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Violence against women: The quest for accountability through normativity AND legality

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Distinguished Delegates

It is a pleasure and an honour for me to participate in this symposium. I am grateful to the organisers, in particular Prof Renée Römkens for inviting me to participate and provide a perspective on international developments in respect of violence against women/gender-based violence. The importance of accountability derives from my 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 UDHR. Article 2 of the UDHR states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The UDHR also includes the right to life, liberty and security of the person 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 and children 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 my 2014 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, the Third World

Conference on Women in Nairobi marked the end of the United Nations Decade for Women (1976-1985). At this Conference, violence against women emerged as an issue of serious global concern that needed the attention of the international community, including focusing on the nature and severity of violence against women, and the challenges to address the problem, including with regards to addressing the public/private dichotomy in law and practice. 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 VAW 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.

Since 2000, the CEDAW 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. In its decisions, the Committee's interpretative views reflect a dual focus i.e. on the level of legislative protection as well as the substantive requirements for implementation. The Committee references General Recommendation No. 19, in addition to relevant CEDAW articles to find that States parties may be responsible for the actions of state and non-state actors if they fail to act with due diligence in responding to or preventing violence against women.¹

¹ The Statistical analysis on CEDAW communications on its website does not reflect the situation as at 2017 (it reflects statistics up to 2012). The information on registered and pending communications was provided via email by a staff member of the OHCHR on 11 Sept 2017. The number of communications on violence against women reflects information as at July 2016.

In 1993, almost 15 years after the adoption of CEDAW, the General Assembly adopted a Declaration on the Elimination of Violence against Women. The Declaration reflects provisions found in General Recommendation No. 19, but provides a more thorough and explicit statement on violence against women. The Declaration incorporates State responsibility to act within a due diligence standard, which requires States to "prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons" (art. 4 generally and 4 (c) specifically). The General Assembly and the Human Rights Council have adopted an increasing number of resolutions specifically dealing with violence against women. These bodies have increasingly identified inequality, discrimination, and gender-based violence, as violations of human rights of women and girls and referred to the heightened risk of gender-based violence for women who suffer multiple forms of discrimination. They have also identified power imbalances and structural inequality between men and women as root causes of violence against women. 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 the issue. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (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 relating to women's reproductive rights, including female genital mutilation. It also includes provisions on the abuse of women in advertising and pornography. Finally, 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. In terms of specific regional instruments, the Inter-American Convention is the only human rights treaty directed solely toward eradicating violence against women which includes an individual complaint mechanism. While strong regional human rights instruments exist in Europe and the Americas, victims in the rest of the world have weak or non-existent regional frameworks to turn to when their governments fail in their duty to protect against and prevent harm.

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. 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 obligations; and generally monitoring cases and evaluating practices to follow up and further modify policies(see 2013 report to the Human Rights Council).

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.

Some challenges as regards the failure in the response of States includes: lack of acceptance of violence against women as a human rights issue; inadequate State responses; minimum effort to deal with the problem in a systematic, comprehensive and sustained manner; minimum time, effort and resources are devoted to the problem; inadequate attention is devoted to investigating patterns, causes and consequences of violence; where cases are reported, few perpetrators are prosecuted, and even fewer convicted; and sanctions often do not reflect the seriousness of the crime perpetrated. Also, 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.

Moving from soft law standard-setting to legally binding obligations

It is argued 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). 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, including using CEDAW General Recommendation 35 in particular; should we adopt a stand-alone international treaty focused solely on violence against women; should we adopt a new optional

protocol to CEDAW that is focused solely on violence? Another important question is whether a new treaty should have its own monitoring body.

A few months ago, the CEDAW Committee adopted General Recommendation 35 on gender-based violence against women, to update General Recommendation 19 on violence against women. Among others, the changes in the updated document include: new language used to identify the issue; the clarification of both general and specific human rights obligations; the reinforcement of the interdependency of rights and also the links between articles of the CEDAW and violence against women; detailed guidance to States in respect of general legislative measures, prevention, protection, prosecution and punishment, reparation, coordination, monitoring, data collection; and international cooperation. Paragraph 14 of the general recommendation reiterates manifestations, causes and consequences of violence against women, including due to new and emerging practices. In paragraph 2 the Committee asserts that the prohibition of gender-based violence against women has evolved into a principle of customary international law, and that General recommendation 19 has been a key catalyst for this process. However, despite the assertion about customary international law, in paragraphs 6 and 7 of General Recommendation 35, the Committee acknowledges that violence against women remains pervasive in all countries of the world, with high levels of impunity and, that in many States, legislation on the issue remains non-existent, inadequate and/or poorly implemented.

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 (see addendum to the 2015 report to the Human Rights Council which reflects the findings from consultations). My successor in the mandate has continued this work on the normative gap (see 2017 report to the UN General Assembly). Submissions received during my tenure and more recently by the new Special Rapporteur reflect overlaps in perspectives.

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 VAW, including explicit definitions and articulations of state's obligations. Some 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 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 broad mandates of legally binding treaty mechanisms specifically on violence against women, and insufficient assessment of State parties' responses. The CEDAW Committee has attempted to address this issue by providing two-year follow-ups for States in order to track the implementation of recommendations. It is unclear whether this measure has increased the effectiveness of the CEDAW Committee, or whether it has placed a further strain on the Committee's time and resources. Violence against women is only one item within many forms of discrimination addressed by the CEDAW committee and concerns were raised regarding the effectiveness of the Committee in addressing all the articles of CEDAW.

The current UN Special Rapporteur on VAW has recognized the need to address the normative and implementation 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, through asking for responses to five questions:

Do you consider that there is a need for a separate legally binding treaty on violence against women with its separate monitoring body? Do you consider that there is an incorporation gap of the international or regional human rights norms and standards? Do you believe that there is a lack of implementation of the international and regional legislation into the domestic law?

Do you think that there is a fragmentation of policies and legislation to address gender-based violence? Could you also provide your views on measures needed to address this normative and implementation gap and to accelerate prevention and elimination of 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. It is encouraging to see my successor and civil society moving the discussion forward about how to close the gap.

Conclusion

The largely unfulfilled promise of articles 3 and 5 of the UDHR in relation to women and their right to life, liberty and security of the person, as well as the prohibition on torture or cruel, inhuman or degrading treatment, is a reality that one cannot deny, considering the prevalence of numerous manifestations of violence against women that are widespread and pervasive. Despite the values and rights that are included in the UDHR, a document that is almost 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 and adoption 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.' The second Special Rapporteur in her 2006 report on due diligence, asserted that the due diligence standards in respect of state obligations to address violence against women, is part of customary international law. As the third Special Rapporteur, my view was 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 for 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 etc., being causes and consequences. An interesting point, presented by several participants at the consultation that I hosted for the Americas, was that States that have promoted and ratified regional obligations for preventing and eradicating violence against women should take an active role in promoting the development and adoption of a global treaty. This is a valuable point in terms of building a community of support for the discussion, and also for addressing concerns emanating from the regional human rights mechanisms.

