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Violence against women under international law: a shift towards normativity desperately needed?

1 Introduction

Despite discussions on the issue, to this date there are no explicit global treaty rules that clearly prohibit violence against women. It has been covered first and foremost by the General Recommendations¹ under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)² and series of soft-law documents. Marking 25 years anniversary work of the CEDAW Committee in this area, an update of the General Recommendation No. 19 was adopted in July 2017.³ Nevertheless, frustration of women rights advocates caused by the lack of explicit treaty norms⁴ continues. Legal scholars have also suggested treaty norms,⁵ even if they found that the prohibition of violence against women has a growing normative significance despite the lack of treaty norms.

¹ General Recommendation No. 19 on Violence against women, UN Doc. A/47/38, eleventh session, 1992.

² Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, UN *Treaty Series*, vol. 1249, p. 13.

³ General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

⁴ See, for instance, <http://everywomaneverywhere.org/>.

⁵ See Alice Edwards, *Violence Against Women under International Human Rights Law*, Cambridge: Cambridge University Press, 2011. Bonita Meyersfeld, *Domestic violence and international law*, Oxford: Hart publishing, 2010.

In 2015, the Special Rapporteur on violence against women, its causes and consequences (the Special Rapporteur) Rashida Manjoo called for re-opening of the debate on a specific Convention on violence against women.⁶ She suggested that a “shift in thinking towards normativity”⁷ was necessary. The normativity in this context refers to black letter treaty norms and the text of the Draft Convention for the Elimination of Violence against Women and Girls (Draft Convention) was added to the call for discussion.⁸ The said Convention could make sure that States bear responsibility for violence against women, even if it is committed by private perpetrators and in domestic environments.

The argument for the “shift towards normativity” in a form of a new treaty on violence against women is based on two key presuppositions:

1. There is a normative gap under international law in this area.
2. Adopting explicit treaty norms on violence against women is automatically a viable solution.

My thesis is that these do not necessarily hold. Regarding the first presupposition, my goal is to show that the norm already exists under international law. A number of facts show that the prohibition of violence against women under international law bears normative significance, and State responsibility in this area should not be questioned or doubted. The paper also challenges the claim “explicit norms are always better to have” in this particular area and at this particular moment of time. The remaining gaps, primarily in practice rather than black letter law, do not necessitate the adoption of a new global Convention. A new treaty can only be justified, if it brings additional benefits in addressing the conceptual (i.e. related to conceptual strategy) and substantive challenges (i.e. related to the substance of the law) in the area.

International law in this area has been significantly influenced by feminist engagement. In fact, the impact of feminist scholarship is often eval-

⁶ Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences. Annual report of 2015. A/HRC/29/27.29th session HRC, 10 June 2015.

⁷ Rashida Manjoo, Annual Report of 2015, *op.cit.*, para 65.

⁸ Rashida Manjoo, Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences, 16 June 2015, A/HRC/29/27/Add.4.

uated as a textbook story of “considerable success”.⁹ At the same time, the said success should not imply that the problem of violence against women is now solved – not at all. Violence is still of epidemic proportions, according to the World Health Organisation,¹⁰ and a transformative change is required to address structural inequalities and discrimination.

It is not my intention to suggest that law is too indeterminate to regulate violence by private perpetrators. Instead, the intention is to suggest that normativity already exists at the international level, by mapping out (or describing)¹¹ the developments under international law. The paper assembles the facts that are both well-known for scholars in this area, and relatively new. It offers to look at the data from different perspective than the one that begs for the urgent shift to normativity.

2 The alleged normative gap

The argument for the shift towards normativity suggests that currently there is a normative vacuum regarding the prohibition of violence against women. Considering that the area is covered largely by soft-law instruments, it is allegedly not completely clear¹² whether States have the responsibility of acting with due diligence¹³ to protect women and girls against violence. The presupposition can be challenged. First, I argue that the norm of customary international law exists. Second, I also discuss the CEDAW as the global treaty that clearly covers violence against women, and that matters.

⁹ Dianne Otto, “Feminist approaches to International Law“, In *Oxford Handbook of the Theory of International Law*, Anne Orford, Florian Hoffmann (eds.), Oxford: 2016, p. 510.

¹⁰ *Global and regional estimates of violence against women*. Clinical and policy guidelines (Geneva: World Health Organisation, 2013).

¹¹ Anne Orford, “In Praise of Description”, *Leiden Journal of International Law* (2012), 25, pp. 609–625.

¹² The Special Rapporteur said the existing normative gap 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.” Rashida Manjoo, 2015, para 63.

¹³ Due diligence is duty of States to investigate cases of violence against women, to prosecute those responsible, to protect the victims and prevent further violence against women, once it becomes known to State agents. The said duty was found to exist by regional human rights bodies (the European Court of Human Rights, and the Inter American Court), and the CEDAW Committee.

It should also be clarified that treaty norms exist at regional level, i.e. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of *Belém do Pará*),¹⁴ Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol),¹⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention),¹⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁷ Not only is due diligence duty explained under these regional documents, Istanbul Convention defines it at the treaty level (Article 5 – State obligations and due diligence). The current discussion concerns only the global level and states not covered by the said treaties.

2.1 Prohibition of violence against women under customary international law

The Statute of the International Court of Justice (ICJ) lists “international custom, as evidence of a general practice accepted as law” (Article 38 part 1 b),¹⁸ among the sources of international law. The international custom consists of state practice and *opinio juris* elements.

The first element is objective and state laws are relevant on this matter. In 2017, the majority of States have improved their practices towards women rights in general and gender based violence against women in particular.¹⁹ It is striking that even the few states that provide discriminatory provisions, e.g. chastising of wives, prohibit violence against women in principle. In the last decade in particular, states started to

¹⁴ Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of *Belém do Pará*”), 9 June 1994.

¹⁵ Protocol to the African Charter on the Rights of Women in Africa. Adopted in 2nd Ordinary Session of the Assembly of the African Union in Maputo, 11 July 2003.

¹⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11 May 2011. CETS No. 210.

¹⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS No. 5.

¹⁸ Statute of the International Court of Justice, United Nations, 18 April 1946.

¹⁹ Review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly. Report of the Secretary-General, E/CN.6/2015/3, paras. 120–139.

adopt specific legislation on violence against women or domestic violence (Jordan, Zimbabwe, Maldives, Lebanon, China, Turkey, Guatemala, Colombia, Swaziland, Gambia, Lithuania, etc.).²⁰ At the very least, they would adopt a strategy, programme or an action plan to decrease violence against women. Sometimes legislating would not come easy, sometimes the steps back are taken, but slowly and surely, state practice has turned towards prohibition of violence against women. The absolute unanimity of state practices is not required to prove the existence of international custom – the general practice is important.

Moreover, it can also be argued that *opinio juris*, the subjective element of international custom, by this time exists. It was said to exist already in 2006, before the landmark cases under CEDAW, as well as before the landmark European and Inter-American jurisprudence of international human rights monitoring bodies. In 2006, the Special Rapporteur Yakin Ertürk argued that the duty to act with due diligence in cases of violence against women has received a status of customary law.²¹ She relied on *opinio juris*, as allegedly shown by General Recommendations under the CEDAW and jurisprudence, Inter-American Convention and relevant practice, the European Court of Human Rights (ECtHR) case practice of that time, and the UN resolutions.

It was perhaps a bit too far-stretched argument in 2006. First, the tendency to adopt national laws that prohibit violence against women was not yet as strong in 2005–2006; it came in a few years. Second, the Special Rapporteur relied on the practice of the ECtHR and Inter-American court which did *not* have anything to do with violence against women, but solely entrenched a general due diligence duty to prevent violence, once the state becomes aware of the risk, which is foreseeable and imminent. However, the report was optimistic: “On the basis of the practice and *opinio juris* [...], it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.”²² In a few years since this analysis, Bonita Meyersfeld convincingly argued that there is at least an emerging norm that requires states protect against systemic domestic

²⁰ UN Women, Global database on VAW, see *Legislation*, <http://evaw-global-database.unwomen.org/en/search>.

²¹ Yakin Ertürk, Due diligence Report, para. 29.

²² *Ibid.*

violence.²³ Notably, she uses the word “emerging” and suggests adopting treaty norms, which somehow weakens the argument. Finally, some essential developments have taken place in this field since 2010, which strengthen the argument of normative customary significance, even under the black letter approach to international law.

In particular, in two different regions – Europe and the Americas, landmark decisions were adopted to recognize breaches of State positive obligations in cases of private-perpetrator violence against women.

The petition of *Jessica Lenahan (Gonzales) v. United States*, reported by Inter-American commission on human rights in 2011, can be seen as an illustration. In this case, the applicant had divorced with her violent husband and despite a restraining order, the husband subsequently abducted and killed their daughters; the US Supreme Court found that the police had no specific duty on enforcing the restraining order and arrest of the suspected abducting father. Before the Inter-American Commission, the USA claimed that “it is not bound by obligations contained in human rights treaties it has not joined and the substantive obligations enshrined in these instruments cannot be imported into the American Declaration.”²⁴ Notably, the USA was not a party to Convention of *Belém do Pará*, which provides explicitly for the state’s duty to act with due diligence in cases of violence against women. The Commission assessed the case under the American Declaration,²⁵ noting that its core provisions have been recognized as part of customary law.²⁶ It further recognized that the duty to protect women and children against domestic violence should also be seen as part of customary law. The Commission stated:

“all States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination. This is part of their legal obligation to respect and ensure the right not to discriminate

²³ Bonita Meyersfeld, *Domestic violence and international law*, 2010.

²⁴ *Jessica Lenahan (Gonzales) v. United States of America*. 21 July 2011, Inter-American Commission. Report No. 80/11, para 55.

²⁵ American Declaration of the Rights and Duties of Man, 1948. The Declaration recognizes a wide range of civil, political, economic, social and cultural rights. In addition, the Inter American human rights system also includes a Charter of the Organization of American States, which also mentions human rights in some of its provisions, and the American Convention on Human rights, the main governing treaty of human rights in the Inter-American legal system.

²⁶ Lenahan report, para 115.

and to equal protection of the law. This due diligence obligation in principle applies to all OAS Member States.”²⁷

I.e. even if the USA was not a party of Convention of *Belém do Pará*, it was still considered as bound by customary law, which provides States with the duty to act with due diligence and prevent violence in cases such as *Lenahan*, where the danger was imminent and a protection order was issued.

The State responsibility in cases of failure to protect women against domestic violence or violence committed by private perpetrators has been consistently found by ECtHR²⁸ and the Inter-American Court of Human Rights.²⁹ Of course, judicial decisions and scholarly doctrine are seen as only secondary sources of international law in Article 38 (1) of the Statute of the ICJ. Yet the consistent stream of decisions finding breach of State responsibility to act with due diligence and consistent doctrine that argues for State responsibility in this area could contribute to seeing that *opinion juris* also exists.

There is also more proof on high levels of the UN system on considering it as the State duty. For instance, the United Nations Human Rights Council underlined in 2010 that States must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girl-children, and that the failure to do so “violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.”³⁰ The CEDAW committee in 2017 also stated that prohibition of violence against women has evolved and is now part of customary law.³¹ Thus, it could be claimed that the duty to act with due diligence while protecting women against violence is part of the international custom, as “general practice accepted as law” (Article 38 of the Statute of ICJ).

²⁷ *Ibid.*, para 162.

²⁸ For instance, see the landmark case of *Opuz v. Turkey*, app.no. 33401/02, 9 June 2009. *Eremia and Others v. Moldova*, app. no 3564/11, 28 May 2013.

²⁹ For instance, see *Gonzalez v. Mexico* (Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, 294 (Nov. 16, 2009).

³⁰ UN GA Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, 16 June 2010. Also see *Accelerating efforts to eliminate violence against women: preventing and responding to violence against women and girls, including indigenous women and girls*. A/HRC/RES/32/19, 19 July 2016.

³¹ General recommendation No. 35, para. 2.

Finally, it must be mentioned that for many years, the Special Rapporteurs on violence against women,³² including Rashida Manjoo, in their special reports have insisted that the States have responsibility to act with due diligence under international law. The Special Rapporteur was the one who argued, back in 2006, that prohibition of violence against women is already a part of customary international law. Therefore, the plea for “shift towards normativity” due to is an unusual stance, because the usual practice is to contend that prohibition of violence is already the norm. Notably, the new Special Rapporteur Dubravka Šimonovic participated in the CEDAW Committee’s discussion on the update of General Recommendation 19³³ rather than purposed the vision of a new treaty. It does not mean that the vision of treaty norms is abandoned. However, the usual stance that the prohibition of violence against women is the norm of customary international law, and that it is already included under the global treaty, i.e. the CEDAW, was recommenced.

2.2 Tackling violence against women under the CEDAW

The CEDAW is one of the fundamental UN human rights Conventions and a global instrument for the implementation of women rights. In the absence of a global treaty which explicitly forbids violence against women, the CEDAW gradually developed into the most significant instrument in this area. Even the more-specific regional instruments in Europe, which explicitly apply to this issue (the CoE Istanbul Convention), and which do so indirectly (the EU Victim rights’ Directive³⁴) provide references to the CEDAW.³⁵ It should be clear that regional human rights acts should not be regarded in isolation but rather in harmony with this global treaty.

³² Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences, Due diligence report, A/HRC/23/49, 2013. Yakin Ertürk, Special Rapporteur on violence against women, its causes and consequences, Report on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, Commission on Human Rights, E/CN.4/2006/61, 2006.

³³ Report of the Special Rapporteur on VAW, 19 April 2016, A/HRC/32/42.

³⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315/57.

³⁵ The references to the CEDAW are also included in the texts of the said documents, see recital 38 of the EU’s Victims’ rights Directive, and the Preamble of the CoE’s Istanbul Convention.

The CEDAW is a dynamic instrument³⁶ that changes with the development of international law in the area. The CEDAW establishes a transformative, holistic and gender specific approach, where transformative aspects of the CEDAW can be linked with social and economic elements, the holistic approach – with political and civil rights, and gender specific approach – with clear frame of non-discrimination and equality paradigm.³⁷ The Committee under the CEDAW is a forum which connects the governments, domestic and transnational human rights stakeholders and performs the central role³⁸ in striving towards substantive equality.

In its General Recommendation No. 19 on violence against women (1992), the CEDAW Committee thoroughly explained the content of the state's duty to protect women from violence, including gender-based violence at home:

“Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”³⁹

The adoption of this recommendation was a “paradigm shift.”⁴⁰ It provides a thorough review of the problem and includes general comments, as well as comments on specific articles of the CEDAW with more specific recommendations. Therefore it was named as the gap-filler which

³⁶ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para 2. General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, para 3.

³⁷ Anne Hellum, Henriette Sinding Aasen (eds), *Women's human rights: CEDAW in international, regional and national law*, Cambridge: Cambridge University press, 2013, at p. 2.

³⁸ See Andrew Byrnes, “The Committee on the Elimination of Discrimination against Women”, in *Women's human rights: CEDAW in international, regional and national law*, Anne Hellum, Henriette Sinding Aasen (eds), Cambridge: Cambridge University press, 2013, 27–61.

³⁹ General Recommendation No. 19, para. 9.

⁴⁰ Kate Rose-Sender, “Emerging from the Shadows: Violence against women and the Women's Convention,” In *The Women's Convention Turned 30, Achievements, Setbacks, and Prospects*, Westendorp, Ingrid. (ed.), Cambridge-Antwerp-Portland, Intersentia, 2012, p. 464.

provided the missing link⁴¹ of understanding violence against women as a human rights violation.

For 25 years since the adoption of the General Recommendation No. 19, “the practice of States parties has endorsed the Committee’s interpretation.”⁴² In 2017, the Committee updated the said General Recommendation, overviewed the developments so far and drew the lines for further developments. There can be no doubt that the CEDAW Committee considers that the States bear responsibility both for acts and omissions of state actors, and private perpetrators under the Convention.

One might stress that General Recommendation is nothing more than “a recommendation.” It must be recalled that the legal status of the UN treaty-interpreting bodies must be weighed against their source. From the case law of ICJ, it can be inferred that General Recommendations of UN Committees are more or less authoritative sources and “it should ascribe great weight to the interpretation”⁴³ by the bodies appointed to supervise application of treaties. Thus, although the very title refers to the soft-law nature, it can nevertheless be claimed that within the system of sources of international law, General Recommendations of the CEDAW Committee must be taken very seriously.

The CEDAW Committee also issued state-specific concluding observations, most of them mentioning gender-based violence against women. It undertook inquiries into systematic violations of women rights, which involved systematic violence against women. Finally, it analysed individual complaints under the Optional Protocol, where it found breaches of the Convention in many instances. Even though these practices also produce recommendations rather than binding decisions, they have a strong persuasive effect. The governmental practices include cooperation with the Committee and striving to undertake the changes necessary for improvement. Hence, it can be claimed that the CEDAW has created a consciousness of normative significance in the area of violence against women.

The said claim can also be substantiated by empirical data, which the Special Rapporteur also relies upon in her call to adopt a new treaty.

⁴¹ Heisoo Shin, “CEDAW and violence against women: providing the missing link,” In *The circle of empowerment: Twenty-Five years of the UN committee on the Elimination of Discrimination against women*, Kofi Annan, Hanna Schopp-Schilling, Cees Flinterman (eds), New York: The Feminist Press, 2000, 223–233.

⁴² General Recommendation No. 35, para 2.

⁴³ Case concerning Ahmadou Sadio Diallo, ICJ, para 66. Notably, the ICJ was referring to the UN Human Rights’ Committee General Comments in this context.

The qualitative study of David Richards and Jillienne Haglund shows that ratification of the CEDAW had an effect on adoption of normative prohibition of domestic violence at the State level.⁴⁴ States which ratified CEDAW were found more likely (by 23,4 %) to adopt normative provisions on protection against domestic violence. The question thus arises, if the CEDAW *does* have a normative significance, why adopt a new treaty? The data itself seems to prove that “the CEDAW matters” rather than give basis for a broader conclusion that a new treaty would have a similar effect.

3 The alleged added value of Draft Convention on violence against women

Legislation itself does not necessarily improve people’s lives and stricter norms do not mean that more women will enjoy their rights and be free from violence. This is not a new argument, just as the argument that “legal norms are good to have” is not. However, I do not consider that law is not a suitable tool for combating violence against women. A suggestion that legal normativity should be avoided altogether would lead to a certain degree of state-phobia⁴⁵ and non-regulation would revive the issue of private-public dichotomy. Rather than suggesting deregulation, I contend that the limitations of legal regulation need to be critically assessed before any legislative steps are taken. An adoption of a new treaty is only viable, if its text brings additional benefits in addressing the conceptual and substantive challenges in the area.

3.1 Offering conceptual novelties on violence against women?

The text of the Draft Convention is a continuation of the UN resolutions and CEDAW recommendations inasmuch as it presents violence against women “a form of sexual discrimination” (Article 2 a). This means that

⁴⁴ David. L. Richards, Jillienne Haglund, *Violence against women and the Law*, London: Paradigm / Routledge, 2015, p. 115.

⁴⁵ Of course, there are also risks related to state power and it is true that it could be used against victims themselves, and that certain areas, in particular prevention of violence, is still neglected. State authorities are more concerned by responsibility than care for victims.

the same conceptual strategy is employed, as under the CEDAW, despite the previous criticism that this strategy essentialized experiences of women.⁴⁶ Notably, the conceptual strategy in Europe has gone towards partial gender neutrality⁴⁷ in addressing gender-based violence. That raised concerns.⁴⁸ Hence, in Draft Convention we see the attempts of continued “sexing”⁴⁹ of international law. Without going deeply into the issue on how to address this issue,⁵⁰ the work on a parallel treaty based on precisely the same conceptual idea is not really viable. It would perhaps be plausible, if it was offered as a Protocol to the CEDAW,⁵¹ rather than as an alternative treaty. However, even then it, the added value is limited, from a conceptual strategy perspective.

Furthermore, treaty norms potentially could help introduce the long awaited conceptual transformation, and address the growing concern that consideration of violence against women as sexual discrimination is based on single identity politics. The term “intersectionality” was coined by Kimberlé Crenshaw, while criticizing of single-ground identity politics and discrimination law.⁵² She marked that black women do not only face discrimination because they are black, but also because they are women. Recognition of intersectionality, she argued, was essential to

⁴⁶ For instance, Alice Edwards offered instead a “contextual intersectional reasoning,” which would involve more individual –tailored response rather than treating all women as homogenous group. Alice Edwards, p. 337.

⁴⁷ Istanbul Convention in principle could be applied to men who are victims of domestic violence. The EU Victim’s Convention provides a gender-neutral definition of gender based violence.

⁴⁸ Rashida Manjoo, 2015, para 39.

⁴⁹ “Sexing” and “gendering” are key feminist techniques under international law making, e.g. see Hilary Charlesworth, Christine Chinkin, *The boundaries of international law*, Juris Publishing, Manchester University press, 2000, p. 4. “Sexing draws attention to body and nature while gendering emphasises mind and culture”.

⁵⁰ For the debate on the issue of gendering the frame of violence against women, see Darren Rosenblum, “Unsex CEDAW, or what’s wrong with Women’s rights” *Columbian Journal of Gender & Law* 20, 98 (2011): 98–194. Berta Esperanca Hernandez Truylol, “Unsex CEDAW? NO! Super-sex it!” *Columbian Journal of Gender and Law* 20, 195 (2011): 195–223. Julie Goldscheid, “Gender Neutrality and the „Violence Against Women Frame,” *University of Miami Race and Social Justice law review* 5, (2015): 307–324.

⁵¹ This is one of the ideas discussed during the work on the new treaty. It is not yet decided whether it would be presented as a new instrument, or an optional protocol to the CEDAW.

⁵² Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color.” *Stanford Law Review* 43, (6, 1991):1241–1299.

fight marginalization from within, for instance, black women's experiences of domestic violence and rape must not be suppressed in order to avoid compromising anti-racial identity politics.

The Draft Convention includes both the keywords of “intersectional discrimination” (Article 8) and “transformative equality” (Article 4). This could have a potential for addressing these concerns rather than pursuing the strategy based on one-ground of identity, i.e. being a woman. However, it is questionable whether including these terms is automatically meaningful and significant. Intersectionality is sometimes used as a token and included “on top” of various legal documents, in order to signify that the text reflects the current concerns, i.e. that it is not limited to single-identity ground. Similarly as with gender mainstreaming, inclusion of “intersectionality” in the language of documents can be simply decorative.

At the same time, the CEDAW Committee in 2010 identified intersectionality as the “basic concept for understanding the scope” of States parties obligations under the Convention⁵³ and the update of the General Recommendation No. 19 refers to wide range of persons, who might be affected by gender-based violence.⁵⁴ It also underlines intersectionality while addressing the issue of State responsibility.⁵⁵ It is not only talk. In its inquiry on systematic violations of women rights in Canada,⁵⁶ the CEDAW Committee applied intersectional approach to recommend the State measures addressing the protection and prevention of systematic violence against aboriginal women. Hence, the concerns of intersectionality are already addressed under the CEDAW. It would have been conceptually innovative, if the Draft Convention also applied to wider groups of persons (for instance, gender based violence against LGBTI⁵⁷ persons), but it only addresses intersectionality within the group of women.

The Draft Convention in fact provides a category of “women” (“persons who are perceived by or self-identify themselves as women,” Arti-

⁵³ General Recommendation No. 28, para 18.

⁵⁴ General Recommendation No. 35, para 12.

⁵⁵ *Ibid*, para. 23.

⁵⁶ CEDAW, Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 30 March 2015, CEDAW/C/OP8/CAN.1.

⁵⁷ Lesbian, gay, bisexual, transgender, intersex persons, who are also affected by gender-based violence.

cle 2). In principle this is somewhat inclusive of transgender women. It is understandable that the drafters would want to retain the focus on structural discrimination against women and avoid losing focus on women. However, by choosing the formulation “perceived by,” it unnecessary underlines the element of “passing” as a woman. Moreover, some transgender women may not see themselves as women, but precisely as trans-women. This definition of the category of women seems to increase stereotyping. There is also a threat of stigmatizing “feminine” men, gay men and transmen, who do not identify with the category “women” but may be perceived as such. It is also not clear how far does self-identity can go and what groups of individuals it is intended to cover. In my opinion, this is another example that shows how legal norms are not always better to have. They are ill-equipped to define, in black letter terms, categories as “women,” “men,” or “humans.” The attempts to do so may lead to essentialisation, and possibly stereotyping and prejudice, rather than a transformative approach.

3.2 Suggesting substantive solutions to violence against women?

The Draft Convention is still at early preparation phases, thus it is difficult to claim that it could be considered as “more conducive” than the CEDAW⁵⁸ and hence provide a better substantial response. However, it relies heavily on Istanbul Convention in its substantive parts, which contains provisions that may be seen as more conducive.⁵⁹ At the same time, the countries that are the geographical “gap areas,” i.e. do not participate in global or regional instruments on the issue, would not necessarily be have the tools or will to implement some ideas.

For instance, regarding prevention of violence, the Draft Convention envisages integration of education materials on non-stereotypical gender roles (Article 11 part 1 of the Draft Convention, which is copied from Article 14 part 1 of Istanbul Convention). The said provision already met

⁵⁸ Article 23 provides: “Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained: (a) In the legislation of a State Party; or (b) In any other international convention, treaty or agreement in force for that State.”

⁵⁹ On the interrelation of these two Conventions, see Dubravka Šimonovic, “Global and Regional standards on Violence against Women: the Evolution and Synergy of the CEDAW and Istanbul Conventions”, *Human Rights Quarterly* 36 (2014): 590–606.

fierce opposition in some parts of Europe, because the states impacted by Roman Catholicism (Lithuania, Poland) feared that this will lead to teaching something the Church calls “gender ideology” in schools. This led to general-nature *Note Verbale* by both Poland and Lithuania, which said that the Convention will be applied in conformity with national Constitutions. The declaration was seen as an impermissible reservation to Istanbul Convention by other countries, including Sweden.⁶⁰ In fact, the said fierce opposition could be one of the factors explaining the gradual change of public opinion in Lithuania to more accepting of violence rather than the opposite.⁶¹ It is similarly doubtful that the broad principle of non-discrimination that includes sexual orientation and gender identity, and education on non-stereotypical gender roles would work well in Asia and the Middle East, and even the current USA, which are the left-out geographic areas. The idea may be seen as Europe-centred and fail to produce the cultural changes intended.

Furthermore, the Draft Convention could provide a strong standard of State responsibility for acts and omissions attributable to the States and non-state actors. Nevertheless, a comparison of Articles 33 and Article 6, as well as Article 23⁶² may give an impression that only grave physical violence that amounts to torture calls for individual accountability of perpetrators. It may seem as an achievement, if the State that is not a party to the CEDAW undertakes to hold perpetrators accountable for torture. However, it may be seen as an entrenchment of a lower standard in consideration of the already existing standards in this area under the

⁶⁰ Objection to declaration of Poland to Istanbul Convention, contained in a *Note Verbale* from the Ministry for Foreign Affairs of Sweden, dated 15 February 2016, registered at the Secretariat General on 3 March 2016. The Ministry noted that “general references to national or religious law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.”

⁶¹ The amount of people, who think that gender based violence should not always be punished, increased by 10 pp in Lithuania. Special Eurobarometer No. 449, Gender-based violence, November 2016, p. 16.

⁶² Draft Convention, Article 6 (2) provides “Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of the present Convention that are perpetrated by non-State actors” and Article 33 requires states to “hold perpetrators accountable for gender-based non-State torture crimes” while Article 23 only asks to legislate, or adopt other measures, on prohibition of physical violence.

customary international law, the CEDAW, as well as under OAS, and CoE systems.

The paradox involves balancing between two poles. On the one hand, the Convention should not go backwards and entrench a standard that could be perceived as lower than the current norm. On the other hand, the Convention that is substantially demanding is not likely to attract the States, which are not parties to the CEDAW or to the regional conventions. In that case, all efforts would be in vain.⁶³ In worse scenario yet, the States may get the idea that there really is an accountability gap, and they could stop acting, as if they are bound by the norm prohibiting violence against women on a global level.

Finally, it must be recalled that the Istanbul Convention can also be accessed by non-member States to the CoE (see Article 76 of the Accession to the Convention). Perhaps the significant stakeholders without any regional treaties, such as Japan and USA, could be attracted to the existing Convention, which has gained significant support, and was signed by the European Union.⁶⁴ These States have already participated in the debates over Istanbul Convention and had been invited to adhere to it by the CoE. Admittedly, it is not a usual action for states from a different region to join a Convention of another region, and it is not highly likely for various reasons. Yet in principle it is possible, for instance, Italy has adhered to Inter-American Convention, and it is made available. It could be a viable alternative, considering that the potential added benefit of the current Draft Convention is mostly related to copying of conductive Istanbul Convention's provisions.

4 Concluding remarks

The plea for shift towards normativity on prohibition of violence against women under international law does not seem well substantiated. The claim that normative gap must be filled by treaty provisions ignores

⁶³ Of course, the standard should not be adjusted to attract the states at any cost. Some powerful stakeholders, i.e. USA, refrain from participation in the CEDAW and likely to refrain from participation in an optional protocol on violence against women due to its special view on international law in the area of human rights.

⁶⁴ Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters.

the fact that prohibition of violence against women has already gained normative significance. This has been argued for many decades by the women rights advocates, by the Special Rapporteurs, and by the CEDAW Committee. State responsibility was found in cases of breach of due diligence duty to protect women against violence and most importantly, States accepted this as an authoritative practice, thus creating legal consciousness of the said norm under international law.

The assumption that any legal norms are always better to have is also questionable. Sometimes treaty norms can even weaken the existing framework, especially if they come together with the message that a vacuum is being filled. Considering that Draft Convention is based on the same conceptual strategy as the CEDAW, the problem should remain at the centre of the CEDAW Committee's agenda, and any prospective document that contains the same conceptual response should be presented as an optional protocol to the CEDAW. The current Draft Convention does not seem to solve substantive challenges in a coherent way either. Arguably, the General Recommendation No. 35 (update of the General Recommendation No. 19) of the CEDAW Committee and the CoE Istanbul Convention at the moment are better equipped for consolidating efforts on elimination of violence against women.

