legally binding instrument, whether a stand-alone treaty or an optional protocol to CEDAW, with its own expert monitoring body, would provide a targeted and in-depth analysis on the issue of violence against women. It would establish a protective, preventative, and educative framework that would articulate that violence against women is a human rights violation, in and of itself, with discrimination and inequality, being causes and

consequences. It is encouraging to see the discussion moving forward about how to close the normative gap, and my hope is that at some point we will honour the international law principle of ‘universality’ through the adoption of a global treaty on violence against women.

Thank you for your attention.